

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MARK BRNOVICH, ATTORNEY GENERAL)
OF ARIZONA, ET AL.,)
 Petitioners,)
 v.) No. 19-1257
DEMOCRATIC NATIONAL COMMITTEE,)
ET AL.,)
 Respondents.)

ARIZONA REPUBLICAN PARTY, ET AL.,)
 Petitioners,)
 v.) No. 19-1258
DEMOCRATIC NATIONAL COMMITTEE,)
ET AL.,)
 Respondents.)

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19 Washington, D.C.

20 Tuesday, March 2, 2021

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22 The above-entitled matter came on for

23 oral argument before the Supreme Court of the

24 United States at 10:00 a.m.

25

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2
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24
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MICHAEL A. CARVIN, ESQ.	
4	On behalf of the Petitioners in 19-1258	4
5	ORAL ARGUMENT OF:	
6	GEN. MARK BRNOVICH, ESQ.	
7	On behalf of the Petitioners	
8	in 19-1257	39
9	ORAL ARGUMENT OF:	
10	JESSICA R. AMUNSON, ESQ.	
11	On behalf of Respondent Secretary Hobbs	63
12	ORAL ARGUMENT OF:	
13	BRUCE V. SPIVA, ESQ.	
14	On behalf of Respondents DNC, et al.	95
15	REBUTTAL ARGUMENT OF:	
16	MICHAEL A. CARVIN, ESQ.	
17	On behalf of the Petitioners in 19-1258	117
18		
19		
20		
21		
22		
23		
24		
25		

1
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3
4
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8
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case Number 19-1257, Brnovich versus Democratic National Committee, and the consolidated case.

Mr. Carvin.

ORAL ARGUMENT OF MICHAEL A. CARVIN
ON BEHALF OF THE PETITIONERS IN 19-1258

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

I think the key conceptual point here to understand is that Arizona has not denied anyone any voting opportunity of any kind. There's not, like, a literacy test which denies you the right to vote. It's not like vote dilution, where white bloc voting denies minorities an equal opportunity to elect. Everyone here is eligible and registered to vote. All they have to do is utilize the myriad opportunities that Arizona has offered them over 27 days to vote by mail for free or in person.

And since there's no denial of opportunity, this is a disparate impact claim that would not even be cognizable in other

1 contexts. Under Title VII, disparate impact
2 relates to a denial of an employment
3 opportunity, a job or a promotion. It doesn't
4 get involved in the process. No one's ever
5 brought a Title VII claim saying you can't
6 require people to send in applications because
7 minorities have less access to transportation
8 and mail, analogous to the claim being made
9 here.

10 So Respondents are trying to move
11 disparate impact into an entirely different
12 context. Since there's no denial of any voting
13 opportunity in this context, the circumstances
14 in which time, place, and manner rules can
15 violate Section 2 are extraordinarily limited.
16 They only occur if the state has organized the
17 time, place, and manner rules and stacked them
18 in such a way that minorities have less
19 opportunity than non-minorities to cast their
20 votes.

21 That comes directly from the plain
22 language of Section 2, and it's also, of course,
23 as a practical matter, the only circumstance in
24 which the state has erected any kind of
25 cognizable barrier to minority voting.

1 Respondents' alternative view is at
2 war with the text of Section 2. Section 2 says,
3 again, voting practices cannot provide less
4 opportunity. They say that voting practices
5 which provide the same opportunity are
6 nonetheless unlawful if external socioeconomic
7 factors somehow contribute to disproportionate
8 utilization. But that language is nowhere in
9 the text and was never even mentioned in the
10 legislative history, which is clear --

11 CHIEF JUSTICE ROBERTS: Mr. --

12 MR. CARVIN: -- and --

13 CHIEF JUSTICE ROBERTS: -- Mr. Carvin,
14 as I understand your test as you've just
15 articulated it, it reduces to -- anything
16 dealing with time, place, or manner, it's an
17 intent test rather than a results test that's
18 provided under Section 2.

19 In other words, so long as it's a
20 time, place, or manner restriction, it's only
21 when there's a difference in its -- between
22 minority voters and white voters that you have a
23 problem. Is that not true?

24 MR. CARVIN: Not entirely, Mr. Chief
25 Justice, for this reason: It does involve

1 differential systems, unequal access, but
2 regardless of whether or not that unequal access
3 is racially motivated, you would not have to
4 prove that the intent behind the differential
5 access provided to minorities was to suppress or
6 hinder the minority vote. And that's a key
7 distinction from Mobile versus Bolden.

8 CHIEF JUSTICE ROBERTS: You -- you
9 talk about the concern being that the analysis
10 would be driven to racial proportionality under
11 the Respondents' approach.

12 Now I understand the concerns about
13 that when you're talking about districting, but
14 why is that -- why is that a bad thing when
15 you're talking about electoral procedures?

16 MR. CARVIN: Well, what it means is
17 that any neutral system must be changed in order
18 to maximize minority voting strength regardless
19 of how strong the justification is.

20 Things that provide no unfairness at
21 all to minorities, you must rejigger every
22 aspect of the time, place, and manner, from
23 registration, to Election Day, to early voting,
24 in order to maximize minorities' participation.

25 Why is that bad? Because it's the

1 same kind of race-conscious activity of
2 subordinating --

3 CHIEF JUSTICE ROBERTS: Well, is it --

4 MR. CARVIN: -- neutral principles --

5 CHIEF JUSTICE ROBERTS: -- is it
6 really -- is it maximizing participation or --
7 or equalizing it? In other words, that only
8 comes up when you have disparate results.
9 And -- and why should there be disparate results
10 if -- if -- if you can avoid them?

11 MR. CARVIN: Because why should you --
12 well, for example, because it would eliminate
13 all the valuable antifraud concerns implicated
14 in the ban on ballot harvesting and because it
15 would substitute the federal courts and the
16 state legislatures to make these rules.

17 The question is not what's wrong with
18 it. The question is why a system that imposes
19 no unfairness on the group should nonetheless be
20 changed simply because they find a different
21 method of voting more convenient.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas.

24 MR. CARVIN: There's no reason to --
25 there's no reason to say --

1 CHIEF JUSTICE ROBERTS: Just --

2 MR. CARVIN: -- that simply because --

3 CHIEF JUSTICE ROBERTS: Justice --

4 MR. CARVIN: I apologize.

5 CHIEF JUSTICE ROBERTS: Yeah.

6 MR. CARVIN: I apologize, Your Honor.

7 CHIEF JUSTICE ROBERTS: Justice

8 Thomas.

9 JUSTICE THOMAS: Thank you, Mr. Chief
10 Justice.

11 Mr. Carvin, I -- I under -- your -- I
12 understand your race neutrality argument, and
13 normally you see that in -- to come in -- in --
14 in the context of a non-discrimination statute
15 or Fourteenth Amendment that under -- that
16 really requires equal treatment.

17 How does that race neutrality approach
18 fit within the language of the Voting Rights
19 Act, though, that doesn't speak in -- in those
20 terms?

21 MR. CARVIN: Well, Justice Thomas, I
22 think it speaks precisely in those terms. It
23 says that a voting practice cannot result in
24 minorities having less opportunity than
25 non-minorities. It says the system needs to be

1 equally open. So what it's saying is as long as
2 everyone has the same opportunity and the system
3 is equally open, Section 2 does not condemn it.

4 The Respondents, however, would say
5 that even if minorities are given precisely the
6 same opportunity, unless they utilize it
7 proportionally, then somehow that comes within
8 the constraints of Section 2.

9 But, again, there's nothing in the
10 text of Section 2 which says you need to expand
11 time, place, and manner restrictions to enhance
12 proportionality or maximization.

13 Indeed, if that had been the rule, in
14 1982, virtually every time, place, and manner
15 restriction in the country would have been
16 illegal overnight because there was severe
17 disproportionate utilization and socioeconomic
18 disparities were ubiquitous. And surely, if
19 Congress had intended that kind of sea change,
20 it would have given some hint of it in the
21 legislative history.

22 So this rule is both contrary to the
23 text of Section 2 and any other formulation of
24 what Congress was intending.

25 JUSTICE THOMAS: So is there a

1 causation standard implicit in your neutrality
2 argument?

3 MR. CARVIN: Only in the sense that
4 result, obviously, connotes causation, right?
5 And the question is: what is the prohibited --
6 what can you not cause? What is the prohibited
7 result? And the plain language of Section 2
8 tells you what the system can't result in is
9 providing less opportunity to minorities. It
10 doesn't say it can't result in providing them
11 the same opportunity, but, for whatever reason,
12 they don't utilize it to the same extent.

13 So there is a causation question, but
14 the question is what can the state not cause.
15 We say it can't cause less opportunity. The
16 other side says it can't do anything that
17 results in disproportionate outcomes.

18 JUSTICE THOMAS: And how much less
19 opportunity? The Ninth Circuit speaks in terms
20 of de minimis language. Does that -- and then
21 the -- of course, Justice -- Judge O'Scannlain
22 talks more in the language of substantial.

23 What -- what -- what -- how much less
24 opportunity?

25 MR. CARVIN: Well, again, it depends

1 what you're talking about, Justice Thomas. If
2 you're talking about disproportionate outcomes,
3 we don't think that's the issue. So we don't
4 think a severely disproportionate outcome
5 jeopardizes Section 2 viability, nor does a
6 minor disproportionate outcome.

7 The question is not the outcome. The
8 question is the opportunity and if the state has
9 provided everyone the same opportunity.

10 Now I will agree with the attorney
11 general, however, if you get past that, then,
12 obviously, there needs to be something
13 substantial for two reasons. No one requires
14 perfect, of course --

15 JUSTICE THOMAS: I'm out of time. I'm
16 sorry to cut you off, Mr. Carvin.

17 MR. CARVIN: I apologize. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer.

20 JUSTICE BREYER: I have two questions.
21 One question is a literacy test. Does that
22 provide people the same opportunity?

23 MR. CARVIN: No.

24 JUSTICE BREYER: I thought that.

25 MR. CARVIN: By definition, a literacy

1 test --

2 JUSTICE BREYER: A literacy test
3 doesn't. And so how do we know whether the test
4 -- the -- the OOP and the other -- whether they
5 do or they don't? I didn't think --

6 MR. CARVIN: Well, I think --

7 JUSTICE BREYER: Well --

8 MR. CARVIN: -- there's an obvious
9 distinction.

10 JUSTICE BREYER: Yes.

11 MR. CARVIN: I apologize. No, I think
12 there's an --

13 JUSTICE BREYER: I just thought that
14 it was a measure, a way of finding out if it's
15 the same opportunity or not to see if minority
16 people use it equally.

17 MR. CARVIN: No, it --

18 JUSTICE BREYER: If they don't use it
19 equally, well, it doesn't prove it, but it might
20 be, but the rule that prevents them from using
21 it equally results in an abridgement on account
22 of race.

23 MR. CARVIN: Right. And that's the
24 key point. A literacy test denies you the
25 opportunity to vote, says you can't vote. Go to

1 the polls, they won't let you vote.

2 Nothing like that is going on here.

3 Everyone has a complete opportunity to vote.

4 The state has not erected any barrier. If the

5 state denies you an opportunity like, under

6 Title VII, it denies --

7 JUSTICE BREYER: No, I've got that

8 point.

9 MR. CARVIN: -- you a job --

10 JUSTICE BREYER: I've got that point,

11 but I have another --

12 MR. CARVIN: -- then you ask your --

13 JUSTICE BREYER: Yeah. I have

14 another, more -- I think a more important

15 question. What would you think of Professor

16 Stephanopoulos's test, basically, or standards

17 which bring in from Title VI, Title VII, The

18 Housing Act, the -- the ADA, you know, it uses

19 roughly the same approach and there would be an

20 opportunity for the state to say we have a good

21 non-race-related reason for doing this.

22 And, therefore, whatever result is,

23 fewer -- fewer minorities use it, but it's not

24 on account of race, it's on account of our good

25 reason. Now that's what we have in all these

1 other statutes, something like that.

2 What would you think of just taking
3 forms of those rules and using them here?

4 MR. CARVIN: Yes. Well, two points.
5 One is, of course, there's nothing in the
6 language of Section 2 which allows you to
7 justify a discriminatory result based on the
8 strength of --

9 JUSTICE BREYER: What about the words
10 "on account of race"?

11 MR. CARVIN: Right.

12 JUSTICE BREYER: If the reason you are
13 doing it is because you have the most wonderful
14 non-race-related reason in the world for doing
15 this, then it is not on account of race.

16 MR. CARVIN: Right. "On account of
17 race," as you know, generally and under Gingles
18 means because of race. And the results test
19 means it doesn't have to be on account of
20 intentional discrimination.

21 In terms of reading in a
22 justification, obviously, that would make it --
23 make their proportionality mandate somewhat less
24 inflexible. But, again, even if you could read
25 it into the statute, you would nonetheless be

1 subjecting the policy judgments of state
2 legislatures to some ad hoc determinations of
3 the sort that was engaged in by the en banc
4 court, where they can find simple things like
5 out-of-precinct voting and ballot harvesting
6 bans to somehow be unjustified.

7 And even under the totality of
8 circumstances in vote dilution, the tenuousness
9 of the policy is only the ninth of the factors.
10 And so I don't understand why, if the statute
11 had actually prohibited, as Respondents said,
12 any kind of disparate outcome, why -- why we
13 would allow the state to get away with that.

14 CHIEF JUSTICE ROBERTS: Justice Alito.

15 MR. CARVIN: But I will fully embrace
16 the notion that --

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE ALITO: Mr. Carvin, you argue
19 that one benchmark for evaluating whether
20 members of a protected class have less
21 opportunity to participate is what we refer to
22 in Crawford as "the usual burdens of voting."

23 What does that mean? What are the --

24 MR. CARVIN: Well --

25 JUSTICE ALITO: -- "usual burdens of

1 voting"? Are they the burdens as they existed
2 in 1982? Do they change? How do we determine
3 what they are?

4 MR. CARVIN: I -- I think what they
5 mean is what the Court meant in Crawford, which
6 is what we all understand to be the usual
7 burdens of voting.

8 You make a very good point about 1982.
9 We know that needs to be the benchmark for the
10 usual burdens because, otherwise, that meant
11 Congress in 1982 was invalidating virtually
12 every time, place, and manner restriction. So
13 that needs to be, if you will, the safe harbor.

14 The only point we're making is Section
15 2 did not immunize minorities from the usual
16 burdens of voting. It didn't say, you -- you
17 don't have to show up at the right precinct and
18 those sorts of things. And there's nothing in
19 the language of Section 2 which somehow exempts
20 them from doing so.

21 So, as long as it's roughly
22 commensurate with the normal Election Day system
23 that exists, that would constitute the usual
24 burden of voting.

25 JUSTICE ALITO: Now this relates to

1 what you were just discussing with Justice
2 Breyer. Your approach differs a bit from that
3 of the attorney general and the Solicitor
4 General's brief in that I don't understand you
5 to argue that a -- a consideration of the
6 strength of the state's interests for a voting
7 practice has a role to play here.

8 Is that a correct understanding of
9 your position? And if so, why isn't that a -- a
10 legitimate consideration?

11 MR. CARVIN: Your Honor, I would love
12 it if the state could justify its systems if
13 you're going to impose on them some kind of
14 proportionality mandate. Our basic point is
15 it's not a proportionality mandate and their
16 justification should not be an affirmative
17 defense to that. If you want to read that into
18 the statute, that would make it better than a
19 straight proportionality mandate.

20 I will emphasize again that even under
21 Houston Lawyers' Association, which the
22 Solicitor General puts forward, the
23 justification is merely one factor out of the
24 nine to be considered. So that means you're now
25 into this amorphous nine Senate report factors

1 where every district court and appellate court
2 can do its own kind of balancing test, which
3 will lead to all sorts of ad hoc results and not
4 give you the kind of clarity and guidance that
5 state legislatures need prior to Election Day.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor.

9 JUSTICE SOTOMAYOR: Counsel, you keep
10 talking about equal opportunity, but I don't see
11 it anywhere in the statute.

12 Aren't you rewriting Section 2? You
13 keep saying repeatedly that it prohibits giving
14 or providing an unequal opportunity to vote.
15 But the language is very clear. It focuses on
16 the effects of government action, not the
17 government action in a vacuum. It says no
18 voting qualification or practice can "result in
19 a denial or abridgement of the right to vote on
20 account of race."

21 MR. CARVIN: Right.

22 JUSTICE SOTOMAYOR: So where do you
23 get equal opportunity from in that language?

24 MR. CARVIN: In two places. One is we
25 -- it's not a denial at a time, place, and

1 manner, so it needs --

2 JUSTICE SOTOMAYOR: Excuse me, sir.

3 MR. CARVIN: -- to be a written --

4 JUSTICE SOTOMAYOR: Excuse me. If you
5 can't vote because you are a Native American or
6 a non-Hispanic in areas where car ownership
7 rates are very small, where you don't have mail
8 pickup or mail delivery, where your post office
9 is at the edge of town and so that you require
10 either a relative to pick up your vote, or you
11 happen to vote in a wrong precinct because your
12 particular area has a confusion of precinct
13 assignments, if you just can't vote for those
14 reasons and you're not -- your vote is not being
15 counted, you've been denied the right to vote,
16 haven't you?

17 MR. CARVIN: I don't think anyone
18 would say you've been denied a due process right
19 to a hearing --

20 JUSTICE SOTOMAYOR: This is not a due
21 process -- this is not a due process claim.

22 MR. CARVIN: No, I'm trying to get at
23 the distinction between denial and --

24 JUSTICE SOTOMAYOR: Well, no. You're
25 denied something if you're not given the right

1 to vote because or results in your denial from
2 circumstances that the state could remedy
3 easily.

4 MR. CARVIN: Well, again, the only way
5 they could remedy it is to engage in the
6 counterintuitive policies allowing everybody to
7 vote in any precinct they want or to have
8 partisan operatives collect their ballots in a
9 real threat --

10 JUSTICE SOTOMAYOR: I thought that --
11 but I'm sorry --

12 MR. CARVIN: -- to fraud. And that's
13 not --

14 JUSTICE SOTOMAYOR: -- if you --

15 MR. CARVIN: -- that's a Hobson's
16 Choice that --

17 JUSTICE SOTOMAYOR: But I would have
18 to --

19 MR. CARVIN: -- I don't --

20 JUSTICE SOTOMAYOR: -- I have to say
21 that if you look at the district court's
22 findings, which, in the end, it voted on your
23 behalf, but the district court found no
24 meaningful threat that ballot collection leads
25 to fraud. It found no meaningful threat

1 whatsoever. Perceived threat, but none.

2 And with respect to voting out of
3 precinct, there was no finding by the district
4 court that the ballots couldn't be easily
5 counted.

6 MR. CARVIN: The -- the only way they
7 could be counted is by defeating the entire
8 purpose of the precinct system, which is to have
9 a uniform ballot so you don't need to create
10 these extra, post-election remedies to figure
11 out which offices are --

12 JUSTICE SOTOMAYOR: But you -- but
13 you --

14 MR. CARVIN: -- valid and which are
15 not.

16 JUSTICE SOTOMAYOR: -- but you have --

17 MR. CARVIN: So it would be an
18 enormous --

19 JUSTICE SOTOMAYOR: Counsel, your
20 state counts out-of-precinct ballot-type things
21 very easily.

22 MR. CARVIN: Well, actually not.

23 JUSTICE SOTOMAYOR: It -- it -- it has
24 a whole mechanism in place according to the
25 district court.

1 MR. CARVIN: Well, what the district
2 court said and what the Ninth Circuit said was
3 the precincts serve -- system serve very
4 valuable purposes. And if the precinct system
5 serves valuable purposes, then enforcing the
6 precinct system must necessarily serve those
7 precinct systems.

8 CHIEF JUSTICE ROBERTS: Justice Kagan.

9 MR. CARVIN: If we're not allowed --

10 CHIEF JUSTICE ROBERTS: Justice --

11 MR. CARVIN: If we turn --

12 CHIEF JUSTICE ROBERTS: -- Justice --
13 Justice Kagan.

14 JUSTICE KAGAN: Mr. Carvin, I have a
15 number of hypotheticals for you, and I'd -- I'd
16 be grateful if we could run through these fairly
17 quickly just so I can get an understanding of
18 your position.

19 So the first one is that the state
20 decides that each county can have one polling
21 place, and because of who lives in -- in -- in
22 larger counties, that creates a -- a -- a -- a
23 -- a disparate impact that black voters have to
24 wait in line for 10 times the amount that white
25 voters do, two-and-a-half hours instead of 15

1 minutes.

2 Is that system equally open in the
3 language of the statute?

4 MR. CARVIN: I would think not.

5 "Equally open" means takes into account
6 demographic reality. If you have one polling
7 place for five people and one polling place for
8 5 million people, obviously, in the latter
9 situation, those people do not have an equal
10 opportunity to vote. So, no, I would think --

11 JUSTICE KAGAN: Okay. How about --
12 how about this one?

13 MR. CARVIN: -- I would think --

14 JUSTICE KAGAN: That's helpful --
15 that's helpful, Mr. Carvin.

16 A state has long had two weeks of
17 early voting, and then the state decides that
18 it's going to get rid of Sunday voting on those
19 two weeks, leave everything else in place.

20 That -- black voters vote on Sunday 10
21 times more than white voters. Is -- is that
22 system equally open?

23 MR. CARVIN: I would think it would be
24 because, let's think about it, Sunday is the day
25 that we traditionally close government offices.

1 It would be the exception rather than the rule
2 to have government workers come in on a Sunday.

3 JUSTICE KAGAN: It's a -- you know,
4 it's an exception --

5 MR. CARVIN: So simply having --

6 JUSTICE KAGAN: -- to have government
7 workers come in on a Saturday too. That's not
8 -- that's not a real problem.

9 MR. CARVIN: Well, I mean, there are
10 Sunday closing laws, as we know from McGowan v.
11 Maryland, which are different than Saturday,
12 but, in all events, Saturday would implicate
13 other religions --

14 JUSTICE KAGAN: Okay. So that -- that
15 means equally open.

16 MR. CARVIN: -- Jewish and --

17 JUSTICE KAGAN: Thank you, Mr. Carvin.
18 Can we go -- just go on to another one? The
19 state says we're placing all our polling places
20 at country clubs. And that decision means that
21 black voters have to drive 10 times as long to
22 the polls and have to go into places which, you
23 know, are traditionally hostile to them.

24 MR. CARVIN: Yeah, I would think that
25 would provide them with less opportunity than

1 non-minorities. Or else they'd --

2 JUSTICE KAGAN: And why is that?

3 MR. CARVIN: Well, because they have
4 to travel further into hostile territory where
5 non-minorities can -- can travel one block to
6 very sympathetic. Under any definition of --

7 JUSTICE KAGAN: Okay. That's helpful.

8 MR. CARVIN: -- whether or not they
9 have less opportunity --

10 JUSTICE KAGAN: The state says we're
11 going to have Election Day voting only, and it's
12 going to be from 9 to 5. And there's plenty of
13 evidence on the record that voters of one races
14 are 10 times more likely to work a job that
15 wouldn't allow them to vote during that time
16 period. Is that system equally open?

17 MR. CARVIN: Seems like it because
18 that would be pretty much the status quo in
19 1982, and, of course, if it was 8 to 7, you
20 could make the same argument about people
21 working.

22 JUSTICE KAGAN: How about 9 to 3?

23 MR. CARVIN: I think anytime you
24 diminish from what I will call the usual
25 burdens, if you went to 15 minutes, to -- to use

1 an extreme example, then, obviously, you're
2 effectively denying the opportunity --

3 JUSTICE KAGAN: So 9 to 5 is okay, but
4 10 to 4 would not be okay? Is that the idea?

5 MR. CARVIN: Again, these are all
6 hypotheticals that have never existed in the
7 real world because --

8 JUSTICE KAGAN: This -- this seems
9 like -- you know, this doesn't seem so fanciful
10 to me. Basically --

11 MR. CARVIN: It may or may not be -- I
12 apologize.

13 JUSTICE KAGAN: -- 9 to 5 is okay, 10
14 to 3 is not? Is that the idea?

15 MR. CARVIN: I -- again, it's a
16 sliding scale, and I think the farther you get
17 from the normal hours that were extant in 1982,
18 the much more specious it becomes. If you want
19 to --

20 JUSTICE KAGAN: Thank you, Mr. Carvin.
21 I'm sorry my time is up.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch.

24 JUSTICE GORSUCH: Good morning,
25 Mr. Carvin. I'd like to return to some

1 questions Justice Thomas touched on.

2 What is the relationship between your
3 test focused on opportunities and the test that
4 the Solicitor General's brief at least suggested
5 about causation and the need for maybe a
6 proximate causation test?

7 MR. CARVIN: Yeah, I -- at the end of
8 the day, I don't know that there's really any
9 difference. They -- they taught -- their first
10 step is, do minorities have the ability to vote?
11 And they say that's synonymous with equal
12 opportunity. So I think we're on the same page
13 there.

14 They also say, if socioeconomic
15 factors lead to underutilization by minorities,
16 that's not a cognizable factor under Section 2
17 because it's got to be the voting practice that
18 causes the diminished opportunity.

19 Again, we are in full-throated
20 agreement with that provision as well. So the
21 two key points are the system itself needs to
22 provide less opportunity to voters, and if
23 socioeconomic factors, which are external to the
24 voting practice, lead to diminished utilization,
25 under neither our test nor the Solicitor's

1 General test would there be a problem under
2 Section 2.

3 JUSTICE GORSUCH: Do you -- is there
4 anything in the Solicitor General's brief that
5 you disagree with?

6 MR. CARVIN: I don't know why they use
7 the word "ability" instead of "opportunity,"
8 because one's in the statute and one's not, but
9 other than that semantic quibble, no.

10 We've also talked about reading
11 justification into the statute, a result which I
12 warmly embrace. We may be a tad more skeptical
13 about whether that flows from the statutory
14 language than the Solicitor General was. But,
15 no, we have no real disagreements with the
16 Solicitor General --

17 JUSTICE GORSUCH: Okay.

18 MR. CARVIN: -- the one that was
19 withdrawn.

20 JUSTICE GORSUCH: All right. And then
21 the other question Justice Thomas touched on
22 that I want to dig down a little bit further on
23 is you speak of equality of opportunity.

24 Does that permit any de minimis
25 distinctions, or does it require equality of

1 opportunity under all circumstances?

2 MR. CARVIN: Right, yes. Obviously,
3 any -- any of these phrases need to take into
4 account the sort of demographic realities, for
5 example, that Justice Kagan was discussing, and
6 if a polling place was a foot farther away for
7 minorities than for non-minorities, I don't
8 think anybody could argue that that really has a
9 cognizable effect on opportunity.

10 So, sure, in all of these tests,
11 there's some kind of basic common-sense
12 definition.

13 JUSTICE GORSUCH: Okay. And then, to
14 add one more hypothetical to this -- well, maybe
15 I'll just stop there. Thank you, Mr. Carvin.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you, Chief
19 Justice.

20 And good morning, Mr. Carvin. Your
21 brief says "ordinary race-neutral regulations of
22 the time, place, and manner of voting to not
23 violate Section 2." And that, of course, will
24 put a lot of pressure on the word "ordinary."

25 Can you tell us how courts are

1 supposed to distinguish ordinary regulations
2 from extraordinary regulations?

3 MR. CARVIN: Well, I -- I think the
4 way the Court has done it countless times in the
5 Anderson/Burdick line of cases and in Crawford,
6 what are the usual burdens of voting? This is
7 not some mystery. We have a long history of
8 about how people go about voting. They show up
9 at precincts and they cast a ballot. That
10 requires you to leave your house, but that's not
11 an ordinary burden of voting -- that's a usual
12 burden of voting.

13 Whereas the other side says, you can
14 never have a system which requires anybody to
15 leave their house. They claim that they can't
16 find the precincts because of socioeconomic
17 disparities. They claim that they can't get to
18 mailboxes because of socioeconomic disparities,
19 which means that the state needs to allow
20 partisan operatives to go collect the ballots.

21 Well, if that's true, of course, that
22 means that the only system that would satisfy
23 their test is something where the government is
24 sent house to house to collect the ballots.

25 And I'm just saying that that can't

1 come with any rational definition of the usual
2 burdens of voting, which is you register and you
3 go cast your ballot. And that is not a very
4 difficult burden, and it's certainly not a
5 difficult burden here when 99.8 percent of
6 minorities were able to find the right precinct.

7 JUSTICE KAVANAUGH: You said in
8 response to Justice Kagan that the test can take
9 account of demographic realities. How exactly
10 under your test does that occur?

11 MR. CARVIN: Well, the precise
12 hypothetical is populations, right? Do they
13 provide precincts that are analogous for
14 minorities and non-minorities? And you can't
15 engage in a formalistic view, well, we put one
16 precinct here, one precinct there, therefore,
17 that's equal.

18 Again, if there's huge population
19 disparities in whom -- in terms of whom the
20 precincts are serving, then that would not be
21 a -- a realistic equal opportunity. If you have
22 10 times the population, then roughly eight to
23 10 more precincts would need to be provided.

24 JUSTICE KAVANAUGH: You referred to
25 common sense. And I think two factors among

1 others, but two factors that as a matter of
2 common sense, as I think about it, would trigger
3 more suspicion.

4 One factor would be if you're changing
5 to a new rule that puts minorities in a worse
6 position than they were under the old rule, and
7 a second factor would be whether a rule is
8 commonplace in other states that do not have a
9 similar history of racial discrimination.

10 Do those two considerations matter
11 under your view of Section 2?

12 MR. CARVIN: Not really. And I think
13 the Court has cautioned -- I'm not saying that
14 you couldn't look at it, but, no, the Court has
15 cautioned in terms of the retrogression point
16 that that is an analysis under Section 5, not
17 under Section 2.

18 And if you think about it, there's a
19 common-sense reason for that. If one party
20 takes power and expands the vote dramatically
21 without concern for ballot integrity or
22 security, and then the other party comes in and
23 wants to reemphasize the notion of secure
24 ballots, they would somehow be hamstrung by
25 whatever the predecessor group did.

1 It would seem odd --

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 MR. CARVIN: -- that once they
5 suggested --

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Mr. Carvin, I want
9 to make sure that I understand your position
10 because it strikes me that it has contradictions
11 in it.

12 So, as I understood from your brief,
13 your position is that Section 2 does not apply
14 to the how, to the time, place, and manner
15 restrictions, as long as they're facially
16 neutral, that it's only about the who.

17 Am I right about that?

18 MR. CARVIN: Qualifications would deny
19 people the opportunity to vote. Time, place,
20 and manner do not deny anybody the opportunity
21 to vote. They're simply providing opportunity
22 to --

23 JUSTICE BARRETT: Okay. But then I
24 don't understand why you conceded in your
25 examples to Justice Kagan that some of those

1 time, place, and manner restrictions -- like
2 time, place, and manner, you can only vote at a
3 country club, or time, place, and manner, you
4 know, this is the placement of the polls and
5 they're going to be placed in areas that are
6 burdensome to minorities.

7 Aren't those time, place, and manner
8 restrictions?

9 MR. CARVIN: But they're not neutral,
10 in other words, because they don't give
11 minorities the same opportunity to access the
12 precincts as is given to whites. In other
13 words, if you put all of your precincts at
14 country clubs, the notion that minorities have
15 the same opportunity to vote is -- is laughable.

16 So, no, no one is arguing for an
17 unrealistic opportunity in terms of what the
18 state has provided.

19 JUSTICE BARRETT: Okay. Well, then --

20 MR. CARVIN: What we're simply --

21 JUSTICE BARRETT: -- I don't think
22 that --

23 MR. CARVIN: -- saying is that --

24 JUSTICE BARRETT: -- I don't really
25 think -- excuse me for interrupting, but the

1 relevant distinction here is between those that
2 regulate who and those that regulate time,
3 place, and manner, really, the -- the pressure
4 under your interpretation is looking at
5 opportunity and what opportunity means.

6 I don't see why time, place, and
7 manner really bears -- you know, carries a lot
8 of weight in your analysis. Can you explain to
9 me --

10 MR. CARVIN: Well, if --

11 JUSTICE BARRETT: -- why I'm wrong?

12 MR. CARVIN: Well, I just want to make
13 it clear, if a facially neutral literacy test
14 denies you the opportunity to vote, then we
15 would think, since the state has now erected a
16 barrier to voting, you would need to look at the
17 racial composition of who the literacy test
18 applies to, because they denied you an
19 opportunity. They stopped you from voting.

20 If the state has not stopped you from
21 voting and the electoral system doesn't skew how
22 you can vote, then you haven't established the
23 threshold requirement to look at the
24 disproportionate outcome. In other words, the
25 state has not done anything wrong.

1 In a time, place, or manner case, if
2 you ask why didn't this person vote, the answer
3 in the literacy test would be because the state
4 told them not to.

5 JUSTICE BARRETT: Okay. Mr. Carvin --

6 MR. CARVIN: And the time frame for
7 that --

8 JUSTICE BARRETT: -- let me move on to
9 a different question. I'm interested in knowing
10 why the RNC is in the case.

11 So, you know, the DNC had standing and
12 the district court said that it had standing to
13 challenge the out-of-precinct policy because the
14 policy placed a greater imperative on Democratic
15 organizations to educate their voters and
16 because the policy harmed its members who would
17 have voted out-of-precinct.

18 What's the interest of the Arizona RNC
19 here in keeping, say, the out-of-precinct voter
20 ballot disqualification rules on the books?

21 MR. CARVIN: Because it puts us at a
22 competitive disadvantage relative to Democrats.
23 Politics is a zero sum game, and every extra
24 vote they get through unlawful interpretations
25 of Section 2 hurts us. It's the difference

1 between winning an election 50 to 49 and losing

2 --

3 JUSTICE BARRETT: Okay. Thank you.

4 MR. CARVIN: -- an election --

5 JUSTICE BARRETT: My time is up.

6 MR. CARVIN: -- 51 to 50.

7 CHIEF JUSTICE ROBERTS: A minute to
8 wrap up, Mr. Carvin.

9 MR. CARVIN: Yes. Thank you, Mr.
10 Chief Justice.

11 The Court has a stark choice between
12 two systems here. Ours is clear, we think
13 derived directly from the text, and is easy to
14 apply.

15 Theirs is one that requires the courts
16 to engage in a maximization policy, which
17 anything that has a disproportionate result is
18 somehow taken out of the hands of state
19 legislatures.

20 If you go down that path, even if you
21 try and limit it by suggesting that the state
22 can justify it or that we'll examine
23 socioeconomic factors, that still gets the
24 courts involved in an amorphous, manipulable
25 situation where no one knows what the rules are

1 going into the next election and they'll all be
2 decided on an ad hoc basis in a hyper-partisan
3 environment.

4 So, in addition to the fact that our
5 test is the only one that comports with the text
6 of Section 2 and the Constitution, it's also the
7 only one that gives lower courts the clarity
8 that is especially important in the voting
9 context.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Carvin.

12 Mr. Brnovich.

13 ORAL ARGUMENT OF MARK BRNOVICH

14 ON BEHALF OF THE PETITIONERS IN 19-1257

15 MR. BRNOVICH: Mr. Chief Justice, and
16 may it please the Court:

17 Public servants have no more sacred
18 duty than protecting the people's right to vote
19 while maintaining confidence in the integrity of
20 election results, this case before the Court
21 establishing a clear and constitutional test
22 that allows states to meet these imperatives. A
23 Section 2 vote denial claim requires substantial
24 disparate impact that is also caused by the
25 challenged law.

1 The laws at issue here are valid under
2 that test. They are also common-sense and
3 commonplace. Requiring in-person voters to cast
4 their ballots at assigned precincts ensures that
5 they can vote in local races and helps officials
6 monitor for fraud. Restricting early ballot
7 collections by third parties, including
8 political operatives, protects against voter
9 coercion and preserves ballot secrecy.

10 Arizona urges this Court to adopt a
11 clear and workable test for voter denial claims
12 that allows states to properly regulate their
13 elections.

14 I would be happy to take questions.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 General. Your approach requires that the burden
17 at issue be substantial, the disparate impact,
18 as you just said. Where do you get that in the
19 statutory language?

20 MR. BRNOVICH: Chief Justice Roberts,
21 it's for the same reasons the Seventh, Fourth,
22 and Sixth Circuits have adopted this
23 requirement. Section 2 prohibits state voting
24 practices only when they result in minorities
25 having less opportunity to vote and to elect

1 representatives of their choice. Any sort of
2 insubstantial impact cannot clearly meet these
3 thresholds.

4 CHIEF JUSTICE ROBERTS: But what if it
5 --

6 MR. BRNOVICH: But one example we
7 believe --

8 CHIEF JUSTICE ROBERTS: -- what if it
9 -- what if the provision --

10 MR. BRNOVICH: Go ahead.

11 CHIEF JUSTICE ROBERTS: -- results in
12 a 1 percent decline in participation by minority
13 voters? Is that substantial enough? I mean,
14 1 percent, according to the statistical
15 analysis, has been denied the opportunity to
16 vote. Why -- is that substantial?

17 MR. BRNOVICH: Chief Justice Roberts,
18 we believe that our test is the most workable
19 because, if you look at what a substantial
20 impact would be, we must analyze that under a
21 totality of circumstances. It has to rise to a
22 level of the denial and abridgement of the right
23 to vote and the opportunity to participate and
24 elect candidates of their choice, because the
25 whole point of Section 2 is to suss out

1 intentional discrimination when it's used as a
2 proxy or a guise.

3 So I believe that if this Court looks
4 at even the redistricting cases, such as Harris
5 versus IRC, at that -- in that point, the Court
6 determined that 10 percent was something that
7 was a substantial number. And then you --

8 CHIEF JUSTICE ROBERTS: When you look
9 at what the -- you're looking at what the --

10 MR. BRNOVICH: -- have the
11 Respondents' arguments --

12 CHIEF JUSTICE ROBERTS: I'm sorry,
13 counsel. When you're looking at the impact, do
14 you look at alternative procedures? In other
15 words, let's say there's a significant impact
16 on -- for -- on minorities voting at the polls.

17 In analyzing that, do you say, well,
18 they can vote by mail, so, overall, it's not
19 that substantial an impact?

20 MR. BRNOVICH: Yes, Chief Justice. We
21 believe that in Arizona there are numerous ways
22 that people can vote. They can -- there's
23 no-excuse absentee balloting. They can vote by
24 mail. We have voting centers in some counties.
25 They can vote early up to 27 days before the

1 election.

2 And so the only way to determine
3 whether there's a substantial impact is to look
4 at the totality of the election numbers.

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

7 Justice Thomas.

8 JUSTICE THOMAS: Thank you, Mr. Chief
9 Justice.

10 General, there's been some
11 disagreement as to your standing in this case.
12 Would you take a minute to discuss why you have
13 standing here?

14 MR. BRNOVICH: Justice Thomas, first
15 and foremost, the Ninth Circuit allowed us to
16 intervene on behalf of the state. As the
17 Attorney General for the State of Arizona, Title
18 41 in -- in Arizona statutes clearly allows the
19 attorney general to represent the state in
20 federal court.

21 JUSTICE THOMAS: The -- there was --
22 the theory that the Ninth Circuit used to
23 discuss some questionable legislative intent
24 involved in the Arizona legislation was the
25 cat's paw theory. One, I'd like you to address

1 that, but I'd also like you to tell us -- to
2 discuss how you would determine the intent of
3 the Arizona legislature in passing this
4 legislation?

5 MR. BRNOVICH: Justice Thomas, I -- we
6 believe that the cat's paw doctrine is
7 completely inapplicable to a case like that.
8 That doctrine arose out of the context of agency
9 relationships, and it imputes the motives for
10 superiors to the agents.

11 But, as this Court knows and has
12 recognized in the past, that you cannot impute a
13 motive to one legislature -- legislator, to a
14 group of 90 independent coequal actors spread
15 across two houses in the legislature. So this
16 is no different, I believe, than the Court's
17 prior recognition that what motivates one
18 legislator to speak out or vote for a bill is
19 not -- not necessarily what motivates other
20 legislators to vote for that bill.

21 At the end of the day, as we've
22 articulated our test, we believe it's a
23 two-prong test and we need -- and it's designed
24 to make sure that -- and determine whether an
25 intentional discrimination is done by proxy.

1 And that's why we need to look at the
2 substantial disparity looking at the totality of
3 the circumstances and to analyze whether that
4 caused that difference in voting.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: I'm curious to know
8 what you think of -- of Professor
9 Stephanopoulos's test. My reason is simply
10 this: It seems to me that in many
11 discrimination statutes -- antidiscrimination,
12 Title VII, Title VI, the Housing Act, the age
13 discrimination -- essentially, the courts have
14 come down in disparate impact situations to
15 three elements.

16 First, the plaintiff has to show that
17 there is some kind of significant disparity.

18 Second, the plaintiff has to show that
19 there is at least a but-for cause and the
20 state's or the employer's policy is the but-for
21 cause.

22 And then, third, the defendant can
23 come back and show, well, we have a good
24 non-race-related reason for this and it can't be
25 accomplished easily in other ways.

1 Those three elements run through the
2 law. Many of the tests, and Stephanopoulos, who
3 says it explicitly, embody those three elements.
4 Are you against our saying those same three
5 elements that implemented the statutory language
6 here are the basis of a cause, we'll never get
7 it perfect, it will always be case by case, it
8 will always involve all the circumstances, but
9 those are the three key elements?

10 MR. BRNOVICH: Justice Breyer, that --
11 those are -- that's an interesting test, but I
12 think, at the end of the day, Congress didn't
13 require that. And we do believe that to adopt
14 those tests from the Title VII context would
15 actually shift the burden. And the text of
16 Section 2 doesn't require it.

17 Once again, I believe that --
18 analyzing any of these burdens on voters or if
19 there's statistical disparities, we have to look
20 at the totality of the circumstances and a
21 totality of the voting systems within that
22 state. And once again, if you look at all the
23 opportunities that people have to vote,
24 regardless of who they are or their background,
25 Arizona provides a plethora of options for

1 people to exercise their franchise.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: Can I ask you
4 something about the statistics regarding
5 out-of-precinct voting. Are -- do they refer
6 only to voters who cast their ballots at a
7 polling place on Election Day, or do they also
8 include voters who voted early?

9 MR. BRNOVICH: Justice Alito, Mark
10 Twain famously said that there are three types
11 of lies: Lies, damn lies, and statistics. And
12 I -- we believe that the Ninth Circuit
13 cherry-picked some of those statistics because,
14 if you look at the overall totality of people
15 that voted in Arizona, we're talking about a
16 tenth of a percent, essentially, that may have
17 been affected by the rules relating to
18 in-precinct voting. And --

19 JUSTICE ALITO: No. What about what
20 would --

21 MR. BRNOVICH: -- at the end of the
22 day, of the nearly 2 million votes cast, only
23 4,000 -- about 4,000 people voted
24 out-of-precinct. So, to simply answer your
25 question, that only included day of voting. It

1 did not include the 80 percent of people that
2 voted early by mail.

3 JUSTICE ALITO: So what would happen
4 if someone showed up for early voting and went
5 to the wrong precinct?

6 MR. BRNOVICH: Justice Alito, they
7 would be told that they are voting in the wrong
8 precinct and they would be told where to go to
9 vote. If they insisted on voting in that
10 precinct, they would be giving a -- given a
11 provisional ballot but be told that that ballot
12 may not count.

13 JUSTICE ALITO: And this would apply
14 to early voting as well as Election Day voting?
15 That was the question I was getting at.

16 MR. BRNOVICH: I'm sorry, Justice
17 Alito. All ballots are available at early
18 voting centers, but not every county in Arizona
19 has voting centers if I understand your question
20 correct -- question correctly.

21 JUSTICE ALITO: Okay. Let me go on to
22 another -- another point. You say we should
23 give some teeth to the requirement that
24 challengers must show not only that a protected
25 class has less opportunity to -- to participate

1 in the political process but also less
2 opportunity to elect representatives of their
3 choice.

4 What would that look like in practice?
5 Does it require pointing to a very close
6 election on -- on a particular day?

7 MR. BRNOVICH: Justice Alito, under
8 our test, it would require looking at both of
9 those prongs. So, first, there would have to be
10 a determination made by the plaintiffs, who
11 would have the burden of proof, to show that
12 there was a substantial disparate impact on the
13 ability of minority voters' ability to
14 participate and elect candidates of their
15 choice.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 MR. BRNOVICH: Once that hurdle is --

19 JUSTICE ALITO: Thank you, thank you.
20 My time is up.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, you said
24 that the general test under Title VII and other
25 civil rights statutes in response to Justice

1 Breyer puts the burden on the state.

2 But the only burden that that test
3 requires is for the state to justify its
4 practice, to explain why.

5 Why is that a burden that you can't
6 meet?

7 MR. BRNOVICH: Well, the text of
8 Section 2 doesn't require it. What Section 2 --

9 JUSTICE SOTOMAYOR: Well, compatible
10 --

11 MR. BRNOVICH: -- essentially means is
12 that --

13 JUSTICE SOTOMAYOR: -- in their -- I'm
14 sorry, counsel. By your own admission, the test
15 under voting -- voting rights too is a totality
16 of the circumstances test. And isn't
17 justification one of the circumstances that the
18 Senate report pointed to?

19 MR. BRNOVICH: Justice Sotomayor, but
20 the burden would be on the plaintiffs to
21 establish that. Under our test --

22 JUSTICE SOTOMAYOR: You have that --

23 MR. BRNOVICH: -- the plaintiffs would
24 have to come forward --

25 JUSTICE SOTOMAYOR: -- absolutely --

1 MR. BRNOVICH: -- and, one, fill that
2 substantial --

3 JUSTICE SOTOMAYOR: Counsel, the test
4 requires an examination of the totality of the
5 circumstances. Can you seriously argue that the
6 reason for why you did something isn't part of
7 that test?

8 MR. BRNOVICH: Well, first and
9 foremost, I believe we look to the -- to the
10 text of the statute itself --

11 JUSTICE SOTOMAYOR: The statute --

12 MR. BRNOVICH: -- to determine how it
13 --

14 JUSTICE SOTOMAYOR: -- talks about --

15 MR. BRNOVICH: -- should be
16 interpreted, of course.

17 JUSTICE SOTOMAYOR: -- totality --
18 counsel, the statute talks about totality of
19 circumstances. I'm asking you a simple
20 question. Are you arguing that the reason you
21 did something is not part of that totality of
22 circumstances?

23 MR. BRNOVICH: Well, twofold. One is
24 -- is --

25 JUSTICE SOTOMAYOR: Counsel, why is

1 that question --

2 MR. BRNOVICH: -- as I mentioned
3 earlier --

4 JUSTICE SOTOMAYOR: -- counsel, why is
5 that question so hard to answer? Yes or no? Is
6 the reason why the state has picked a particular
7 practice an important part of the totality of
8 the circumstances test?

9 MR. BRNOVICH: Yes.

10 JUSTICE SOTOMAYOR: Thank you,
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: General Brnovich,
14 would you have answered my hypotheticals the
15 same way that Mr. Carvin did?

16 MR. BRNOVICH: No.

17 JUSTICE KAGAN: What would be
18 different?

19 MR. BRNOVICH: Well, I think that our
20 test would require looking first and foremost at
21 whether there was a substantial disparity and
22 then, two --

23 JUSTICE KAGAN: I'm just asking
24 which --

25 MR. BRNOVICH: -- really going through

1 a causation analysis.

2 JUSTICE KAGAN: -- which hypotheticals
3 would be different.

4 MR. BRNOVICH: So --

5 JUSTICE KAGAN: Which ones would you
6 have answered differently?

7 MR. BRNOVICH: All three of them. I
8 mean, yeah, I -- I think all three of them would
9 require that analysis. For example --

10 JUSTICE KAGAN: I mean --

11 MR. BRNOVICH: -- just because there's
12 --

13 JUSTICE KAGAN: -- I'm not asking
14 really about analysis.

15 MR. BRNOVICH: -- a polling place at a
16 country club, I don't believe --

17 JUSTICE KAGAN: General, if you could
18 stop for a second. I -- I just want to know
19 what the -- the -- the answers are. Mr. Carvin
20 said both polling place hypotheticals would be
21 impermissible. Are they impermissible?

22 MR. BRNOVICH: Justice, it would
23 depend on the evidence that was presented at
24 trial.

25 JUSTICE KAGAN: I -- I just gave --

1 MR. BRNOVICH: We know in our case --

2 JUSTICE KAGAN: -- you the evidence.

3 MR. BRNOVICH: -- it was a 10-day
4 trial that --

5 JUSTICE KAGAN: I just gave you the
6 evidence, General. The -- the evidence is 10
7 times more wait times, 10 times fewer votes for
8 blacks than whites. That's the evidence.

9 MR. BRNOVICH: Under -- under our
10 analysis, so you would look at whether there's a
11 substantial disparity. So, in that situation,
12 what percentage of, for example, African
13 American voters were voting less than white
14 voters.

15 JUSTICE KAGAN: I just meant --

16 MR. BRNOVICH: They say now -- now
17 they'd have to look at the --

18 JUSTICE KAGAN: General, the
19 hypothetical is the hypothetical, all right?
20 It's 10 times the impact, right? Ten times, you
21 know, a greater distance to the polls, 10 times
22 more polling stations.

23 MR. BRNOVICH: Justice Kagan, I'm not
24 trying to be difficult, but it -- it really
25 depends on the magnitude. Are we talking about

1 one person versus 10 people? A hundred people
2 versus a thousand people?

3 JUSTICE KAGAN: All right. We're
4 talking about a thousand people.

5 MR. BRNOVICH: Ultimately, it's is
6 that burden -- does that cause someone to not be
7 allowed to elect a representative of their
8 choice and --

9 JUSTICE KAGAN: Okay.

10 MR. BRNOVICH: -- if there's a
11 significant prohibition --

12 JUSTICE KAGAN: How about hours? How
13 about hours, General? How about hours, 10 to 2?

14 MR. BRNOVICH: Same answer. It -- it
15 depends on the circumstances and how that
16 impacts and does that have a substantial impact
17 on the ability of minorities to participate in
18 the election.

19 JUSTICE KAGAN: Yes, it does have a
20 substantial impact, General. You know, if it's
21 10 to 2, people who work 10 to 2 and don't have
22 cars and -- and the impact has been shown to be
23 that black voters will be very
24 disproportionately impacted by hours that are 10
25 to 2.

1 MR. BRNOVICH: Justice Kagan, in that
2 hypothetical, it very well could be a violation
3 of Section 2. At that point, I believe it would
4 be -- we've moved on to the second prong of that
5 and we'd look at causation and whether the
6 challenged law did indeed cause that --

7 JUSTICE KAGAN: Thank you, General.

8 MR. BRNOVICH: -- circumstance. Once
9 it's generally determined that --

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 MR. BRNOVICH: -- the totality of the
13 circumstances --

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Go ahead and finish
17 your answer, counsel, please.

18 MR. BRNOVICH: Thank you, Justice
19 Gorsuch. Once again, both of these prongs, we
20 have to look at the totality of circumstances.
21 And so, even with voting hours, the question
22 becomes, well, what are the alternative methods
23 or ways for people to vote? How many people act
24 -- actually are affected by that 10 to 2 voting,
25 those hours?

1 JUSTICE GORSUCH: All right. So we --
2 we have before us two actual voting practices,
3 the in-precinct requirement and the rule against
4 vote collection or harvesting. Can you explain
5 in -- in -- succinctly your thoughts on why
6 those don't count as substantial burdens?

7 MR. BRNOVICH: Justice Gorsuch, after
8 a 10-day trial, Federal District Judge Rayes
9 found both of these statutes constitutional,
10 that there was -- additionally, the states, when
11 it comes to time, place, and manner, when it
12 comes to regulations that are designed to uphold
13 the integrity of the election process, I think
14 the Court should be very skeptical when it
15 overturns any sort of state election statutes
16 based on some sort of statistical anomalies.

17 JUSTICE GORSUCH: Okay. But what do
18 you say about what you call the statistical
19 anomalies but the other side would call proof?
20 What -- why -- why -- why don't they rise to the
21 level of a substantial burden?

22 MR. BRNOVICH: As the district court
23 found, there was -- there was no burden on the
24 ability of votes. And literally we're talking,
25 for example, in the out-of-precinct voting of

1 about 4,000 ballots of more than 2 million cast.

2 No one was denied the opportunity.

3 And if we look at these statistical anomalies,
4 those slight statistical differences, we have to
5 look at that in the context of the totality of
6 our voting system. You know, once again,
7 Arizona provides, you know, early voting.
8 People can vote at voting centers. They can
9 vote 27 days before the election.

10 There's no excuse. Absentee
11 balloting. Eighty percent of people in Arizona
12 vote by mail. So there are a whole plethora of
13 options and ways to people to exercise the right
14 to franchise. And so by -- just when the --
15 what the Ninth Circuit en banc did is they took
16 a small number, as Justice Alito referred to, of
17 people that actually voted day of and then tried
18 to extrapolate that somehow that Arizona's laws
19 were racist or unconstitutional.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh.

23 JUSTICE KAVANAUGH: Thank you, Chief
24 Justice.

25 Counsel, you acknowledged several

1 times that the totality of the circumstances are
2 relevant here. And, of course, that's in the
3 statutory text, as my colleagues have pointed
4 out.

5 Is the availability of alternatives
6 that could serve your policy goals a
7 circumstance that matters when we consider the
8 totality of the circumstances?

9 MR. BRNOVICH: Yes, absolutely,
10 Justice Kavanaugh.

11 JUSTICE KAVANAUGH: And so, if there's
12 an alternative available that would serve the
13 policy objective without causing the
14 disproportionate impact or would cause less of a
15 disproportionate impact, do you have to go with
16 that? And if not, why not?

17 MR. BRNOVICH: Yes, Justice Gorsuch,
18 that -- that is in the law. And we believe that
19 causation also plays an important role. In the
20 totality, we look at that not only on
21 substantial impact but also on the causation
22 because that causation plays an important role
23 in connecting the totality of the circumstances
24 with the integrity measures.

25 So there may be multiple or there

1 could be isolated instances of disparity, and
2 those can be remedied without upsetting a
3 race-neutral election integrity law. And that
4 would obviously be strongly preferred.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: So, General, one of
9 the disputes in this case about -- is about
10 whether we look at the electoral system as a
11 whole or whether we look at the challenged
12 regulation in isolation or let's say on a
13 regulation-by-regulation basis.

14 And I want to give you this point or
15 this example that's in Secretary Hobbs's brief,
16 she makes a pretty good point. She says in
17 response to your argument that we have to look
18 at the process itself to say, overall, is the
19 process, you know, open enough for disadvantaged
20 voters. So, you know, even if they can't send
21 their ballot in via ballot collection, they have
22 many other opportunities to do so, early voting,
23 et cetera.

24 She points out in Footnote 6 on page
25 23 that if a state sends unsolicited ballot

1 applications to residents of white neighborhoods
2 but not to residents of black neighborhoods,
3 that would amount to giving the latter less
4 opportunity to participate. And she's, you
5 know, quoting the Republican party there.

6 Wouldn't that be true even if black
7 voters could vote in other ways? In other
8 words, reducing an opportunity is reducing an
9 opportunity in the text of the statute even if
10 there's still other avenues open to the black
11 voters.

12 MR. BRNOVICH: Justice Barrett, in the
13 hypothetical, the example you provided, that
14 would seem to be unconstitutional on its face
15 because it's not facially neutral.

16 JUSTICE BARRETT: Okay, but isn't --
17 you know, we might disagree about that, but
18 let's say that, you know, some of Justice
19 Kagan's examples which seemed on their face to
20 be ostensibly neutral, on their face, time,
21 place, and manner restrictions, if it takes one
22 opportunity away, I guess I still don't
23 understand why that isn't reducing the ability
24 of those voters to vote, relative to other white
25 voters that don't share that same burden?

1 MR. BRNOVICH: Once again, if we focus
2 too much on de minimis or small statistical
3 disparities, I believe we run into grounds where
4 then the statute itself would run afoul of the
5 Fourteenth, Fifteenth Amendments.

6 So that's why, if we take a step back
7 and we analyze it with our test, looking at,
8 one, the substantial disparate impact, the total
9 -- totality of circumstances --

10 JUSTICE BARRETT: Okay, thank you,
11 General. I'm out of time.

12 CHIEF JUSTICE ROBERTS: Take a minute
13 to wrap up, General Brnovich.

14 MR. BRNOVICH: Thank you, Chief
15 Justice. Arizona endorses without qualification
16 the Voting Rights Act goal of ending racial
17 discrimination in voting. The Constitution
18 demands that all Americans be free from this
19 pernicious evil.

20 A disparate impact on minority voters
21 can be an appropriate proxy for legal
22 discrimination when that disparity is
23 substantial. But without these showings,
24 Section 2 would exceed Congress's powers to
25 enforce the Reconstruction amendments,

1 improperly inject race into all voting laws, and
2 impede a state's ability to run their elections.

3 Arizona's requirements that ballots be
4 cast at assigned local precincts and its
5 restrictions on ballot harvesting are
6 appropriate election integrity measures that do
7 not create any disparate impact on racial
8 minorities but serve us all equally well.

9 The desire to enhance the convenience
10 of voting must never outweigh the imperative of
11 securing the integrity of the result.

12 We urge this Court to reverse with
13 instructions and enter judgment for the State.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Ms. Amunson.

17 ORAL ARGUMENT OF JESSICA R. AMUNSON
18 ON BEHALF OF RESPONDENT SECRETARY HOBBS

19 MS. AMUNSON: Good morning, Mr. Chief
20 Justice, and may it please the Court:

21 When an eligible voter casts a ballot
22 and that ballot is discarded, rather than
23 counted, that voter has been denied the right to
24 vote. Likewise, when an eligible voter relies
25 on ballot collection to vote and that practice

1 is criminalized, that citizen's vote right as at
2 the very least been abridged.

3 The question, then, is whether that
4 denial or abridgement has occurred on account of
5 race. Section 2's plain text tells courts how
6 to answer that question, and the statutory
7 command to answer based on the totality of
8 circumstances necessarily requires rejection of
9 the inflexible rules Petitioners advocate.

10 To the contrary, it mandates what this
11 Court has called a searching, practical
12 evaluation of the past and present reality and a
13 functional view of the political process.

14 Petitioners have caricatured the
15 Section 2 results test as resting on bare
16 statistical disparities that will call into
17 question every election regulation in the
18 country. Not true.

19 Section 2's results test has been in
20 place for almost 40 years, and nothing like what
21 Petitioners claim has come to pass. Indeed,
22 successful Section 2 challenges to statewide
23 election laws involving voter ID, early voting,
24 ballot collection, and out-of-precinct voting
25 number in the single digits.

1 Section 2 liability has been limited
2 to policies that, due to their interaction with
3 particular facts on the ground, are outliers in
4 the discriminatory burden that they impose on
5 minority voters. That is the case here.

6 As Arizona's chief elections officer,
7 Secretary of State Hobbs knows that the
8 out-of-precinct policy and the ballot collection
9 statute imposed discriminatory burdens on Native
10 American, Latino, and black voters that are not
11 justified by any legitimate state interest.

12 We, therefore, ask this Court to
13 affirm the judgment below. And I welcome the
14 Court's questions.

15 CHIEF JUSTICE ROBERTS: Counsel,
16 you're aware of what the Carter-Baker Commission
17 found about ballot harvesting. They said that
18 absentee ballots are the largest sort of
19 potential voter fraud. It said citizens who
20 vote at home, at nursing homes, at the workplace
21 or church are more susceptible to pressure or to
22 intimidation, and that they recommended that the
23 practice of allowing candidates or party workers
24 to pick up and deliver absentee ballots should
25 be eliminated.

1 You think that's -- you disagree with
2 that in this case, right? Given your position
3 on ballot harvesting?

4 MS. AMUNSON: In this case, Your
5 Honor, and that is the important distinction
6 here. States can have an interest in -- in
7 securing their elections through limiting ballot
8 collection, but when you look at the particular
9 facts here, that does not appear to have been
10 Arizona's interest.

11 And in McCutcheon, for example, Your
12 Honor, the Court noted that where, as here, a --
13 a legislature takes a prophylaxis upon
14 prophylaxis approach, the Court should be
15 particularly diligent in scrutinizing the law.

16 CHIEF JUSTICE ROBERTS: So if the --
17 the law is -- you would strike down because of
18 -- there's not racial proportionality in -- in
19 enforcing the law, and that means that your
20 pursuit of racial proportionality would require
21 you to keep in place the pressure, the
22 intimidation that caused President Carter and
23 Secretary Baker to recommend that that
24 harvesting practice be eliminated?

25 MS. AMUNSON: Your Honor, it has -- it

1 has nothing to do with racial proportionality.
2 What it has to do with are the burdens that the
3 law actually imposes on voters here. So there
4 are particular facts and circumstances in
5 Arizona that may not be present in other states.
6 And --

7 CHIEF JUSTICE ROBERTS: Well, but when
8 you say it doesn't -- when you say it doesn't
9 involve racial proportionality, you say it's if
10 the burdens were equally distributed among the
11 races, that issue or that policy wouldn't be
12 before us, would it?

13 MS. AMUNSON: Your Honor, what I'm
14 saying is that here what we have is a record
15 that shows that Native Americans and Latinos in
16 Arizona rely disproportionately on ballot
17 collection and white voters do not. So that is
18 why this is before you.

19 So, for example, as the district court
20 found, voting on Native American reservations is
21 an activity that requires the active --

22 CHIEF JUSTICE ROBERTS: No, no --

23 MS. AMUNSON: -- participation of --

24 CHIEF JUSTICE ROBERTS: -- I
25 understand your position, which is that if there

1 isn't racial proportionality, then the -- the
2 law should be struck down. I'm just asking you
3 if that requires you to tolerate the
4 difficulties in problems and pressures that
5 President Carter and Secretary Baker outlined in
6 their report.

7 MS. AMUNSON: Your Honor, I am simply
8 saying that while states can have a -- an
9 interest in -- in securing absentee ballots and
10 in limiting ballot collection, that is not the
11 -- the interest here. And I think the
12 legislative history shows that, in fact, what
13 Arizona was acting to do was to limit the
14 participation of Hispanics and Native Americans,
15 in particular --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas.

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 Ms. Amunson, is the out-of-precinct
22 policy still in place?

23 MS. AMUNSON: It is, Your Honor.

24 JUSTICE THOMAS: And there's -- and
25 the Secretary of State plans to enforce it?

1 MS. AMUNSON: The out-of-precinct
2 policy is in -- is part of the election
3 procedures manual that is by statute in place
4 until at least the end of this year. So, yes,
5 the -- the -- the out-of-precinct policy was
6 enforced in the 2020 election.

7 JUSTICE THOMAS: Okay. The -- what
8 percentage of the minority voters in the state
9 of Arizona are affected by the out-of-precinct
10 policy or were adversely affected, as well as
11 the ballot collection policies?

12 MS. AMUNSON: As to the
13 out-of-precinct policy, the -- the record showed
14 that minority voters were affected at a rate of
15 2 to 1 as to the -- as to the out-of-precinct
16 policy.

17 As to the --

18 JUSTICE THOMAS: No, I -- I understand
19 what you're saying there, but what percentage of
20 the minorities who cast ballots in the state of
21 Arizona were affected by the policies?

22 MS. AMUNSON: It was less than
23 1 percent, Your Honor. However, Your Honor,
24 this Court has never held -- and, in fact, the
25 text of Section 2 says that it is about the

1 right of any voter to be abridged.

2 Of course, we recognize that the
3 number of voters affected may affect how a
4 plaintiff can prove that a policy denied or
5 abridged the right to vote on account of race.
6 But it is not the case that simply a small
7 number of voters being affected by the policy is
8 enough to render it immune from Section 2
9 liability, as -- as the United States also
10 agreed both in its brief below and in its brief
11 in this case.

12 JUSTICE THOMAS: You know, I often
13 wonder when you -- when we say there is an
14 additional burden, Arizona is a big state and
15 it's quite rural. I'm sure there are some
16 people in very rural parts of Arizona who are
17 quite burdened by the distance they have to
18 travel in order to vote.

19 How do you compare someone who is
20 supposedly burdened or allegedly burdened by the
21 out-of-precinct policy to a person like that?

22 MS. AMUNSON: Well, Your Honor,
23 it's -- it's -- that's exactly our point here is
24 that, for example, with respect to Native
25 American voters who have to vote -- who rely on

1 ballot collection to vote, simply saying that
2 those voters can go ahead and vote in person or
3 go ahead and vote by mail when they don't
4 actually have home mail service or access to
5 postal facilities, that's exactly our -- our --
6 the contrast that we draw with Mr. Carvin's
7 position that it's all just about opportunity.

8 Instead, you have to actually look at
9 the reality of how the -- the burden is
10 affecting voters on the ground under the
11 totality of circumstances inquiry.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.

15 JUSTICE BREYER: Well, I have two
16 related questions. And both are about
17 standards, which I think is the main issue here.

18 What do you think of, since disparate
19 impact is -- this is not the only field in which
20 it comes up, that we take the standards from the
21 other areas, employment, age, and housing and so
22 forth, and simply say they're roughly the same
23 here?

24 The statute does speak on account of
25 race, which means if it's justified, it's not on

1 account of race. All right? So we simply take
2 those standards producing a uniformity in the
3 law. That's my general question.

4 My specific question is, what do you
5 really say about the question that I think
6 Justice Thomas was asking, that if you win in
7 the details here, in many -- in the majority of
8 states, they won't be able to engage in precinct
9 voting, because a lot of the precincts will turn
10 out to be maybe 10 feet or maybe 100 yards or
11 maybe a thousand yards on -- in general further
12 away from a minority group of houses than a
13 majority group of houses.

14 Are you supposed to go out with a tape
15 measure? What? All right. That's a concern in
16 the specific case, so I'm interested in both.
17 One, what's your general view of using roughly
18 the same standards and, two, what about that
19 specific case?

20 MS. AMUNSON: First, Your Honor, as to
21 the -- the disparate impact standard, we think
22 that is -- those elements are already
23 incorporated in the test that the Court applied
24 below and our only quibble with the -- with the
25 standard that Your Honor set forth is the

1 requirement of a "significant disparity."

2 We don't think simply importing a
3 textual adjective like significant or
4 substantial really moves the ball. That said,
5 we do recognize that you have to -- that the
6 size of a disparity will matter for purposes of
7 being able to prove whether a policy is, in
8 fact, discriminatory on account of race.

9 As to Your Honor's second question
10 about whether states can engage in -- still
11 engage in precinct-based voting, certainly, Your
12 Honor, states maintain plenty of discretion and
13 authority to regulate their elections as they
14 see fit and to have precinct-based voting
15 systems.

16 The reality is that is actually not --
17 not what is happening in Arizona. In fact, in
18 2020, 75 percent of voters voted in counties
19 that do not actually use precinct-based systems.

20 And so while there may be some
21 interest in maintaining precinct-based systems
22 in other states, that is not actually the
23 reality on the ground in Arizona. We don't
24 think the states need to take out tape -- tape
25 measures. Instead, what they have to do is

1 ensure that they are not providing less
2 opportunity to minorities.

3 So they do have to be conscious of
4 ensuring that -- that, in fact, opportunities
5 are equalized across the races. And that is
6 what Section 2 is meant to do.

7 JUSTICE BREYER: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Alito.

9 JUSTICE ALITO: Counsel, I want to try
10 to give you a couple of examples and ask you for
11 each one to assume that a title -- a Section 2
12 plaintiff is able to show statistical
13 disparities that are at least as great as those
14 that were shown here with respect to
15 out-of-precinct -- precinct voting, and that
16 those disparities were caused for -- but-for
17 caused by the same socioeconomic factors that
18 you say were the but-for causes here.

19 So the first example is a state that
20 has the early voting period begin two weeks
21 before Election Day and the plaintiffs say --
22 and they show that that has -- instead of the
23 issue -- it should have been 60 days. And
24 there's the same kind of statistical
25 disparities.

1 MS. AMUNSON: Your Honor, if I may ask
2 in your hypothetical, the plaintiffs want to go
3 from 14 to 60 days or they're reducing it from
4 --

5 JUSTICE ALITO: Right, they want to
6 go -- they want to go from 14 to 60. A lot of
7 minority voters are unable, they -- they -- they
8 don't have -- they -- they don't vote within the
9 14-day period to the same extent as they would
10 within the 60-day period.

11 MS. AMUNSON: Well, Your Honor, we
12 think that there is a difference, both in text
13 and in precedent in asking a Court or asking a
14 state to adopt a new policy versus a state
15 taking away a policy that already exists.

16 And so I don't think that Section 2
17 plaintiffs could come in and say that you are
18 required to expand from 14 to 60. And that's
19 because the text actually talks about the
20 challenged standard practice or procedure in the
21 state or political subdivision.

22 JUSTICE ALITO: All right. How about
23 a -- how about a rule -- the state has a rule
24 that you have to -- you have to fill in a little
25 box to vote for a candidate, but it can be shown

1 that there's a statistical disparity with
2 respect to voters who don't actually fill in the
3 box but they -- they make a checkmark beside the
4 box.

5 MS. AMUNSON: Your Honor, again, I --
6 I think that what Section 2 calls for and -- and
7 what this Court has said is a practical
8 evaluation of the past and present reality. I
9 don't think specific -- I just want to be clear,
10 statistical disparities alone are not enough to
11 make out a Section 2 violation.

12 You would have to show that this is,
13 in fact, imposing a burden -- discriminatory
14 burden on the minority voters that it is not
15 imposing on non-minority --

16 JUSTICE ALITO: I don't really see the
17 difference between -- let me give you one more
18 example.

19 The state has a rule that says that
20 mailed-in ballots have to be received within
21 three days after Election Day, and the section
22 -- and a Section 2 plaintiff says it should be
23 one week, and they showed the same kind of
24 statistical disparities.

25 MS. AMUNSON: And again, Your -- Your

1 Honor, my answer is the same. Statistical
2 disparities alone are not enough. You have to
3 take a functional view of the political process
4 and look to a holistic view of -- of how it is
5 actually affecting the voter on the ground.

6 JUSTICE ALITO: Well, those are a lot
7 of words. I really don't understand what they
8 mean. But I'm out of time. Thanks.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Counsel, I'd like
12 to return to a question that Justice Thomas
13 asked, not of you, I don't believe, but more
14 generally, which is: How do you prove that a
15 legislature acted with discriminatory intent,
16 assuming, as we must, that the legislature is
17 made up of individuals?

18 And so if you show only two or three
19 of them have a discriminatory intent, how can
20 you assume that the others do?

21 MS. AMUNSON: Well, Your Honor, as
22 this Court has held in Arlington Heights and in
23 the cases applying it, what the plaintiffs must
24 do is show that discriminatory intent was a
25 motivating factor for the legislation.

1 And here I think the record was
2 abundantly clear, in fact, much more clear than
3 it normally is in such cases, that
4 discriminatory intent was a motivating factor
5 and that the entire purpose of introducing the
6 law by Senator Shooter was to attempt to keep
7 Hispanics in his district from voting and was
8 premised on far-fetched racial -- racially
9 hinged allegations that Latinos in the District
10 were engaging in fraud with respect to ballot
11 collection.

12 JUSTICE SOTOMAYOR: Do you know
13 whether -- can you remind me whether the
14 district court found that absent those -- those
15 two legislative motives, this law would not have
16 passed? Meaning --

17 MS. AMUNSON: Sure.

18 JUSTICE SOTOMAYOR: Just -- the Chief
19 Justice pointed out that there are independent
20 reasons for passing the ballot collection
21 limitations.

22 Did the district court actually look
23 to determine that even if this was a motivating
24 factor, that the law would not have passed
25 without it?

1 MS. AMUNSON: Your Honor, the -- the
2 district court because it found it was not a
3 motivating factor did not reach that question,
4 but -- but as the en banc court held, clearly
5 discriminatory intent was a motivating factor.

6 And it used the district court's own
7 fact findings. The district court simply
8 minimized the importance of those findings.
9 They do show that discriminatory intent was a
10 motivating factor and -- and certainly the state
11 did not meet its burden to show that the law
12 would -- would have been enacted absent that.

13 JUSTICE SOTOMAYOR: Thank you,
14 counsel.

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 JUSTICE KAGAN: Ms. Amunson, the
17 longer this argument goes on, the less clear I
18 am as to how the parties' standards differ.

19 So if I understood what Mr. Carvin
20 said at argument, as opposed to what he said in
21 his brief, he said, of course, you should look
22 at demographic realities. He even said, you
23 know, it would be laughable to not look at
24 demographic realities on occasion.

25 And I bring you back to this

1 hypothetical question where black voters have
2 many fewer polling stations, even though that's
3 a completely neutral rule on its face, but the
4 way it operates is to make voting more difficult
5 for black voters than white voters and leave it
6 so that they -- the political system is not
7 equally open to their participation. And he
8 said, sure, you can -- you can look at that.
9 And, similarly, you talked about, like, the
10 practical evaluation of realities on the ground.

11 So, I mean, tell me how you think
12 these things differ. And I guess, more
13 specifically -- I guess, when you start thinking
14 about a whole run of hypotheticals, there are
15 some things that are really quite obvious
16 burdens, which you just know looking at them is
17 going to lead to -- to real difficulty for
18 some -- you know, to black -- for black voters
19 or for Native American voters or for Latino
20 voters, and then other restrictions where you
21 can say, well, you know, that's kind of an
22 inconvenience, but they could -- they could
23 overcome that inconvenience if -- if they really
24 wanted to.

25 So how -- how -- is -- is -- is -- you

1 know, I guess what I'm saying, that there's a
2 spectrum of restrictions and a spectrum of the
3 effects that those restrictions cause. How are
4 we to think about that?

5 MS. AMUNSON: Well, Your Honor, as to
6 the -- Mr. Carvin's concession that the Court
7 needs to look to demographic realities, I -- I
8 find myself in agreement with him on that. And
9 -- and as the Court has said in its -- its
10 Gingles and in its vote dilution jurisprudence,
11 the essence of a Section 2 claim is looking to
12 how the state's practice interacts with social
13 and historical conditions to cause the
14 inequality.

15 And so, Your Honor, as to the kind of
16 spectrum of regulations, that's exactly what
17 Section 2 is meant for courts to do, to
18 undertake a functional inquiry into the totality
19 of the circumstances.

20 What I took Mr. Carvin's brief to be
21 saying, as opposed to what Mr. Carvin argued
22 here today, is that, in fact, so-called neutral
23 time, place, and manner regulations don't even
24 implicate Section 2. That is, you don't even
25 get to -- get past the pleading stage if you

1 come in with -- and say this is simply a -- a
2 neutral time, place, and manner restriction.

3 Instead, what courts should be doing
4 is looking at how that restriction interacts
5 with the facts on the ground to see whether it
6 is, in fact, causing a discriminatory burden on
7 minority voters. And, here, that's what the
8 court did and, in fact, found, that the
9 out-of-precinct policy and the ballot collection
10 law imposed discriminatory burdens that are not
11 justified by any legitimate state interests.

12 JUSTICE KAGAN: Thank you,
13 Ms. Amunson.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Good morning,
17 Ms. Amunson. Would the state agree that -- or
18 would the Secretary of State agree that Arizona
19 could have a law saying we will not count
20 fraudulent ballots?

21 MS. AMUNSON: In fact, Arizona does
22 have such a law, Your Honor, yes.

23 JUSTICE GORSUCH: Okay. And if -- if
24 that's the case, can the state also have some
25 laws that try to prevent fraud in balloting?

1 MS. AMUNSON: Certainly, Your Honor.
2 States have an interest in preventing fraud in
3 balloting, but, as this Court has recognized in
4 its campaign finance jurisprudence, when it is
5 acting to prevent fraud in balloting, a state
6 must actually have record evidence that there
7 is, in fact, the danger that it is acting to
8 prevent.

9 Here, there was no such danger.

10 JUSTICE GORSUCH: Okay. So -- so
11 let's -- let's take the harvesting one, for
12 example. The -- you know, the district court
13 found that there was evidence available. The
14 Chief Justice has referred to the -- the
15 Carter-Baker Commission, and there was also
16 evidence, I believe, in the record of -- of
17 harvesting affecting -- fraudulent practices,
18 harvesting affecting at least one election
19 elsewhere.

20 What -- what about that is
21 insufficient?

22 MS. AMUNSON: Your Honor, with
23 respect, there was no such evidence of there
24 ever being any ballot collection fraud in
25 Arizona and --

1 JUSTICE GORSUCH: I didn't say
2 Arizona. It was in another state.

3 MS. AMUNSON: Oh.

4 JUSTICE GORSUCH: Does Arizona have to
5 wait for fraud to occur in Arizona using a
6 practice --

7 MS. AMUNSON: No, Your Honor.

8 JUSTICE GORSUCH: -- before it can
9 outlaw it?

10 MS. AMUNSON: No, Your Honor, but, as
11 this Court has said in its --

12 JUSTICE GORSUCH: Okay. So it doesn't
13 matter then -- you -- you agree it doesn't
14 matter that there -- harvesting hasn't resulted
15 in fraud in Arizona. How many states, how many
16 elections does it need to affect out -- out of
17 state before Arizona can take cognizance of it
18 in its own state?

19 MS. AMUNSON: Your Honor, what this
20 Court said is that when -- in McCutcheon, is
21 that when a legislature takes a
22 prophylactic-upon-prophylactic approach, the
23 Court should be particularly diligent in
24 scrutinizing the law. And that should be just
25 as true --

1 JUSTICE GORSUCH: I'm afraid that --
2 yeah, I'm just asking, you know, how many
3 elections? What -- what would be enough in --
4 in -- in the Secretary's view?

5 MS. AMUNSON: Well --

6 JUSTICE GORSUCH: If it doesn't have
7 to happen in Arizona, how many states does it
8 have to happen in? How many elections?

9 MS. AMUNSON: Your Honor, to be clear,
10 Arizona already has a law prohibiting fraudulent
11 ballot collection. What this law does is it
12 criminalizes neighbors helping neighbors deliver
13 ballots with up to two years in jail and a --

14 JUSTICE GORSUCH: But you can't --

15 MS. AMUNSON: -- \$150,000 fine.

16 JUSTICE GORSUCH: -- Counsel, I -- I
17 guess it's -- I'm just asking a pretty simple
18 question. You -- you -- you agree that some
19 prophylactics are allowed and that this
20 addresses a prophylactic issue that other states
21 have found to be problematic and -- and a
22 blue-ribbon commission found to be problematic.

23 How much more evidence -- what more
24 concretely would you require?

25 MS. AMUNSON: Your Honor, what I'm

1 saying is Arizona already has a law
2 preventing --

3 JUSTICE GORSUCH: I understand what
4 you've said. I'm asking, how much more would
5 you require before Arizona could do -- do this?
6 Or are you saying it could never do this?

7 MS. AMUNSON: I am saying that
8 criminalizing non-fraudulent ballot collection
9 simply is -- does not get at the state's
10 interest in preventing fraud. And as with
11 respect to prophylactic restrictions, the
12 Court's inquiry should be at least as searching
13 for restrictions on the ability to participate
14 in the political process through voting as it is
15 for restrictions on the political process
16 through spending money.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you, Chief
21 Justice.

22 And good morning, Ms. Amunson. I want
23 to explore how we got here as a statutory matter
24 and try to square up the statutory text and
25 common sense a bit. It seems like there are two

1 polar positions one could have reading different
2 parts of the statute.

3 So Section 2(a) speaks only of
4 results. That was the House bill, of course.
5 And that strongly supports a position that any
6 disproportionate impact would be problematic
7 under the statute. Of course, the Dole
8 compromise meant that Section 2(b) was added to
9 the statute, and that speaks of opportunity.

10 And a polar position on that would be,
11 as was suggested in Mr. Carvin's brief, that
12 time, place, and manner restrictions that are
13 race-neutral provide equal opportunity.

14 But, as Justice Kagan pointed out,
15 just -- Mr. Carvin alluded to demographic
16 realities being relevant, the state attorney
17 general also talked about the totality of the
18 circumstances being relevant, and, of course, in
19 Section 2(b) -- refers to the totality of the
20 circumstances.

21 So, to the extent we're not at either
22 polar position, we're between pure results and
23 pure opportunity, as defined in the -- in
24 Mr. Carvin's brief at least, and we're in
25 totality of the circumstances, two -- two

1 circumstances that seem to make a difference as
2 a matter of common sense. One, as the Chief
3 Justice pointed out, when you have the
4 Carter-Baker Commission saying that a particular
5 state law is a good idea as a matter of policy,
6 that would seem to be a circumstance that is --
7 as a matter of common sense, would -- would lend
8 support to the state's rule.

9 And then, secondly, and I mentioned
10 this earlier, when a state rule is commonplace
11 in other states, that would seem to be a
12 circumstance that puts a thumb on the scale in
13 the favor of the legitimacy of the state rule
14 and it not being a reflection of discriminatory
15 intent. And, here, the out-of-precinct policy
16 is in something like 26 other states, including
17 a wide variety of states, including states with
18 no history of discrimination.

19 So, if we get into totality of the
20 circumstances, why don't those two things
21 matter? And you can comment more generally on
22 how I've outlined this.

23 MS. AMUNSON: Thank you, Your Honor.

24 Taking both policies in turn, it
25 certainly is relevant that policies are

1 commonplace. However, it doesn't give a state a
2 free pass just by saying this is a common
3 policy.

4 Instead, you have to look at whether,
5 in fact, the policy is justified in that state.
6 And so, for example, with the out-of-precinct
7 policy, the state justifies it by saying that it
8 needs to maintain a precinct-based system. But
9 the reality in Arizona is that 75 percent of
10 voters in the 2020 election voted in counties
11 that do not use a precinct-based system.

12 And so that should cause a court to
13 question whether, in fact, such a policy is
14 actually necessary or is, in fact, doing
15 something else, which is disenfranchising
16 minority voters.

17 Second, with respect to the ballot
18 collection statute, again, Arizona had a 25-year
19 history of literally not a single instance of
20 fraud with ballot collection. It already has a
21 statute that criminalizes ballot collection.
22 And it -- the way that the policy will operate
23 on the ground will be to disenfranchise Native
24 American and Hispanic voters. So --

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett.

2 MS. AMUNSON: -- again, that it is
3 commonplace doesn't give the state a pass. You
4 still have to look --

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett.

7 JUSTICE BARRETT: Secretary -- Ms. --
8 sorry, I got distracted by the run-on there.

9 So Ms. Amunson, I want to ask you a
10 question about the degree of, say, inconvenience
11 versus burden because one of the difficulties in
12 this case is that, you know, the attorney
13 general says that the burden has to be
14 substantial, Mr. Carvin is talking about the
15 ordinary burdens of voting.

16 And there's a difficulty that, you
17 know, the statutory language and its lack of
18 clarity presents in trying to figure out when
19 something crosses from an inconvenience to a
20 burden.

21 You know, on the other side, and I
22 think some of the hypotheticals that Justice
23 Alito was asking you emphasized this, I think,
24 you know, your position, and its emphasis on any
25 disparity at all, risks saying that any election

1 rule, you know, which as Judge Easterbrook
2 pointed out in his Frank opinion, you know, all
3 election rules are going to make it easier for
4 some to vote than others.

5 So your approach risks ruling them all
6 out. So let me give you an example. What about
7 a rule that the polls close at 7 p.m. and
8 because of socioeconomic reasons, it's harder
9 for minority voters to get to the polls spot
10 before 7 p.m. because of the time, you know, of
11 their work hours in the day.

12 Is that the kind of burden that
13 triggers Section 2? Would that -- would such a
14 rule -- poll closure rule, would that violate
15 Section 2?

16 MS. AMUNSON: Your Honor, no. I don't
17 believe so. And -- and, again, though, Your
18 Honor, you would look to the actual facts on the
19 ground. And as I said to Justice Alito, a
20 statistical disparity, that is not enough.

21 Instead you would have to see whether,
22 in fact, on the ground this is acting to
23 actually cause less opportunity for minority
24 voters.

25 JUSTICE BARRETT: But I'm telling you

1 it is, that because of socioeconomic conditions
2 and the hours that minorities work, you know,
3 that is the cause of their not being able to get
4 to the polls during hours that the polls are
5 open.

6 MS. AMUNSON: Well, again, Your Honor,
7 one would have to make out a case that -- that
8 those -- those minority voters had no other
9 alternatives of voting. If one was able to do
10 that, then --

11 JUSTICE BARRETT: I thought that your
12 position was that you look at it on a
13 regulation-by-regulation basis, not the system
14 as a whole, so that it didn't matter if there
15 were other alternatives, the question whether
16 it's this alternative --

17 MS. AMUNSON: Your Honor --

18 JUSTICE BARRETT: -- reduce
19 opportunities --

20 MS. AMUNSON: Your Honor, our position
21 is that you should consider the -- the
22 regulations in the context of -- of the system
23 as a whole. However, you can't simply excuse
24 one discriminatory practice by saying that there
25 are others.

1 So, for example, to say to a Native
2 American voter who lives on a reservation 45
3 miles from the post office that --

4 JUSTICE BARRETT: Okay. But you're
5 changing my hypothetical. I want you to explain
6 why my hypothetical doesn't fail your test.

7 MS. AMUNSON: Your Honor, under our
8 test, we'd have to show that the voter, in fact,
9 has less ability to vote. That the -- that the
10 policy is a but-for cause of that lesser ability
11 to vote, and that there -- you would consider
12 the totality of the circumstances, including, in
13 particular, the state's justification. The
14 courts --

15 JUSTICE BARRETT: Okay, thank you.

16 MS. AMUNSON: -- always have strong
17 justifications in ending elections by -- by a
18 reasonable time.

19 CHIEF JUSTICE ROBERTS: A minute to
20 wrap up, counsel.

21 MS. AMUNSON: Thank you, Your Honor.

22 As this Court has repeatedly said, no
23 right is more precious in a democracy than the
24 right to vote and to have that vote counted.
25 That is what Section 2 protects.

1 Petitioners have pejoratively called
2 Section 2 a one-way ratchet but in a democracy,
3 we should actually want to ratchet up
4 participation so that every eligible citizen who
5 wants to vote can do so.

6 Candidates and parties should be
7 trying to win over voters on the basis of their
8 ideas, not trying to remove voters from the
9 electorate by imposing unjustified and
10 discriminatory burdens.

11 Unfortunately, Petitioners have made
12 clear that that is not their vision of
13 democracy. Indeed, Mr. Carvin's clients frankly
14 admitted to this Court in their briefing that
15 they are here because they view enforcement of
16 the Voting Rights Act as a "injury to their
17 electoral prospects."

18 Secretary Hobbs submits that the real
19 injury here is to the Native American, Latino,
20 and black citizens of Arizona whose right to
21 vote has been denied or abridged by the
22 out-of-precinct policy and the criminalization
23 of neighbors helping neighbors deliver their
24 ballots.

25 We ask the Court to affirm the

1 judgment below.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Spiva.

5 ORAL ARGUMENT OF BRUCE V. SPIVA
6 ON BEHALF OF RESPONDENTS DNC, ET AL.

7 MR. SPIVA: Thank you, Mr. Chief
8 Justice and may it please the Court:

9 The Ninth Circuit applied the correct
10 test to determine that Arizona's policy of
11 entirely disenfranchising voters who cast
12 out-of-precinct ballots and its criminal ban on
13 non-fraudulent ballot collection violates
14 Section 2 of the Voting Rights Act.

15 The test is rooted in the plain text
16 of Section 2, clear congressional intent and
17 this Court's long-standing precedents. It has
18 proven workable over many years in vote denial
19 cases in the circuit courts.

20 This test has resulted neither in the
21 rejection of all manner of common sense voting
22 regulations nor in the impermissible
23 consideration of race in the adoption of voting
24 laws. Far from it.

25 Using this test, courts have done the

1 intensely localized analysis called for by the
2 Act and have struck laws only with clear
3 discriminatory effects. Applying the right
4 test, the Ninth Circuit also reached the correct
5 result in this case.

6 I welcome your questions.

7 CHIEF JUSTICE ROBERTS: Counsel, I
8 want to touch on an issue that Justice Sotomayor
9 raised with your friend about legislative
10 intent.

11 Let's say that you have 49 legislators
12 who speak and give good reasons for adopting,
13 say, a law against ballot harvesting. They --
14 they quote the Carter-Baker Commission, 49 of
15 the legislatures don't say anything, legislators
16 don't say anything at all, and two legislators
17 have a clear racial motivation. And the law
18 passes 80 to 20.

19 Was race a motivating factor in that
20 case so that the legislation would be suspect?

21 MR. SPIVA: Probably not, Your Honor,
22 assuming that in -- in your hypothetical that
23 only the two were motivated by race and that did
24 not infect any of the other members. What we
25 have here in this record, though, Your Honor,

1 is -- is far from that.

2 It is a careful application of this
3 Court's test in Arlington Heights that looked at
4 not only the --

5 CHIEF JUSTICE ROBERTS: Well, I
6 thought -- I thought the evidence of racial
7 intent was really quite limited in this case.

8 MR. SPIVA: It's actually well beyond
9 what you normally have, Your Honor. Not only
10 did you have the pervasive influence of Senator
11 Shooter but also you had the LaFaro video that
12 was widely played as the district court found
13 and that was --

14 CHIEF JUSTICE ROBERTS: Well, how many
15 -- how many -- how much evidence did you have?
16 Is it -- is there any evidence of other
17 legislators other than Mr. Shooter?

18 MR. SPIVA: Well, yes, Your Honor.
19 There -- there was -- there was evidence that,
20 in terms of the history of the -- of the -- of
21 the Act that a precursor bill was withdrawn when
22 the DOJ asked for additional information,
23 declined to preclear it until it could get
24 additional information.

25 CHIEF JUSTICE ROBERTS: Well, with

1 respect to this -- this legislation, you know,
2 the only racial motivation I -- I thought on the
3 record was Mr. Shooter, one of the legislators.

4 MR. SPIVA: No, Your Honor, that's not
5 accurate. I -- I think in each of these prongs
6 of the Arlington Heights test, look at the
7 circumstantial and direct evidence that's
8 available, there -- there were several things
9 that indicated a racial motivation. One was Mr.
10 Shooter, but also there was the LaFaro video.
11 Also there was the sequence event -- of events
12 that started with the DOJ declining to preclear
13 --

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

16 Justice Thomas.

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice.

19 Counsel, the -- again, the legislative
20 intent is interesting. And I don't know how
21 much weight we should put on it, but the Ninth
22 Circuit did put somewhat -- some weight on that.

23 I'm wondering how you would analyze
24 that if, in addition to what was said that was
25 somewhat of a pejorative nature about

1 minorities, if someone said the opposite or
2 something similar or countervailing about
3 whites, and you had both sets of pejoratives in
4 the legislative history, how would you analyze
5 that and how would it change the way you would
6 analyze this case?

7 MR. SPIVA: I -- I'm -- I'm not sure
8 that it would make a difference, Your Honor. I
9 guess it would depend on what -- what was said
10 and what role, if any, it played in the passage
11 of the legislation.

12 Because as this Court has held in --
13 in Arlington Heights, determining whether racial
14 motivation was a factor, doesn't have to be the
15 only factor, but a factor in the passage of the
16 Act is not simply a question of counting heads
17 or -- or -- or statements.

18 Oftentimes there -- there are no
19 discriminatory statements available, and yet the
20 Court has -- has said that the way to determine
21 whether racial discrimination is at work as a
22 motivating factor is to analyze the Arlington
23 Heights factors because often in this day and
24 age the circumstantial evidence of that is all
25 that's available.

1 Here is one of these extraordinary
2 cases where you actually have, in addition to a
3 wealth of -- of circumstantial evidence,
4 actually direct evidence of -- of racial
5 motivation at work.

6 JUSTICE THOMAS: The -- there have
7 been some questions raised about the RNC roles
8 or participation in this case. If there are
9 doubts about the RNC, if those prevail, should
10 that also undermine your standing in this case
11 too?

12 MR. SPIVA: No, Your Honor. The DNC
13 and the other plaintiff standing rests on
14 organizational standing principles because they
15 have to expend resources in order to overcome
16 the discriminatory effects of these laws.

17 There -- there are constituents, and
18 members are also impacted because it makes it
19 harder, at least, and sometimes result --
20 results in the denial of their vote.

21 The RNC standing, as I understand it
22 from their briefing, is that if this -- if the
23 ruling stands, that -- that more minorities who
24 will vote for Democrats -- and -- and this --
25 I'm taking the view of their -- of their brief

1 -- will -- will vote against them.

2 And that's not a cognizable interest,
3 trying to -- a concern that more people will be
4 able to vote and it's because you don't like the
5 way they're going to vote.

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer.

8 JUSTICE THOMAS: Thank you.

9 JUSTICE BREYER: Listen, because I --
10 I just appreciate your comments. You've
11 listened to the same argument I have here, and
12 it seems to me lots of the parties on both sides
13 are pretty close on the standards.

14 So you take the Title VII or these
15 other title standards. You might have to modify
16 it a little. I think you do have to use the
17 word "significant" harm because you have to out
18 -- you have to some way or other get rid of this
19 happening just by chance. Maybe you'd say it
20 was reasonably foreseeable that minorities would
21 be impacted negatively.

22 And there's room there for who has the
23 burden of proof of showing that there's a
24 justification? And there's a question about the
25 extent to which non-race-based tradition would

1 count as a justification.

2 Now, any comments you want to make are
3 welcome. Any additions to what I'm seeing as
4 open areas or not, any comment?

5 MR. SPIVA: Yes, Your Honor. I -- I
6 think there is not a lot of daylight between
7 what we think the -- the statute and the
8 legislative history and this Court's precedents
9 require in terms of a standard and say the
10 Stephanopoulos, I think, principle that Your
11 Honor has asked about. I do think that the --
12 the existing standard that has been applied in a
13 number of cases over the last several years in
14 vote denial cases does -- generally does look at
15 the magnitude. It doesn't require it as a
16 threshold matter, and it shouldn't, but -- but
17 most of the cases where plaintiffs have
18 prevailed have actually found a significant
19 disparity as the Ninth Circuit found here.

20 And -- and -- and -- and that -- that
21 the state's interest comes into consideration
22 under the tenuousness factor under the totality
23 of the circumstances. That's -- that's an
24 appropriate thing to look at and should be
25 looked at and was looked at here. And -- and

1 what the Ninth Circuit found was that really the
2 state did not have a justifiable interest in --
3 in continuing these policies.

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE BREYER: Thank you.

6 JUSTICE ALITO: I -- I think what
7 concerns me is that your position is going to
8 make every voting rule vulnerable to attack
9 under Section 2 to the same extent that the
10 out-of-precinct policy is -- was found to -- to
11 violate Section 2 by the Ninth Circuit, because
12 people who are poor and less well educated on
13 balance probably will find it more difficult to
14 comply with just about every voting rule than do
15 people who are more affluent and have had the
16 benefit of more education.

17 Explain to me why that is not so.
18 Will it not be possible to show with respect to
19 just about every voting rule that there is the
20 kind of statistical disparity that was shown
21 with respect to out-of-precinct voting and that
22 the disparity was caused by the same
23 socioeconomic factors that you would say were
24 sufficient here?

25 MR. SPIVA: Yes. It -- it won't

1 result and it hasn't resulted, Your Honor -- we
2 -- we don't have to project or --

3 JUSTICE ALITO: No, not -- not whether
4 it has up to this point. This is a new area of
5 litigation. How -- explain to me why it will
6 not result in that.

7 MR. SPIVA: Well, but this -- the
8 standard that we support, Your Honor, has been
9 applied in numerous cases over the last decade,
10 and I'll give you an example.

11 Voter ID. In the League versus
12 Virginia State Board of Elections case, voter ID
13 was -- was upheld there because the Court found
14 that there wasn't a disparate impact because the
15 state provided free IDs in that context. Again,
16 using the totality of the circumstances test,
17 came to the conclusion that voter ID in Virginia
18 was -- was -- was -- was permissible and Section
19 2 didn't require it to be struck down.

20 Compare that to the Fifth Circuit in
21 Veasey, found --

22 JUSTICE ALITO: All right. Thank you.
23 My -- my time is up. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Counsel, should
2 there be a different burden between changing a
3 long-established voting requirement and imposing
4 a new one? Let's go back to the two questions
5 -- the two practices at issue here.

6 The out-of-precinct voting is not a
7 new law. It's always been in effect. And so
8 where is that fact considered in the totality of
9 circumstances as you define it? And I have an
10 easier time understanding how the ballot
11 collection is a change in law and one in which
12 the information provided to the legislature and
13 the voters -- a lot of it was racially tinged
14 and false, correct?

15 MR. SPIVA: That's correct, Your
16 Honor.

17 JUSTICE SOTOMAYOR: All right. So
18 answer -- tell me how those factors get
19 considered in your -- in your views.

20 MR. SPIVA: Yes. I -- I think that it
21 is part of the consideration. I think where
22 you're talking about adding a new method of
23 voting, that that is very different from taking
24 away a method of voting that people have come --
25 minority people have come to rely upon because

1 the text speaks in terms of abridging a right to
2 vote, i.e., to shortening, lessen, taking
3 something away.

4 So I think a -- I think a plaintiff
5 would have a harder time in -- in -- in the
6 general case advocating for a new rule, some of
7 the hypotheticals about adding additional days
8 of early voting and the like. I think --

9 JUSTICE SOTOMAYOR: So why don't you
10 have --

11 MR. SPIVA: -- you know, in terms of
12 the --

13 JUSTICE SOTOMAYOR: -- why don't you
14 have the difficulty of that burden with respect
15 to the out-of-precinct voting here? That's been
16 around, working imperfectly, but it's been
17 around for a long time.

18 MR. SPIVA: Right. And that --

19 JUSTICE SOTOMAYOR: So what makes --

20 MR. SPIVA: -- and then some --

21 JUSTICE SOTOMAYOR: -- what makes your
22 circumstances compelling enough to justify its
23 appearance?

24 MR. SPIVA: Right. And that -- and
25 that, of course, is a -- is a standard that has

1 resulted in the denial of the vote, and it has
2 been around for -- for a long time. So I think
3 that's -- that's one difference.

4 But -- but, secondly, I think the pass
5 -- the passage of time here cuts the other way
6 because whereas -- as there may have at one time
7 before such things as electronic poll books and
8 the like that -- that made it necessary perhaps
9 to -- to disenfranchise people if they voted in
10 the wrong precinct, as the Secretary has stated
11 and as the record reflects here, there is no
12 longer any such justification for entirely
13 disenfranchising people if they go to the wrong
14 precinct --

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 MR. SPIVA: -- considering that --

17 JUSTICE KAGAN: Mr. Spiva, you -- you
18 -- you spoke with Justice Breyer about the
19 Stephanopoulos test. I would like to ask you
20 about the old SG test. If -- if you look at the
21 SG brief that was filed in this case, what do
22 you think is right with what the SG said and
23 what do you think is wrong with it?

24 MR. SPIVA: Well, I -- I -- what I
25 think was wrong with it, which is a little bit

1 easier for me to -- to answer, is the proximate
2 cause standard that they were advocating, which,
3 essentially, as I read it, was saying that you
4 shouldn't consider the Senate factors in the --
5 in the totality of the circumstances, that
6 essentially that the -- the challenged standard
7 of practice by itself must have caused the
8 disparity, and I think the -- the -- the problem
9 with that is that it essentially would immunize
10 any voting rule, including literacy tests, that
11 were not either facially or intentionally
12 discriminatory.

13 A literacy test does not in itself,
14 despite what my distinguished colleague on the
15 other side said, stop anybody from voting. If
16 you pass the test, you can vote. Everybody has
17 an equal opportunity on its face to pass the
18 test.

19 And this Court actually in *Lassiter v.*
20 *Northampton* actually said that literacy tests
21 were okay prior to the -- the passage of the --
22 the Voting Rights Act. The problem is that
23 because of discrimination in education and
24 opportunity, it has a disparate impact on racial
25 minorities.

1 JUSTICE KAGAN: And what's -- what's
2 right with it? What don't you disagree with?

3 MR. SPIVA: Well, I -- I think that
4 they maintain the position they maintained at
5 the Ninth Circuit, that there shouldn't be some
6 arbitrary threshold requirement in the test,
7 that you show that a certain number of -- of --
8 of minorities were disenfranchised before the
9 court proceeds to analyze under the totality of
10 the circumstances whether it's a prohibited
11 discriminatory result.

12 JUSTICE KAGAN: Thank you.

13 MR. SPIVA: I think that's right.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Good morning,
17 Mr. Spiva. Did you have a chance to comment on
18 the Solicitor General's causation test? What do
19 you think of that?

20 MR. SPIVA: Well, they -- they
21 advocated -- they, of course, have withdrawn it,
22 the proximate causation. And I think that
23 that's wrong because I think but -- but-for
24 causation is the appropriate standard, as this
25 Court said in the Bostock case that but-for

1 causation is the -- is the appropriate --

2 JUSTICE GORSUCH: Well, the law
3 sometimes uses proximate cause and other times
4 it uses but-for cause. That was a Title VII
5 case. This is obviously a Section 2 case.

6 Any thoughts on why a proximate cause
7 test would be inappropriate given the language
8 of the statute?

9 MR. SPIVA: Yes, Your Honor, because
10 the -- the statute and the legislative history
11 as well call for a totality of the circumstances
12 inquiry, which -- which requires evaluating
13 whether the standard --

14 JUSTICE GORSUCH: Well, what evidence
15 you use to -- is one question and what -- what
16 test you apply that evidence against is another.
17 So I'm not sure that -- that explains it.

18 MR. SPIVA: Well --

19 JUSTICE GORSUCH: What explains the
20 need for a but-for rather than a proximate cause
21 test --

22 MR. SPIVA: As I --

23 JUSTICE GORSUCH: -- as opposed to
24 what evidence you look at?

25 MR. SPIVA: As I understand the

1 proximate cause standard that the SG was
2 advocating for, and that Petitioners still are,
3 it would not look to any interacting factors to
4 establish, i.e., the Senate factors, to
5 establish the causal link between the disparate
6 impact and race.

7 And I think that is countertextual and
8 -- and -- and -- and would -- would actually
9 inappropriately limit the prohibition of Section
10 2 only to those circumstances where the standard
11 was discriminatory in -- in intent or facially
12 discriminatory.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Good morning,
17 counsel.

18 Section 2's language is elusive in the
19 wake of the Dole compromise, which created
20 murkiness because it was a compromise that
21 generated then overwhelming support in Congress
22 and from President Reagan, but the statute after
23 the Dole compromise, I think you agree, creates
24 something of a gray area between a pure results
25 and pure opportunity.

1 And you look at the totality of the
2 circumstances, several counsel have said,
3 including, I think you said, the Senate factors.
4 One of those factors is is there a good
5 justification for these rules?

6 And then on the ballot collection, I'm
7 going to repeat the question, you have the
8 Carter-Baker recommendation. On the
9 out-of-precinct, you have it being commonplace
10 in other states. That on its face, at least to
11 me, suggests a strong justification for doing
12 these rules.

13 How does that weigh in the balance in
14 your view?

15 MR. SPIVA: Well, the -- two things,
16 Your Honor. The Carter-Baker Report was not
17 something that the legislature here considered.
18 And even the recommendations of the Carter-Baker
19 Report was not based on any evidence of -- of
20 ballot collection fraud anywhere in the country.

21 The legislature -- and the district
22 court found this -- had no evidence of voter
23 fraud, not only in Arizona, but anywhere in the
24 country at the time that it passed the criminal
25 ballot collection ban.

1 In terms of it being commonplace in
2 other states, I do think you have to look to the
3 context. It's -- it is relevant, but there are
4 also more states that actually permit some form
5 of ballot collection than don't.

6 So I think what the --

7 JUSTICE KAVANAUGH: On -- the
8 out-of-precinct is common in other states,
9 correct, 26 states?

10 MR. SPIVA: Well, but also 20 -- at
11 least 20 partially count out-of-precinct
12 ballots, and so you have to do the intensely
13 localized analysis, to use this Court's phrase,
14 in -- in the jurisdiction.

15 And -- and when you do that in
16 Arizona, you find that there -- that the Arizona
17 moves its precincts around a lot, that it
18 locates them further from minority households
19 than from white households, that there are all
20 these factors at -- at work in Arizona, in
21 particular, that make -- that cause the policy
22 to be discriminatory --

23 JUSTICE KAVANAUGH: Thank you,
24 counsel.

25 MR. SPIVA: -- and have discriminatory

1 -- thanks.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 JUSTICE BARRETT: Mr. Spiva, I want to
5 pick up where you left off with Justice
6 Kavanaugh.

7 You said there were a number of
8 factors in Arizona that caused the
9 out-of-precinct policy to discriminate on the
10 basis of race, including, you know, the fact
11 that Arizona changes its precincts often.

12 Let's assume that we adopt a but-for
13 standard of causation, as you propose. I want
14 to ask you a question that Judge O'Scannlain
15 raised in his dissent on the Ninth Circuit's en
16 banc decision, which is why isn't it the
17 precinct system itself rather than the policy of
18 discounting votes that causes the disparity,
19 because as you described it, it is the fact
20 that, you know, the precincts change, the
21 locations move around, but you have expressly
22 disavowed any challenge to the precinct policy
23 itself; am I right?

24 MR. SPIVA: Well, we -- we have
25 challenged -- the reason -- to answer your

1 question directly, the -- but -- the reason that
2 we challenged and the reason it's the but-for
3 cause, the -- the policy of not counting the
4 votes is that is what causes minority groups to
5 be disenfranchised by two to one --

6 JUSTICE BARRETT: But it's not --

7 MR. SPIVA: -- by the policy.

8 JUSTICE BARRETT: -- what causes them,
9 as opposed to the ballot collection where the
10 argument is the inability to vote by relying on
11 a third-party actually reduces the opportunity
12 to vote.

13 Here it's not the -- the discounting
14 of the vote, it's the inability to locate and
15 show up at the right precinct that causes the
16 disparity, correct?

17 MR. SPIVA: Well, but -- but the
18 result -- what causes the result is the fact
19 that Arizona doesn't partially count those
20 ballots. I don't -- I don't quarrel at all with
21 the -- the fact that Arizona's practices
22 contribute to that, and that is -- that was and
23 is part of our -- our challenge.

24 But -- but the claim, though, is
25 focused on the practice that causes not only an

1 abridgement but actually the outright denial of
2 the right to vote in this case.

3 JUSTICE BARRETT: Okay. Thank you,
4 counsel.

5 CHIEF JUSTICE ROBERTS: Mr. Spiva, a
6 minute to wrap up.

7 MR. SPIVA: Thank you, Mr. Chief
8 Justice.

9 This Court said in Shelby County that
10 Section 2 remained as a permanent nationwide ban
11 on voting discrimination. And the Court
12 acknowledged that voting discrimination still
13 exists. No one doubts this.

14 This is proven not just an accurate
15 description of the times in 2013, but also
16 prophetic. More voting restrictions have been
17 enacted over the last decade than at any point
18 since the end of Jim Crow.

19 The last three months have seen an
20 even greater uptick in proposed voting
21 restrictions, many aimed squarely at the
22 minority groups whose participation Congress
23 intended to protect.

24 Rigorous and fair enforcement of
25 Section 2 is as critical to the protection of

1 minority voting rights today as it was when
2 Congress passed the 1982 amendment. The test
3 used by the majority of circuits has not
4 undermined a large swath of neutral voting
5 restrictions.

6 Rather, it has been used to carefully
7 review and, where necessary, strike down
8 discriminatory voting laws. Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Carvin,
10 rebuttal.

11 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN
12 ON BEHALF OF PETITIONERS IN 19-1258

13 MR. CARVIN: Thank you, Mr. Chief
14 Justice.

15 I think the colloquy makes clear that
16 we're the only people who are providing a clear
17 rule that can be applied by the lower courts.
18 To clarify, any ambiguity in this, both at
19 argument in our brief, we have been making the
20 same argument. Does the voting system provide
21 different opportunities to minorities than it
22 does to non-minorities? Has the voting system
23 stacked the deck to favor non-minorities?

24 If it hasn't, if it doesn't treat
25 minority neighborhoods differently than

1 non-minority neighborhoods, then there's no
2 problem. If it does, that's what gets at it.

3 Now, figuring out whether there's this
4 kind of differential treatment, you need to look
5 at population or, stated differently,
6 demographic reality. One precinct with five
7 people in it is quite different than one polling
8 place with 5,000 people in it because the latter
9 has much less opportunity.

10 But if there's no differential
11 treatment of that kind, socioeconomic factors,
12 contribution to minority's ability to utilize
13 that same opportunity is irrelevant.

14 Finally, I want to get back to the
15 colloquy that Justice Alito was having with Mr.
16 Spiva. Given the ubiquity of socioeconomic
17 disparities, this would clearly put states in a
18 straightjacket. This case brilliantly
19 illustrates that.

20 They claim that there's a lot of
21 problem for minorities to get to precincts
22 relative to non-minorities. What does Arizona
23 do? Has this free mail system for 27 days
24 that's utilized by 80 percent of the people, the
25 very system that the DNC went around the country

1 advocating as an expansion of the franchise.

2 Now we're told that a mail system
3 somehow discriminates against minorities, which
4 is completely untrue under the facts, but the
5 only fact you need to know is anybody whose
6 ballot is harvested received the ballot through
7 the mail.

8 This is all people who've already got
9 the ballots, and they are picked up after they
10 are voted.

11 Well, how did they get the ballots?
12 They received them through the mail. So for
13 that reason, the district court was quite
14 correct to hold that there's no connection
15 between access to mail and the need for ballot
16 harvesting.

17 They couldn't produce a single voter
18 who said it was more difficult to vote without
19 ballot harvesting. Same thing in terms of
20 precincts. The notion that socioeconomic
21 disparities make it difficult to find a precinct
22 has nothing to do with this case, because
23 everybody involved here found a precinct. They
24 simply found the wrong precinct. So
25 transportation and work schedules had no

1 inhibiting effect on minorities.

2 And, finally, of course, they didn't
3 challenge the arrangement of precincts. The
4 Court found at Joint Appendix 336, precincts are
5 no harder to find. And, indeed, plaintiff's
6 expert at Joint Appendix 109 said that precincts
7 were closer to Latinos in Maricopa County than
8 to non-minorities. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 11:54 a.m., the case
12 was submitted.)

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Official - Subject to Final Review

\$	6 ^[1] 60:24	added ^[1] 87:8	American ^[9] 20:5 54 :13 65 :10 67 :20 70 :25 80 :19 89 :24 93 :2 94 :19
\$150,000 ^[1] 85:15	60 ^[4] 74:23 75 :3,6,18	adding ^[2] 105:22 106 :7	Americans ^[3] 62:18 67 :15 68 :14
1	60-day ^[1] 75:10	addition ^[3] 39:4 98 :24 100 :2	among ^[2] 32:25 67 :10
1 ^[4] 41:12,14 69 :15,23	63 ^[1] 3:11	additional ^[4] 70:14 97 :22,24 106 :7	amorphous ^[2] 18:25 38 :24
10 ^[20] 23:24 24 :20 25 :21 26 :14 27 :4,13 32 :22,23 42 :6 54 :6,7,20,21	7	additionally ^[1] 57:10	amount ^[2] 23:24 61 :3
55 :1,13,21,21,24 56 :24 72 :10	7 ^[3] 26:19 91 :7,10	additions ^[1] 102:3	AMUNSON ^[5] 2:7 3 :10 63 :16,17,19 66 :4,25 67 :13,23 68 :7,21,23
10-day ^[2] 54:3 57 :8	75 ^[2] 73:18 89 :9	address ^[1] 43:25	69 :1,12,22 70 :22 72 :20 75 :1,11
10:00 ^[2] 1:24 4 :2	8	addresses ^[1] 85:20	76 :5,25 77 :21 78 :17 79 :1,16 81 :5
100 ^[1] 72:10	8 ^[1] 26:19	adjective ^[1] 73:3	82 :13,17,21 83 :1,22 84 :3,7,10,19
109 ^[1] 120:6	80 ^[3] 48:1 96 :18 118 :24	admission ^[1] 50:14	85 :5,9,15,25 86 :7,22 88 :23 90 :2,9
11:54 ^[1] 120:11	9	admitted ^[1] 94:14	91 :16 92 :6,17,20 93 :7,16,21
117 ^[1] 3:17	9 ^[4] 26:12,22 27 :3,13	adopt ^[4] 40:10 46 :13 75 :14 114 :12	analogous ^[2] 5:8 32 :13
14 ^[3] 75:3,6,18	90 ^[1] 44:14	adopted ^[1] 40:22	analysis ^[10] 7:9 33 :16 36 :8 41 :15
14-day ^[1] 75:9	95 ^[1] 3:14	adopting ^[1] 96:12	53 :1,9,14 54 :10 96 :1 113 :13
15 ^[2] 23:25 26 :25	99.8 ^[1] 32:5	adoption ^[1] 95:23	analyze ^[8] 41:20 45 :3 62 :7 98 :23
19-1257 ^[4] 2:6 3 :8 4 :4 39 :14	A	adversely ^[1] 69:10	99 :4,6,22 109 :9
19-1258 ^[5] 2:4 3 :4,17 4 :9 117 :12	a.m ^[3] 1:24 4 :2 120 :11	advocate ^[1] 64:9	analyzing ^[2] 42:17 46 :18
1982 ^[7] 10:14 17 :2,8,11 26 :19 27 :17 117 :2	ability ^[12] 28:10 29 :7 49 :13,13 55 :17 57 :24 61 :23 63 :2 86 :13 93 :9,10 118 :12	advocated ^[1] 109:21	Anderson/Burdick ^[1] 31:5
2	able ^[7] 32:6 72 :8 73 :7 74 :12 92 :3,9 101 :4	advocating ^[4] 106:6 108 :2 111 :2 119 :1	anomalies ^[3] 57:16,19 58 :3
2 ^[67] 1:20 5 :15,22 6 :2,2,18 10 :3,8,10,23 11 :7 12 :5 15 :6 17 :15,19 19 :12 28 :16 29 :2 30 :23 33 :11,17 34 :13 37 :25 39 :6,23 40 :23 41 :25 46 :16 47 :22 50 :8,8 55 :13,21,21,25	above-entitled ^[1] 1:22	affected ^[2] 70:3 84 :16	another ^[7] 14:11,14 25 :18 48 :22,22 84 :2 110 :16
56 :3,24 58 :1 62 :24 64 :15,22 65 :1	abridged ^[4] 64:2 70 :1,5 94 :21	affected ^[8] 47:17 56 :24 69 :9,10,14,21 70 :3,7	answer ^[11] 37:2 47 :24 52 :5 55 :14
69 :15,25 70 :8 74 :6,11 75 :16 76 :6,11,22 81 :11,17,24 91 :13,15 93 :25	abridgement ^[5] 13:21 19 :19 41 :22 64 :4 116 :1	affecting ^[4] 71:10 77 :5 83 :17,18	56 :17 64 :6,7 77 :1 105 :18 108 :1 114 :25
94 :2 95 :14,16 103 :9,11 104 :19	abridging ^[1] 106:1	affirm ^[2] 65:13 94 :25	answered ^[2] 52:14 53 :6
110 :5 111 :10 116 :10,25	absent ^[2] 78:14 79 :12	affirmative ^[1] 18:16	answers ^[1] 53:19
2's ^[3] 64:5,19 111 :18	absentee ^[5] 42:23 58 :10 65 :18,24 68 :9	affluent ^[1] 103:15	antidiscrimination ^[1] 45:11
2(a) ^[1] 87:3	absolutely ^[2] 50:25 59 :9	afoul ^[1] 62:4	antifraud ^[1] 8:13
2(b) ^[2] 87:8,19	abundantly ^[1] 78:2	afraid ^[1] 85:1	anybody ^[5] 30:8 31 :14 34 :20 108 :15 119 :5
20 ^[3] 96:18 113 :10,11	access ^[7] 5:7 7 :1,2,5 35 :11 71 :4 119 :15	African ^[1] 54:12	anytime ^[1] 26:23
2013 ^[1] 116:15	accomplished ^[1] 45:25	age ^[3] 45:12 71 :21 99 :24	apologize ^[5] 9:4,6 12 :17 13 :11 27 :12
2020 ^[3] 69:6 73 :18 89 :10	according ^[2] 22:24 41 :14	agency ^[1] 44:8	appear ^[1] 66:9
2021 ^[1] 1:20	account ^[16] 13:21 14 :24,24 15 :10,15,16,19 19 :20 24 :5 30 :4 32 :9 64 :4 70 :5 71 :24 72 :1 73 :8	agents ^[1] 44:10	appearance ^[1] 106:23
25-year ^[1] 89:18	accurate ^[2] 98:5 116 :14	agree ^[6] 12:10 82 :17,18 84 :13 85 :18 111 :23	APPEARANCES ^[1] 2:1
26 ^[2] 88:16 113 :9	acknowledged ^[2] 58:25 116 :12	agreed ^[1] 70:10	appellate ^[1] 19:1
27 ^[4] 4:22 42 :25 58 :9 118 :23	across ^[2] 44:15 74 :5	agreement ^[2] 28:20 81 :8	Appendix ^[2] 120:4,6
3	Act ^[11] 9:19 14 :18 45 :12 56 :23 62 :16 94 :16 95 :14 96 :2 97 :21 99 :16 108 :22	ahead ^[4] 41:10 56 :16 71 :2,3	application ^[1] 97:2
3 ^[2] 26:22 27 :14	acted ^[1] 77:15	aimed ^[1] 116:21	applications ^[2] 5:6 61 :1
336 ^[1] 120:4	acting ^[4] 68:13 83 :5,7 91 :22	AL ^[7] 1:4,8,11,15 2 :10 3 :14 95 :6	applied ^[5] 72:23 95 :9 102 :12 104 :9 117 :17
39 ^[1] 3:8	action ^[2] 19:16,17	Alito ^[31] 16:14,17,18,25 17 :25 19 :6 47 :2,3,9,19 48 :3,6,13,17,21 49 :7,19 58 :16 74 :8,9 75 :5,22 76 :16 77 :6 90 :23 91 :19 103 :4,6 104 :3,22 118 :15	applies ^[1] 36:18
4	active ^[1] 67:21	118 :15	apply ^[4] 34:13 38 :14 48 :13 110 :16
4 ^[2] 3:4 27 :4	activity ^[2] 8:1 67 :21	allegations ^[1] 78:9	applying ^[2] 77:23 96 :3
4,000 ^[3] 47:23,23 58 :1	actors ^[1] 44:14	allegedly ^[1] 70:20	appreciate ^[1] 101:10
40 ^[1] 64:20	actual ^[29] 16:11 22 :22 46 :15 56 :24 58 :17 67 :3 71 :4,8 73 :16,19,22 75 :19 76 :2 77 :5 78 :22 83 :6 89 :14 91 :23 94 :3 97 :8 100 :2,4 102 :18 108 :19,20 111 :8 113 :4 115 :11 116 :1	allow ^[3] 16:13 26 :15 31 :19	approach ^[8] 7:11 9 :17 14 :19 18 :2 40 :16 66 :14 84 :22 91 :5
41 ^[1] 43:18	actually ^[29] 16:11 22 :22 46 :15 56 :24 58 :17 67 :3 71 :4,8 73 :16,19,22 75 :19 76 :2 77 :5 78 :22 83 :6 89 :14 91 :23 94 :3 97 :8 100 :2,4 102 :18 108 :19,20 111 :8 113 :4 115 :11 116 :1	allowed ^[4] 23:9 43 :15 55 :7 85 :19	appropriate ^[5] 62:21 63 :6 102 :24 109 :24 110 :1
45 ^[1] 93:2	ad ^[3] 16:2 19 :3 39 :2	allowing ^[2] 21:6 65 :23	arbitrary ^[1] 109:6
49 ^[3] 38:1 96 :11,14	ADA ^[1] 14:18	allows ^[4] 15:6 39 :22 40 :12 43 :18	area ^[3] 20:12 104 :4 111 :24
5	add ^[1] 30:14	alluded ^[1] 87:15	areas ^[4] 20:6 35 :5 71 :21 102 :4
5 ^[5] 24:8 26 :12 27 :3,13 33 :16		almost ^[1] 64:20	Aren't ^[2] 19:12 35 :7
5,000 ^[1] 118:8		alone ^[2] 76:10 77 :2	argue ^[4] 16:18 18 :5 30 :8 51 :5
50 ^[2] 38:1,6		already ^[6] 72:22 75 :15 85 :10 86 :1 89 :20 119 :8	argued ^[1] 81:21
51 ^[1] 38:6		alternative ^[5] 6:1 42 :14 56 :22 59 :12 92 :16	arguing ^[2] 35:16 51 :20
6		alternatives ^[3] 59:5 92 :9,15	argument ^[22] 1:23 3 :2,5,9,12,15 4 :4,8 9 :12 11 :2 26 :20 39 :13 60 :17 63 :17 79 :17,20 95 :5 101 :11 115 :10 117 :11,19,20

Official - Subject to Final Review

<p>arguments ^[1] 42:11 ARIZONA ^[50] 1:4,11 2:6 4:13,21 37:18 40:10 42:21 43:17,18,24 44:3 46:25 47:15 48:18 58:7,11 62:15 67:5,16 68:13 69:9,21 70:14,16 73:17,23 82:18,21 83:25 84:2,4,5,15,17 85:7,10 86:1,5 89:9,18 94:20 112:23 113:16,16,20 114:8,11 115:19 118:22 Arizona's ^[6] 58:18 63:3 65:6 66:10 95:10 115:21 Arlington ^[5] 77:22 97:3 98:6 99:13,22 arose ^[1] 44:8 around ^[6] 106:16,17 107:2 113:17 114:21 118:25 arrangement ^[1] 120:3 articulated ^[2] 6:15 44:22 aspect ^[1] 7:22 assigned ^[2] 40:4 63:4 assignments ^[1] 20:13 Association ^[1] 18:21 assume ^[3] 74:11 77:20 114:12 assuming ^[2] 77:16 96:22 attack ^[1] 103:8 attempt ^[1] 78:6 ATTORNEY ^[8] 1:3 2:5 12:10 18:3 43:17,19 87:16 90:12 authority ^[1] 73:13 availability ^[1] 59:5 available ^[6] 48:17 59:12 83:13 98:8 99:19,25 avenues ^[1] 61:10 avoid ^[1] 8:10 aware ^[1] 65:16 away ^[7] 16:13 30:6 61:22 72:12 75:15 105:24 106:3</p>	<p>banc ^[4] 16:3 58:15 79:4 114:16 bans ^[1] 16:6 bare ^[1] 64:15 Barrett ^[30] 34:3,7,8,23 35:19,21,24 36:11 37:5,8 38:3,5 60:7,8 61:12,16 62:10 90:1,6,7 91:25 92:11,18 93:4,15 114:3,4 115:6,8 116:3 barrier ^[3] 5:25 14:4 36:16 based ^[4] 15:7 57:16 64:7 112:19 basic ^[2] 18:14 30:11 basically ^[2] 14:16 27:10 basis ^[6] 39:2 46:6 60:13 92:13 94:7 114:10 bears ^[1] 36:7 becomes ^[2] 27:18 56:22 begin ^[1] 74:20 behalf ^[16] 2:4,6,8,9 3:4,7,11,14,17 4:9 21:23 39:14 43:16 63:18 95:6 117:12 behind ^[1] 7:4 believe ^[18] 41:7,18 42:3,21 44:6,16,22 46:13,17 47:12 51:9 53:16 56:3 59:18 62:3 77:13 83:16 91:17 below ^[4] 65:13 70:10 72:24 95:1 benchmark ^[2] 16:19 17:9 benefit ^[1] 103:16 beside ^[1] 76:3 better ^[1] 18:18 between ^[13] 6:21 20:23 28:2 36:1 38:1,11 76:17 87:22 102:6 105:2 111:5,24 119:15 beyond ^[1] 97:8 big ^[1] 70:14 bill ^[4] 44:18,20 87:4 97:21 bit ^[4] 18:2 29:22 86:25 107:25 black ^[13] 23:23 24:20 25:21 55:23 61:2,6,10 65:10 80:1,5,18,18 94:20 blacks ^[1] 54:8 bloc ^[1] 4:17 block ^[1] 26:5 blue-ribbon ^[1] 85:22 Board ^[1] 104:12 Bolden ^[1] 7:7 books ^[2] 37:20 107:7 Bostock ^[1] 109:25 both ^[13] 10:22 49:8 53:20 56:19 57:9 70:10 71:16 72:16 75:12 88:24 99:3 101:12 117:18 box ^[3] 75:25 76:3,4 Breyer ^[25] 12:19,20,24 13:2,7,10,13,18 14:7,10,13 15:9,12 18:2 45:6,7 46:10 50:1 71:14,15 74:7 101:7,9 103:5 107:18 brief ^[15] 18:4 28:4 29:4 30:21 34:12 60:15 70:10,10 79:21 81:20 87:11,24 100:25 107:21 117:19 briefing ^[2] 94:14 100:22 brilliantly ^[1] 118:18 bring ^[2] 14:17 79:25 BRNOVICH ^[62] 1:3 2:5 3:6 4:5 39:12,13,15 40:20 41:6,10,17 42:10,20 43:14 44:5 46:10 47:9,21 48:6,</p>	<p>16 49:7,18 50:7,11,19,23 51:1,8,12,15,23 52:2,9,13,16,19,25 53:4,7,11,15,22 54:1,3,9,16,23 55:5,10,14 56:1,8,12,18 57:7,22 59:9,17 61:12 62:1,13,14 brought ^[1] 5:5 BRUCE ^[3] 2:9 3:13 95:5 burden ^[30] 17:24 31:11,12 32:4,5 40:16 46:15 49:11 50:1,2,5,20 55:6 57:21,23 61:25 65:4 70:14 71:9 76:13,14 79:11 82:6 90:11,13,20 91:12 101:23 105:2 106:14 burdened ^[8] 70:17,20,20 burdens ^[18] 16:22,25 17:1,7,10,16 26:25 31:6 32:2 46:18 57:6 65:9 67:2,10 80:16 82:10 90:15 94:10 burdensome ^[1] 35:6 but-for ^[11] 45:19,20 74:16,18 93:10 109:23,25 110:4,20 114:12 115:2</p>	<p>cases ^[10] 31:5 42:4 77:23 78:3 95:19 100:2 102:13,14,17 104:9 cast ^[10] 5:19 31:9 32:3 40:3 47:6,22 58:1 63:4 69:20 95:11 casts ^[1] 63:21 cat's ^[2] 43:25 44:6 causal ^[1] 111:5 causation ^[15] 11:1,4,13 28:5,6 53:1 56:5 59:19,21,22 109:18,22,24 110:1 114:13 cause ^[23] 11:6,14,15 45:19,21 46:6 55:6 56:6 59:14 81:3,13 89:12 91:23 92:3 93:10 108:2 110:3,4,6,20 111:1 113:21 115:3 caused ^[8] 39:24 45:4 66:22 74:16,17 103:22 108:7 114:8 causes ^[8] 28:18 74:18 114:18 115:4,8,15,18,25 causing ^[2] 59:13 82:6 cautioned ^[2] 33:13,15 centers ^[4] 42:24 48:18,19 58:8 certain ^[1] 109:7 certainly ^[5] 32:4 73:11 79:10 83:1 88:25 cetera ^[1] 60:23 challenge ^[4] 37:13 114:22 115:23 120:3 challenged ^[7] 39:25 56:6 60:11 75:20 108:6 114:25 115:2 challengers ^[1] 48:24 challenges ^[1] 64:22 chance ^[2] 101:19 109:17 change ^[5] 10:19 17:2 99:5 105:11 114:20 changed ^[2] 7:17 8:20 changes ^[1] 114:11 changing ^[3] 33:4 93:5 105:2 checkmark ^[1] 76:3 cherry-picked ^[1] 47:13 CHIEF ^[96] 4:3,10 6:11,13,24 7:8 8:3,5,22 9:1,3,5,7,9 12:18 16:14,17 19:7 23:8,10,12 27:22 30:16,18 34:2,6 38:7,10 39:10,15 40:15,20 41:4,8,11,17 42:8,12,20 43:5,8 45:5 47:2 49:16,21 52:12 56:10,14 58:21,23 60:6 62:12,14 63:14,19 65:6,15 66:16 67:7,22,24 68:16,19 71:13 74:8 77:9 78:18 79:15 82:14 83:14 86:18,20 88:2 89:25 90:5 93:19 95:2,7 96:7 97:5,14,25 98:14,17 101:6 103:4 104:24 107:15 109:14 111:14 114:2 116:5,7 117:9,13 120:9 Choice ^[7] 21:16 38:11 41:1,24 49:3,15 55:8 church ^[1] 65:21 Circuit ^[15] 11:19 23:2 43:15,22 47:12 58:15 95:9,19 96:4 98:22 102:19 103:1,11 104:20 109:5 Circuit's ^[1] 114:15 Circuits ^[2] 40:22 117:3 circumstance ^[5] 5:23 56:8 59:7 88:6,12 circumstances ^[40] 5:13 16:8 21:</p>
C			
<p>back ^[5] 45:23 62:6 79:25 105:4 118:14 background ^[1] 46:24 bad ^[2] 7:14,25 Baker ^[2] 66:23 68:5 balance ^[2] 103:13 112:13 balancing ^[1] 19:2 ball ^[1] 73:4 ballot ^[49] 8:14 16:5 21:24 22:9 31:9 32:3 33:21 37:20 40:6,9 48:11,11 60:21,21,25 63:5,21,22,25 64:24 65:8,17 66:3,7 67:16 68:10 69:11 71:1 78:10,20 82:9 83:24 85:11 86:8 89:17,20,21 95:13 96:13 105:10 112:6,20,25 113:5 115:9 119:6,6,15,19 ballot-type ^[1] 22:20 balloting ^[5] 42:23 58:11 82:25 83:3,5 ballots ^[23] 21:8 22:4 31:20,24 33:24 40:4 47:6 48:17 58:1 63:3 65:18,24 68:9 69:20 76:20 82:20 85:13 94:24 95:12 113:12 115:20 119:9,11 ban ^[4] 8:14 95:12 112:25 116:10</p>	<p>call ^[5] 26:24 57:18,19 64:16 110:11 called ^[3] 64:11 94:1 96:1 calls ^[1] 76:6 came ^[2] 1:22 104:17 campaign ^[1] 83:4 candidate ^[1] 75:25 candidates ^[4] 41:24 49:14 65:23 94:6 cannot ^[4] 6:3 9:23 41:2 44:12 car ^[1] 20:6 careful ^[1] 97:2 carefully ^[1] 117:6 caricatured ^[1] 64:14 carries ^[1] 36:7 cars ^[1] 55:22 Carter ^[2] 66:22 68:5 Carter-Baker ^[7] 65:16 83:15 88:4 96:14 112:8,16,18 CARVIN ^[108] 2:3 3:3,16 4:7,8,10 6:12,13,24 7:16 8:4,11,24 9:2,4,6,11,21 11:3,25 12:16,17,23,25 13:6,8,11,17,23 14:9,12 15:4,11,16 16:15,18,24 17:4 18:11 19:21,24 20:3,17,22 21:4,12,15,19 22:6,14,17,22 23:1,9,11,14 24:4,13,15,23 25:5,9,16,17,24 26:3,8,17,23 27:5,11,15,20,25 28:7 29:6,18 30:2,15,20 31:3 32:11 33:12 34:4,8,18 35:9,20,23 36:10,12 37:5,6,21 38:4,6,8,9 39:11 52:15 53:19 79:19 81:21 87:15 90:14 117:9,11,13 Carvin's ^[6] 71:6 81:6,20 87:11,24 94:13 Case ^[38] 4:4,6 37:1,10 39:20 43:11 44:7 46:7,7 54:1 60:9 65:5 66:2,4 70:6,11 72:16,19 82:24 90:12 92:7 96:5,20 97:7 99:6 100:8,10 104:12 106:6 107:21 109:25 110:5,5 116:2 118:18 119:22 120:10,11</p>	<p>call ^[5] 26:24 57:18,19 64:16 110:11 called ^[3] 64:11 94:1 96:1 calls ^[1] 76:6 came ^[2] 1:22 104:17 campaign ^[1] 83:4 candidate ^[1] 75:25 candidates ^[4] 41:24 49:14 65:23 94:6 cannot ^[4] 6:3 9:23 41:2 44:12 car ^[1] 20:6 careful ^[1] 97:2 carefully ^[1] 117:6 caricatured ^[1] 64:14 carries ^[1] 36:7 cars ^[1] 55:22 Carter ^[2] 66:22 68:5 Carter-Baker ^[7] 65:16 83:15 88:4 96:14 112:8,16,18 CARVIN ^[108] 2:3 3:3,16 4:7,8,10 6:12,13,24 7:16 8:4,11,24 9:2,4,6,11,21 11:3,25 12:16,17,23,25 13:6,8,11,17,23 14:9,12 15:4,11,16 16:15,18,24 17:4 18:11 19:21,24 20:3,17,22 21:4,12,15,19 22:6,14,17,22 23:1,9,11,14 24:4,13,15,23 25:5,9,16,17,24 26:3,8,17,23 27:5,11,15,20,25 28:7 29:6,18 30:2,15,20 31:3 32:11 33:12 34:4,8,18 35:9,20,23 36:10,12 37:5,6,21 38:4,6,8,9 39:11 52:15 53:19 79:19 81:21 87:15 90:14 117:9,11,13 Carvin's ^[6] 71:6 81:6,20 87:11,24 94:13 Case ^[38] 4:4,6 37:1,10 39:20 43:11 44:7 46:7,7 54:1 60:9 65:5 66:2,4 70:6,11 72:16,19 82:24 90:12 92:7 96:5,20 97:7 99:6 100:8,10 104:12 106:6 107:21 109:25 110:5,5 116:2 118:18 119:22 120:10,11</p>	

Official - Subject to Final Review

<p>2 30:1 41:21 45:3 46:8,20 50:16, 17 51:5,19,22 52:8 55:15 56:13, 20 59:1,8,23 62:9 64:8 67:4 71:11 81:19 87:18,20,25 88:1,20 93:12 102:23 104:16 105:9 106:22 108: 5 109:10 110:11 111:10 112:2</p> <p>circumstantial [3] 98:7 99:24 100: 3</p> <p>citizen [1] 94:4</p> <p>citizen's [1] 64:1</p> <p>citizens [2] 65:19 94:20</p> <p>civil [1] 49:25</p> <p>claim [1] 4:24 5:5,8 20:21 31:15, 17 39:23 64:21 81:11 115:24 118: 20</p> <p>claims [1] 40:11</p> <p>clarify [1] 117:18</p> <p>clarity [3] 19:4 39:7 90:18</p> <p>class [2] 16:20 48:25</p> <p>clear [17] 6:10 19:15 36:13 38:12 39:21 40:11 76:9 78:2,2 79:17 85: 9 94:12 95:16 96:2,17 117:15,16</p> <p>clearly [4] 41:2 43:18 79:4 118:17</p> <p>clients [1] 94:13</p> <p>close [4] 24:25 49:5 91:7 101:13</p> <p>closer [1] 120:7</p> <p>closing [1] 25:10</p> <p>closure [1] 91:14</p> <p>club [2] 35:3 53:16</p> <p>clubs [2] 25:20 35:14</p> <p>coequal [1] 44:14</p> <p>coercion [1] 40:9</p> <p>cognizable [5] 4:25 5:25 28:16 30: 9 101:2</p> <p>cognizance [1] 84:17</p> <p>colleague [1] 108:14</p> <p>colleagues [1] 59:3</p> <p>collect [3] 21:8 31:20,24</p> <p>collection [27] 21:24 57:4 60:21 63:25 64:24 65:8 66:8 67:17 68: 10 69:11 71:1 78:11,20 82:9 83: 24 85:11 86:8 89:18,20,21 95:13 105:11 112:6,20,25 113:5 115:9</p> <p>collections [1] 40:7</p> <p>colloquy [2] 117:15 118:15</p> <p>come [12] 9:13 25:2,7 32:1 45:14, 23 50:24 64:21 75:17 82:1 105:24, 25</p> <p>comes [8] 5:21 8:8 10:7 33:22 57: 11,12 71:20 102:21</p> <p>command [1] 64:7</p> <p>commensurate [1] 17:22</p> <p>comment [3] 88:21 102:4 109:17</p> <p>comments [2] 101:10 102:2</p> <p>Commission [5] 65:16 83:15 85: 22 88:4 96:14</p> <p>COMMITTEE [3] 1:7,14 4:5</p> <p>common [8] 32:25 33:2 86:25 88: 2,7 89:2 95:21 113:8</p> <p>common-sense [3] 30:11 33:19 40:2</p> <p>commonplace [7] 33:8 40:3 88: 10 89:1 90:3 112:9 113:1</p> <p>compare [2] 70:19 104:20</p>	<p>compatible [1] 50:9</p> <p>compelling [1] 106:22</p> <p>competitive [1] 37:22</p> <p>complete [1] 14:3</p> <p>completely [3] 44:7 80:3 119:4</p> <p>comply [1] 103:14</p> <p>comports [1] 39:5</p> <p>composition [1] 36:17</p> <p>compromise [4] 87:8 111:19,20, 23</p> <p>conceded [1] 34:24</p> <p>conceptual [1] 4:12</p> <p>concern [4] 7:9 33:21 72:15 101:3</p> <p>concerns [3] 7:12 8:13 103:7</p> <p>concession [1] 81:6</p> <p>conclusion [1] 104:17</p> <p>concretely [1] 85:24</p> <p>condemn [1] 10:3</p> <p>conditions [2] 81:13 92:1</p> <p>confidence [1] 39:19</p> <p>confusion [1] 20:12</p> <p>Congress [7] 10:19,24 17:11 46: 12 111:21 116:22 117:2</p> <p>Congress's [1] 62:24</p> <p>congressional [1] 95:16</p> <p>connecting [1] 59:23</p> <p>connection [1] 119:14</p> <p>connotes [1] 11:4</p> <p>conscious [1] 74:3</p> <p>consider [4] 59:7 92:21 93:11 108: 4</p> <p>consideration [5] 18:5,10 95:23 102:21 105:21</p> <p>considerations [1] 33:10</p> <p>considered [4] 18:24 105:8,19 112:17</p> <p>considering [1] 107:16</p> <p>consolidated [1] 4:6</p> <p>constituents [1] 100:17</p> <p>constitute [1] 17:23</p> <p>Constitution [2] 39:6 62:17</p> <p>constitutional [2] 39:21 57:9</p> <p>constraints [1] 10:8</p> <p>context [10] 5:12,13 9:14 39:9 44: 8 46:14 58:5 92:22 104:15 113:3</p> <p>contexts [1] 5:1</p> <p>continuing [1] 103:3</p> <p>contradictions [1] 34:10</p> <p>contrary [2] 10:22 64:10</p> <p>contrast [1] 71:6</p> <p>contribute [2] 6:7 115:22</p> <p>contribution [1] 118:12</p> <p>convenience [1] 63:9</p> <p>convenient [1] 8:21</p> <p>correct [9] 18:8 48:20 95:9 96:4 105:14,15 113:9 115:16 119:14</p> <p>correctly [1] 48:20</p> <p>couldn't [3] 22:4 33:14 119:17</p> <p>Counsel [3] 19:9 22:19 42:13 43: 6 49:23 50:14 51:3,18,25 52:4,11 56:17 58:25 63:15 65:15 68:17 74: 9 77:11 79:14 85:16 93:20 95:3 96:7 98:15,19 105:1 111:17 112:2 113:24 116:4 120:10</p>	<p>count [6] 48:12 57:6 82:19 102:1 113:11 115:19</p> <p>counted [5] 20:15 22:5,7 63:23 93: 24</p> <p>counterintuitive [1] 21:6</p> <p>countertextual [1] 111:7</p> <p>countervailing [1] 99:2</p> <p>counties [4] 23:22 42:24 73:18 89: 10</p> <p>counting [2] 99:16 115:3</p> <p>countless [1] 31:4</p> <p>country [9] 10:15 25:20 35:3,14 53:16 64:18 112:20,24 118:25</p> <p>counts [1] 22:20</p> <p>county [4] 23:20 48:18 116:9 120: 7</p> <p>couple [1] 74:10</p> <p>course [17] 5:22 11:21 12:14 15:5 26:19 30:23 31:21 51:16 59:2 70: 2 79:21 87:4,7,18 106:25 109:21 120:2</p> <p>COURT [67] 1:1,23 4:11 16:4 17:5 19:1,1 21:23 22:4,25 23:2 31:4 33: 13,14 37:12 38:11 39:16,20 40:10 42:3,5 43:20 44:11 57:14,22 63: 12,20 64:11 65:12 66:12,14 67:19 69:24 72:23 75:13 76:7 77:22 78: 14,22 79:2,4,7 81:6,9 82:8 83:3, 12 84:11,20,23 89:12 93:22 94:14, 25 95:8 97:12 99:12,20 104:13 108:19 109:9,25 112:22 116:9,11 119:13 120:4</p> <p>court's [9] 21:21 44:16 65:14 79:6 86:12 95:17 97:3 102:8 113:13</p> <p>courts [13] 8:15 30:25 38:15,24 39: 7 45:13 64:5 81:17 82:3 93:14 95: 19,25 117:17</p> <p>Crawford [3] 16:22 17:5 31:5</p> <p>create [2] 22:9 63:7</p> <p>created [1] 111:19</p> <p>creates [2] 23:22 111:23</p> <p>criminal [2] 95:12 112:24</p> <p>criminalization [1] 94:22</p> <p>criminalized [1] 64:1</p> <p>criminalizes [2] 85:12 89:21</p> <p>criminalizing [1] 86:8</p> <p>critical [1] 116:25</p> <p>crosses [1] 90:19</p> <p>Crow [1] 116:18</p> <p>curious [1] 45:7</p> <p>cut [1] 12:16</p> <p>cuts [1] 107:5</p> <hr/> <p>D</p> <p>D.C [4] 1:19 2:3,7,9</p> <p>damn [1] 47:11</p> <p>danger [2] 83:7,9</p> <p>Day [18] 7:23 17:22 19:5 24:24 26: 11 28:8 44:21 46:12 47:7,22,25 48:14 49:6 58:17 74:21 76:21 91: 11 99:23</p> <p>daylight [1] 102:6</p> <p>days [8] 4:22 42:25 58:9 74:23 75: 3 76:21 106:7 118:23</p>	<p>de [3] 11:20 29:24 62:2</p> <p>dealing [1] 6:16</p> <p>decade [2] 104:9 116:17</p> <p>decided [1] 39:2</p> <p>decides [2] 23:20 24:17</p> <p>decision [2] 25:20 114:16</p> <p>deck [1] 117:23</p> <p>decline [1] 41:12</p> <p>declined [1] 97:23</p> <p>declining [1] 98:12</p> <p>defeating [1] 22:7</p> <p>defendant [1] 45:22</p> <p>defense [1] 18:17</p> <p>define [1] 105:9</p> <p>defined [1] 87:23</p> <p>definition [4] 12:25 26:6 30:12 32: 1</p> <p>degree [1] 90:10</p> <p>deliver [3] 65:24 85:12 94:23</p> <p>delivery [1] 20:8</p> <p>demands [1] 62:18</p> <p>democracy [3] 93:23 94:2,13</p> <p>DEMOCRATIC [4] 1:7,14 4:5 37: 14</p> <p>Democrats [2] 37:22 100:24</p> <p>demographic [8] 24:6 30:4 32:9 79:22,24 81:7 87:15 118:6</p> <p>denial [16] 4:23 5:2,12 19:19,25 20: 23 21:1 39:23 40:11 41:22 64:4 95:18 100:20 102:14 107:1 116:1 18 41:15 58:2 63:23 70:4 94:21</p> <p>denies [6] 4:15,17 13:24 14:5,6 36: 14</p> <p>deny [2] 34:18,20</p> <p>denying [1] 27:2</p> <p>depend [2] 53:23 99:9</p> <p>depends [3] 11:25 54:25 55:15</p> <p>derived [1] 38:13</p> <p>described [1] 114:19</p> <p>description [1] 116:15</p> <p>designed [2] 44:23 57:12</p> <p>desire [1] 63:9</p> <p>despite [1] 108:14</p> <p>details [1] 72:7</p> <p>determination [1] 49:10</p> <p>determinations [1] 16:2</p> <p>determine [8] 17:2 43:2 44:2,24 51:12 78:23 95:10 99:20</p> <p>determined [2] 42:6 56:9</p> <p>determining [1] 99:13</p> <p>differ [2] 79:18 80:12</p> <p>difference [9] 6:21 28:9 37:25 45: 4 75:12 76:17 88:1 99:8 107:3</p> <p>differences [1] 58:4</p> <p>different [12] 5:11 8:20 25:11 37:9 44:16 52:18 53:3 87:1 105:2,23 117:21 118:7</p> <p>differential [4] 7:1,4 118:4,10</p> <p>differently [3] 53:6 117:25 118:5</p> <p>differs [1] 18:2</p> <p>difficult [7] 32:4,5 54:24 80:4 103: 13 119:18,21</p> <p>difficulties [2] 68:4 90:11</p>
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Official - Subject to Final Review

<p>difficulty ^[3] 80:17 90:16 106:14</p> <p>dig ^[1] 29:22</p> <p>digits ^[1] 64:25</p> <p>diligent ^[2] 66:15 84:23</p> <p>dilution ^[3] 4:17 16:8 81:10</p> <p>diminish ^[1] 26:24</p> <p>diminished ^[2] 28:18,24</p> <p>direct ^[2] 98:7 100:4</p> <p>directly ^[3] 5:21 38:13 115:1</p> <p>disadvantage ^[1] 37:22</p> <p>disadvantaged ^[1] 60:19</p> <p>disagree ^[4] 29:5 61:17 66:1 109:2</p> <p>disagreement ^[1] 43:11</p> <p>disagreements ^[1] 29:15</p> <p>disavowed ^[1] 114:22</p> <p>discarded ^[1] 63:22</p> <p>discounting ^[2] 114:18 115:13</p> <p>discretion ^[1] 73:12</p> <p>discriminate ^[1] 114:9</p> <p>discriminates ^[1] 119:3</p> <p>discrimination ^[13] 15:20 33:9 42:1 44:25 45:11,13 62:17,22 88:18 99:21 108:23 116:11,12</p> <p>discriminatory ^[26] 15:7 65:4,9 73:8 76:13 77:15,19,24 78:4 79:5,9 82:6,10 88:14 92:24 94:10 96:3 99:19 100:16 108:12 109:11 111:11,12 113:22,25 117:8</p> <p>discuss ^[3] 43:12,23 44:2</p> <p>discussing ^[2] 18:1 30:5</p> <p>disenfranchise ^[2] 89:23 107:9</p> <p>disenfranchised ^[2] 109:8 115:5</p> <p>disenfranchising ^[3] 89:15 95:11 107:13</p> <p>disparate ^[19] 4:24 5:1,11 8:8,9 16:12 23:23 39:24 40:17 45:14 49:12 62:8,20 63:7 71:18 72:21 104:14 108:24 111:5</p> <p>disparities ^[15] 10:18 31:17,18 32:19 46:19 62:3 64:16 74:13,16,25 76:10,24 77:2 118:17 119:21</p> <p>disparity ^[17] 45:2,17 52:21 54:11 60:1 62:22 73:1,6 76:1 90:25 91:20 102:19 103:20,22 108:8 114:18 115:16</p> <p>disproportionate ^[11] 6:7 10:17 11:17 12:2,4,6 36:24 38:17 59:14,15 87:6</p> <p>disproportionately ^[2] 55:24 67:16</p> <p>disputes ^[1] 60:9</p> <p>disqualification ^[1] 37:20</p> <p>dissent ^[1] 114:15</p> <p>distance ^[2] 54:21 70:17</p> <p>distinction ^[5] 7:7 13:9 20:23 36:1 66:5</p> <p>distinctions ^[1] 29:25</p> <p>distinguish ^[1] 31:1</p> <p>distinguished ^[1] 108:14</p> <p>distracted ^[1] 90:8</p> <p>distributed ^[1] 67:10</p> <p>district ^[21] 19:1 21:21,23 22:3,25 23:1 37:12 57:8,22 67:19 78:7,9,</p>	<p>14,22 79:2,6,7 83:12 97:12 112:21 119:13</p> <p>districting ^[1] 7:13</p> <p>DNC ^[6] 2:10 3:14 37:11 95:6 100:12 118:25</p> <p>doctrine ^[2] 44:6,8</p> <p>doing ^[7] 14:21 15:13,14 17:20 82:3 89:14 112:11</p> <p>DOJ ^[2] 97:22 98:12</p> <p>Dole ^[3] 87:7 111:19,23</p> <p>done ^[4] 31:4 36:25 44:25 95:25</p> <p>doubts ^[2] 100:9 116:13</p> <p>down ^[7] 29:22 38:20 45:14 66:17 68:2 104:19 117:7</p> <p>dramatically ^[1] 33:20</p> <p>draw ^[1] 71:6</p> <p>drive ^[1] 25:21</p> <p>driven ^[1] 7:10</p> <p>due ^[4] 20:18,20,21 65:2</p> <p>during ^[2] 26:15 92:4</p> <p>duty ^[1] 39:18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[3] 23:20 74:11 98:5</p> <p>earlier ^[2] 52:3 88:10</p> <p>early ^[14] 7:23 24:17 40:6 42:25 47:8 48:2,4,14,17 58:7 60:22 64:23 74:20 106:8</p> <p>easier ^[3] 91:3 105:10 108:1</p> <p>easily ^[4] 21:3 22:4,21 45:25</p> <p>Easterbrook ^[1] 91:1</p> <p>easy ^[1] 38:13</p> <p>edge ^[1] 20:9</p> <p>educate ^[1] 37:15</p> <p>educated ^[1] 103:12</p> <p>education ^[2] 103:16 108:23</p> <p>effect ^[3] 30:9 105:7 120:1</p> <p>effectively ^[1] 27:2</p> <p>effects ^[4] 19:16 81:3 96:3 100:16</p> <p>eight ^[1] 32:22</p> <p>Eighty ^[1] 58:11</p> <p>either ^[3] 20:10 87:21 108:11</p> <p>elect ^[6] 4:18 40:25 41:24 49:2,14 55:7</p> <p>Election ^[29] 7:23 17:22 19:5 26:11 38:1,4 39:1,20 43:1,4 47:7 48:14 49:6 55:18 57:13,15 58:9 60:3 63:6 64:17,23 69:2,6 74:21 76:21 83:18 89:10 90:25 91:3</p> <p>elections ^[10] 40:13 63:2 65:6 66:7 73:13 84:16 85:3,8 93:17 104:12</p> <p>electoral ^[4] 7:15 36:21 60:10 94:17</p> <p>electorate ^[1] 94:9</p> <p>electronic ^[1] 107:7</p> <p>elements ^[6] 45:15 46:1,3,5,9 72:22</p> <p>eligible ^[4] 4:19 63:21,24 94:4</p> <p>eliminate ^[1] 8:12</p> <p>eliminated ^[2] 65:25 66:24</p> <p>elsewhere ^[1] 83:19</p> <p>elusive ^[1] 111:18</p> <p>embody ^[1] 46:3</p>	<p>embrace ^[2] 16:15 29:12</p> <p>emphasis ^[1] 90:24</p> <p>emphasize ^[1] 18:20</p> <p>emphasized ^[1] 90:23</p> <p>employer's ^[1] 45:20</p> <p>employment ^[2] 5:2 71:21</p> <p>en ^[4] 16:3 58:15 79:4 114:15</p> <p>enacted ^[2] 79:12 116:17</p> <p>end ^[7] 21:22 28:7 44:21 46:12 47:21 69:4 116:18</p> <p>ending ^[2] 62:16 93:17</p> <p>endorses ^[1] 62:15</p> <p>enforce ^[2] 62:25 68:25</p> <p>enforced ^[1] 69:6</p> <p>enforcement ^[2] 94:15 116:24</p> <p>enforcing ^[2] 23:5 66:19</p> <p>engage ^[6] 21:5 32:15 38:16 72:8 73:10,11</p> <p>engaged ^[1] 16:3</p> <p>engaging ^[1] 78:10</p> <p>enhance ^[2] 10:11 63:9</p> <p>enormous ^[1] 22:18</p> <p>enough ^[8] 41:13 60:19 70:8 76:10 77:2 85:3 91:20 106:22</p> <p>ensure ^[1] 74:1</p> <p>ensures ^[1] 40:4</p> <p>ensuring ^[1] 74:4</p> <p>enter ^[1] 63:13</p> <p>entire ^[2] 22:7 78:5</p> <p>entirely ^[4] 5:11 6:24 95:11 107:12</p> <p>environment ^[1] 39:3</p> <p>equal ^[10] 4:18 9:16 19:10,23 24:9 28:11 32:17,21 87:13 108:17</p> <p>equality ^[2] 29:23,25</p> <p>equalized ^[1] 74:5</p> <p>equalizing ^[1] 8:7</p> <p>equally ^[13] 10:1,3 13:16,19,21 24:2,5,22 25:15 26:16 63:8 67:10 80:7</p> <p>erected ^[3] 5:24 14:4 36:15</p> <p>especially ^[1] 39:8</p> <p>ESQ ^[5] 3:3,6,10,13,16</p> <p>ESQUIRE ^[3] 2:3,7,9</p> <p>essence ^[1] 81:11</p> <p>essentially ^[6] 45:13 47:16 50:11 108:3,6,9</p> <p>establish ^[3] 50:21 111:4,5</p> <p>established ^[1] 36:22</p> <p>establishing ^[1] 39:21</p> <p>ET ^[8] 1:4,8,11,15 2:10 3:14 60:23 95:6</p> <p>evaluating ^[2] 16:19 110:12</p> <p>evaluation ^[3] 64:12 76:8 80:10</p> <p>even ^[19] 4:25 6:9 10:5 15:24 16:7 18:20 38:20 42:4 56:21 60:20 61:6,9 78:23 79:22 80:2 81:23,24 112:18 116:20</p> <p>event ^[1] 98:11</p> <p>events ^[2] 25:12 98:11</p> <p>everybody ^[3] 21:6 108:16 119:23</p> <p>Everyone ^[4] 4:19 10:2 12:9 14:3</p> <p>everything ^[1] 24:19</p> <p>evidence ^[24] 26:13 53:23 54:2,6,6,8 83:6,13,16,23 85:23 97:6,15,</p>	<p>16,19 98:7 99:24 100:3,4 110:14,16,24 112:19,22</p> <p>evil ^[1] 62:19</p> <p>exactly ^[4] 32:9 70:23 71:5 81:16</p> <p>examination ^[1] 51:4</p> <p>examine ^[1] 38:22</p> <p>example ^[19] 8:12 27:1 30:5 41:6 53:9 54:12 57:25 60:15 61:13 66:11 67:19 70:24 74:19 76:18 83:12 89:6 91:6 93:1 104:10</p> <p>examples ^[3] 34:25 61:19 74:10</p> <p>exceed ^[1] 62:24</p> <p>exception ^[2] 25:1,4</p> <p>Excuse ^[5] 20:2,4 35:25 58:10 92:23</p> <p>exempts ^[1] 17:19</p> <p>exercise ^[2] 47:1 58:13</p> <p>existed ^[2] 17:1 27:6</p> <p>existing ^[1] 102:12</p> <p>exists ^[3] 17:23 75:15 116:13</p> <p>expand ^[2] 10:10 75:18</p> <p>expands ^[1] 33:20</p> <p>expansion ^[1] 119:1</p> <p>expand ^[1] 100:15</p> <p>expert ^[1] 120:6</p> <p>explain ^[6] 36:8 50:4 57:4 93:5 103:17 104:5</p> <p>explains ^[2] 110:17,19</p> <p>explicitly ^[1] 46:3</p> <p>explore ^[1] 86:23</p> <p>expressly ^[1] 114:21</p> <p>extant ^[1] 27:17</p> <p>extent ^[5] 11:12 75:9 87:21 101:25 103:9</p> <p>external ^[2] 6:6 28:23</p> <p>extra ^[2] 22:10 37:23</p> <p>extraordinarily ^[1] 5:15</p> <p>extraordinary ^[2] 31:2 100:1</p> <p>extrapolate ^[1] 58:18</p> <p>extreme ^[1] 27:1</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face ^[6] 61:14,19,20 80:3 108:17 112:10</p> <p>facially ^[5] 34:15 36:13 61:15 108:11 111:11</p> <p>facilities ^[1] 71:5</p> <p>fact ^[25] 39:4 68:12 69:24 73:8,17 74:4 76:13 78:2 79:7 81:22 82:6,8,21 83:7 89:5,13,14 91:22 93:8 105:8 114:10,19 115:18,21 119:5</p> <p>factor ^[16] 18:23 28:16 33:4,7 77:25 78:4,24 79:3,5,10 96:19 99:14,15,15,22 102:22</p> <p>factors ^[20] 6:7 16:9 18:25 28:15,23 32:25 33:1 38:23 74:17 99:23 103:23 105:18 108:4 111:3,4 112:3,4 113:20 114:8 118:11</p> <p>facts ^[6] 65:3 66:9 67:4 82:5 91:18 119:4</p> <p>fail ^[1] 93:6</p> <p>fair ^[1] 116:24</p> <p>fairly ^[1] 23:16</p> <p>false ^[1] 105:14</p>
--	---	---	--

Official - Subject to Final Review

<p>famously ^[1] 47:10 fanciful ^[1] 27:9 Far ^[2] 95:24 97:1 far-fetched ^[1] 78:8 farther ^[2] 27:16 30:6 favor ^[2] 88:13 117:23 federal ^[3] 8:15 43:20 57:8 feet ^[1] 72:10 fewer ^[4] 14:23,23 54:7 80:2 field ^[1] 71:19 Fifteenth ^[1] 62:5 Fifth ^[1] 104:20 figure ^[2] 22:10 90:18 figuring ^[1] 118:3 filed ^[1] 107:21 fill ^[3] 51:1 75:24 76:2 Finally ^[2] 118:14 120:2 finance ^[1] 83:4 find ^[9] 8:20 16:4 31:16 32:6 81:8 103:13 113:16 119:21 120:5 finding ^[2] 13:14 22:3 findings ^[3] 21:22 79:7,8 fine ^[1] 85:15 finish ^[1] 56:16 first ^[9] 23:19 28:9 43:14 45:16 49:9 9 51:8 52:20 72:20 74:19 fit ^[2] 9:18 73:14 five ^[2] 24:7 118:6 flows ^[1] 29:13 focus ^[1] 62:1 focused ^[2] 28:3 115:25 focuses ^[1] 19:15 foot ^[1] 30:6 Footnote ^[1] 60:24 foremost ^[3] 43:15 51:9 52:20 foreseeable ^[1] 101:20 form ^[1] 113:4 formalistic ^[1] 32:15 forms ^[1] 15:3 formulation ^[1] 10:23 forth ^[2] 71:22 72:25 forward ^[2] 18:22 50:24 found ^[23] 21:23,25 57:9,23 65:17 67:20 78:14 79:2 82:8 83:13 85:21,22 97:12 102:18,19 103:1,10 104:13,21 112:22 119:23,24 120:4 Fourteenth ^[2] 9:15 62:5 Fourth ^[1] 40:21 frame ^[1] 37:6 franchise ^[3] 47:1 58:14 119:1 Frank ^[1] 91:2 frankly ^[1] 94:13 fraud ^[15] 21:12,25 40:6 65:19 78:10 82:25 83:2,5,24 84:5,15 86:10 89:20 112:20,23 fraudulent ^[3] 82:20 83:17 85:10 free ^[5] 4:22 62:18 89:2 104:15 118:23 friend ^[1] 96:9 full-throated ^[1] 28:19 fully ^[1] 16:15 functional ^[3] 64:13 77:3 81:18 further ^[4] 26:4 29:22 72:11 113:</p>	<p>18 <hr/> G <hr/> game ^[1] 37:23 gave ^[2] 53:25 54:5 GEN ^[2] 2:5 3:6 GENERAL ^[29] 1:3 2:5 12:11 18:3, 22 29:1,14,16 40:16 43:10,17,19 49:24 52:13 53:17 54:6,18 55:13, 20 56:7 60:8 62:11,13 72:3,11,17 87:17 90:13 106:6 General's ^[4] 18:4 28:4 29:4 109:18 generally ^[5] 15:17 56:9 77:14 88:21 102:14 generated ^[1] 111:21 gets ^[2] 38:23 118:2 getting ^[1] 48:15 Gingles ^[2] 15:17 81:10 give ^[11] 19:4 35:10 48:23 60:14 74:10 76:17 89:1 90:3 91:6 96:12 104:10 given ^[8] 10:5,20 20:25 35:12 48:10 66:2 110:7 118:16 gives ^[1] 39:7 giving ^[3] 19:13 48:10 61:3 goal ^[1] 62:16 goals ^[1] 59:6 Gorsuch ^[36] 27:23,24 29:3,17,20 30:13 56:11,15,16,19 57:1,7,17 58:20 59:17 82:15,16,23 83:10 84:1,4,8, 12 85:1,6,14,16 86:3,17 109:15,16 110:2,14,19,23 111:13 got ^[6] 14:7,10 28:17 86:23 90:8 119:8 government ^[6] 19:16,17 24:25 25:2,6 31:23 grateful ^[1] 23:16 gray ^[1] 111:24 great ^[1] 74:13 greater ^[3] 37:14 54:21 116:20 ground ^[9] 65:3 71:10 73:23 77:5 80:10 82:5 89:23 91:19,22 grounds ^[1] 62:3 group ^[5] 8:19 33:25 44:14 72:12, 13 groups ^[2] 115:4 116:22 guess ^[6] 61:22 80:12,13 81:1 85:17 99:9 guidance ^[1] 19:4 guise ^[1] 42:2 <hr/> H <hr/> hamstrung ^[1] 33:24 hands ^[1] 38:18 happen ^[4] 20:11 48:3 85:7,8 happening ^[2] 73:17 101:19 happy ^[1] 40:14 harbor ^[1] 17:13 hard ^[1] 52:5 harder ^[4] 91:8 100:19 106:5 120:5 harm ^[1] 101:17 harmed ^[1] 37:16</p>	<p>Harris ^[1] 42:4 harvested ^[1] 119:6 harvesting ^[14] 8:14 16:5 57:4 63:5 65:17 66:3,24 83:11,17,18 84:14 96:13 119:16,19 heads ^[1] 99:16 hear ^[1] 4:3 hearing ^[1] 20:19 Heights ^[5] 77:22 97:3 98:6 99:13, 23 held ^[4] 69:24 77:22 79:4 99:12 helpful ^[3] 24:14,15 26:7 helping ^[2] 85:12 94:23 helps ^[1] 40:5 hinder ^[1] 7:6 hinged ^[1] 78:9 hint ^[1] 10:20 Hispanic ^[1] 89:24 Hispanics ^[2] 68:14 78:7 historical ^[1] 81:13 history ^[11] 6:10 10:21 31:7 33:9 68:12 88:18 89:19 97:20 99:4 102:8 110:10 Hobbs ^[5] 2:8 3:11 63:18 65:7 94:18 Hobbs's ^[1] 60:15 Hobson's ^[1] 21:15 hoc ^[3] 16:2 19:3 39:2 hold ^[1] 119:14 holistic ^[1] 77:4 home ^[2] 65:20 71:4 homes ^[1] 65:20 Honor ^[52] 9:6 18:11 66:5,12,25 67:13 68:7,23 69:23,23 70:22 72:20,25 73:12 75:1,11 76:5 77:1,21 79:1 81:5,15 82:22 83:1,22 84:7,10,19 85:9,25 88:23 91:16,18 92:6,17,20 93:7,21 96:21,25 97:9,18 98:4 99:8 100:12 102:5,11 104:1,8 105:16 110:9 112:16 Honor's ^[1] 73:9 hostile ^[2] 25:23 26:4 hours ^[11] 23:25 27:17 55:12,13, 13,24 56:21,25 91:11 92:2,4 house ^[5] 31:10,15,24,24 87:4 households ^[2] 113:18,19 houses ^[3] 44:15 72:12,13 Housing ^[3] 14:18 45:12 71:21 Houston ^[1] 18:21 however ^[5] 10:4 12:11 69:23 89:1 92:23 huge ^[1] 32:18 hundred ^[1] 55:1 hurdle ^[1] 49:18 hurts ^[1] 37:25 hyper-partisan ^[1] 39:2 hypothetical ^[11] 30:14 32:12 54:19,19 56:2 61:13 75:2 80:1 93:5,6 96:22 hypotheticals ^[8] 23:15 27:6 52:14 53:2,20 80:14 90:22 106:7 <hr/> I <hr/> i.e ^[2] 106:2 111:4</p>	<p>ID ^[4] 64:23 104:11,12,17 idea ^[3] 27:4,14 88:5 ideas ^[1] 94:8 IDs ^[1] 104:15 illegal ^[1] 10:16 illustrates ^[1] 118:19 immune ^[1] 70:8 immunize ^[2] 17:15 108:9 impact ^[30] 4:24 5:1,11 23:23 39:24 40:17 41:2,20 42:13,15,19 43:3 45:14 49:12 54:20 55:16,20,22 59:14,15,21 62:8,20 63:7 71:19 72:21 87:6 104:14 108:24 111:6 impacted ^[3] 55:24 100:18 101:21 impacts ^[1] 55:16 impede ^[1] 63:2 imperative ^[2] 37:14 63:10 imperatives ^[1] 39:22 imperfectly ^[1] 106:16 impermissible ^[3] 53:21,21 95:22 implemented ^[1] 46:5 implicate ^[2] 25:12 81:24 implicated ^[1] 8:13 implicit ^[1] 11:1 importance ^[1] 79:8 important ^[6] 14:14 39:8 52:7 59:19, 22 66:5 importing ^[1] 73:2 impose ^[2] 18:13 65:4 imposed ^[2] 65:9 82:10 imposes ^[2] 8:18 67:3 imposing ^[4] 76:13,15 94:9 105:3 improperly ^[1] 63:1 impute ^[1] 44:12 imputes ^[1] 44:9 in-person ^[1] 40:3 in-precinct ^[2] 47:18 57:3 inability ^[2] 115:10,14 inapplicable ^[1] 44:7 inappropriate ^[1] 110:7 inappropriately ^[1] 111:9 include ^[2] 47:8 48:1 included ^[1] 47:25 including ^[7] 40:7 88:16,17 93:12 108:10 112:3 114:10 inconvenience ^[4] 80:22,23 90:10,19 incorporated ^[1] 72:23 Indeed ^[5] 10:13 56:6 64:21 94:13 120:5 independent ^[2] 44:14 78:19 indicated ^[1] 98:9 individuals ^[1] 77:17 inequality ^[1] 81:14 infect ^[1] 96:24 inflexible ^[2] 15:24 64:9 influence ^[1] 97:10 information ^[3] 97:22,24 105:12 inhibiting ^[1] 120:1 inject ^[1] 63:1 injury ^[2] 94:16,19 inquiry ^[4] 71:11 81:18 86:12 110:12 insisted ^[1] 48:9</p>
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Official - Subject to Final Review

<p>instance ^[1] 89:19 instances ^[1] 60:1 instead ^[8] 23:25 29:7 71:8 73:25 74:22 82:3 89:4 91:21 instructions ^[1] 63:13 insubstantial ^[1] 41:2 insufficient ^[1] 83:21 integrity ^[7] 33:21 39:19 57:13 59: 24 60:3 63:6,11 intended ^[2] 10:19 116:23 intending ^[1] 10:24 intensely ^[2] 96:1 113:12 intent ^[16] 6:17 7:4 43:23 44:2 77: 15,19,24 78:4 79:5,9 88:15 95:16 96:10 97:7 98:20 111:11 intentional ^[3] 15:20 42:1 44:25 intentionally ^[1] 108:11 interacting ^[1] 111:3 interaction ^[1] 65:2 interacts ^[2] 81:12 82:4 interest ^[12] 37:18 65:11 66:6,10 68:9,11 73:21 83:2 86:10 101:2 102:21 103:2 interested ^[2] 37:9 72:16 interesting ^[2] 46:11 98:20 interests ^[2] 18:6 82:11 interpretation ^[1] 36:4 interpretations ^[1] 37:24 interpreted ^[1] 51:16 interrupting ^[1] 35:25 intervene ^[1] 43:16 intimidation ^[2] 65:22 66:22 introducing ^[1] 78:5 invalidating ^[1] 17:11 involve ^[3] 6:25 46:8 67:9 involved ^[4] 5:4 38:24 43:24 119: 23 involving ^[1] 64:23 IRC ^[1] 42:5 irrelevant ^[1] 118:13 isn't ^[7] 18:9 50:16 51:6 61:16,23 68:1 114:16 isolated ^[1] 60:1 isolation ^[1] 60:12 issue ^[9] 12:3 40:1,17 67:11 71:17 74:23 85:20 96:8 105:5 itself ^[8] 28:21 51:10 60:18 62:4 108:7,13 114:17,23</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jail ^[1] 85:13 jeopardizes ^[1] 12:5 JESSICA ^[3] 2:7 3:10 63:17 Jewish ^[1] 25:16 Jim ^[1] 116:18 job ^[3] 5:3 14:9 26:14 Joint ^[2] 120:4,6 Judge ^[4] 11:21 57:8 91:1 114:14 judgment ^[3] 63:13 65:13 95:1 judgments ^[1] 16:1 jurisdiction ^[1] 113:14 jurisprudence ^[2] 81:10 83:4 JUSTICE ^[359] 4:3,10 6:11,13,25 7: 8 8:3,5,22,22 9:1,3,3,5,7,9,10,21</p>	<p>10:25 11:18,21 12:1,15,18,18,20, 24 13:2,7,10,13,18 14:7,10,13 15: 9,12 16:14,14,17,17,18,25 17:25 18:1 19:6,7,7,9,22 20:2,4,20,24 21:10,14,17,20 22:12,16,19,23 23: 8,8,10,10,12,12,13,14 24:11,14 25: 3,6,14,17 26:2,7,10,22 27:3,8,13, 20,22,22,24 28:1 29:3,17,20,21 30: 5,13,16,16,18,19 32:7,8,24 34:2,2, 6,6,8,23,25 35:19,21,24 36:11 37: 5,8 38:3,5,7,10 39:10,15 40:15,20 41:4,8,11,17 42:8,12,20 43:5,7,8,9, 14,21 44:5 45:5,5,7 46:10 47:2,2, 3,9,19 48:3,6,13,16,21 49:7,16,16, 19,21,21,23,25 50:9,13,19,22,25 51:3,11,14,17,25 52:4,10,12,12,13, 17,23 53:2,5,10,13,17,22,25 54:2, 5,15,18,23 55:3,9,12,19 56:1,7,10, 10,14,14,16,18 57:1,7,17 58:16,20, 21,21,23,24 59:10,11,17 60:5,6,6, 8 61:12,16,18 62:10,12,15 63:14, 20 65:15 66:16 67:7,22,24 68:16, 18,19,20,24 69:7,18 70:12 71:12, 13,13,15 72:6 74:7,8,8,9 75:5,22 76:16 77:6,9,9,11,12 78:12,18,19 79:13,15,15,16 82:12,14,14,16,23 83:10,14 84:1,4,8,12 85:1,6,14,16 86:3,17,18,18,20,21 87:14 88:3 89:25,25 90:5,5,7,22 91:19,25 92: 11,18 93:4,15,19 95:2,8 96:7,8 97: 5,14,25 98:14,16,17,18 100:6 101: 6,6,8,9 103:4,4,5,6 104:3,22,24,24 105:1,17 106:9,13,19,21 107:15, 15,17,18 109:1,12,14,14,16 110:2, 14,19,23 111:13,14,14,16 113:7, 23 114:2,2,4,5 115:6,8 116:3,5,8 117:9,14 118:15 120:9</p> <p>justifiable ^[1] 103:2 justification ^[12] 7:19 15:22 18:16, 23 29:11 50:17 93:13 101:24 102: 1 107:12 112:5,11 justifications ^[1] 93:17 justified ^[4] 65:11 71:25 82:11 89: 5 justifies ^[1] 89:7 justify ^[5] 15:7 18:12 38:22 50:3 106:22</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan ^[49] 23:8,13,14 24:11,14 25: 3,6,14,17 26:2,7,10,22 27:3,8,13, 20 30:5 32:8 34:25 52:12,13,17, 23 53:2,5,10,13,17,25 54:2,5,15, 18,23 55:3,9,12,19 56:1,7 79:15, 16 82:12 87:14 107:15,17 109:1, 12 Kagan's ^[1] 61:19 Kavanaugh ^[16] 30:17,18 32:7,24 58:22,23 59:10,11 60:5 86:19,20 111:15,16 113:7,23 114:6 keep ^[4] 19:9,13 66:21 78:6 keeping ^[1] 37:19 key ^[5] 4:12 7:6 13:24 28:21 46:9 kind ^[18] 4:14 5:24 8:1 10:19 16:12</p>	<p>18:13 19:2,4 30:11 45:17 74:24 76:23 80:21 81:15 91:12 103:20 118:4,11 knowing ^[1] 37:9 knows ^[3] 38:25 44:11 65:7</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack ^[1] 90:17 LaFaro ^[2] 97:11 98:10 language ^[17] 5:22 6:8 9:18 11:7, 20,22 15:6 17:19 19:15,23 24:3 29:14 40:19 46:5 90:17 110:7 111: 18 large ^[1] 117:4 larger ^[1] 23:22 largest ^[1] 65:18 Lassiter ^[1] 108:19 last ^[4] 102:13 104:9 116:17,19 Latino ^[3] 65:10 80:19 94:19 Latinos ^[3] 67:15 78:9 120:7 latter ^[3] 24:8 61:3 118:8 laughable ^[2] 35:15 79:23 law ^[28] 39:25 46:2 56:6 59:18 60: 3 66:15,17,19 67:3 68:2 72:3 78:6, 15,24 79:11 82:10,19,22 84:24 85: 10,11 86:1 88:5 96:13,17 105:7, 11 110:2 laws ^[10] 25:10 40:1 58:18 63:1 64: 23 82:25 95:24 96:2 100:16 117:8 Lawyers' ^[1] 18:21 lead ^[4] 19:3 28:15,24 80:17 leads ^[1] 21:24 League ^[1] 104:11 least ^[11] 28:4 45:19 64:2 69:4 74: 13 83:18 86:12 87:24 100:19 112: 10 113:11 leave ^[4] 24:19 31:10,15 80:5 left ^[1] 114:5 legal ^[1] 62:21 legislation ^[6] 43:24 44:4 77:25 96:20 98:1 99:11 legislative ^[10] 6:10 10:21 43:23 68:12 78:15 96:9 98:19 99:4 102: 8 110:10 legislator ^[2] 44:13,18 legislators ^[6] 44:20 96:11,15,16 97:17 98:3 legislature ^[10] 44:3,13,15 66:13 77:15,16 84:21 105:12 112:17,21 legislatures ^[5] 8:16 16:2 19:5 38: 19 96:15 legitimacy ^[1] 88:13 legitimate ^[3] 18:10 65:11 82:11 lend ^[1] 88:7 less ^[26] 5:7,18 6:3 9:24 11:9,15, 18,23 15:23 16:20 25:25 26:9 28: 22 40:25 48:25 49:1 54:13 59:14 61:3 69:22 74:1 79:17 91:23 93:9 103:12 118:9 lessen ^[1] 106:2 lesser ^[1] 93:10 level ^[2] 41:22 57:21 liability ^[2] 65:1 70:9 lies ^[3] 47:11,11,11</p>	<p>likely ^[1] 26:14 Likewise ^[1] 63:24 limit ^[3] 38:21 68:13 111:9 limitations ^[1] 78:21 limited ^[3] 5:15 65:1 97:7 limiting ^[2] 66:7 68:10 line ^[2] 23:24 31:5 link ^[1] 111:5 Listen ^[1] 101:9 listened ^[1] 101:11 literacy ^[11] 4:15 12:21,25 13:2,24 36:13,17 37:3 108:10,13,20 literally ^[2] 57:24 89:19 litigation ^[1] 104:5 little ^[4] 29:22 75:24 101:16 107: 25 lives ^[2] 23:21 93:2 local ^[2] 40:5 63:4 localized ^[2] 96:1 113:13 locate ^[1] 115:14 locates ^[1] 113:18 locations ^[1] 114:21 long ^[9] 6:19 10:1 17:21 24:16 25: 21 31:7 34:15 106:17 107:2 long-established ^[1] 105:3 long-standing ^[1] 95:17 longer ^[2] 79:17 107:12 look ^[45] 21:21 33:14 36:16,23 41: 19 42:8,14 43:3 45:1 46:19,22 47: 14 49:4 51:9 54:10,17 56:5,20 58: 3,5 59:20 60:10,11,17 66:8 71:8 77:4 78:22 79:21,23 80:8 81:7 89: 4 90:4 91:18 92:12 98:6 102:14, 24 107:20 110:24 111:3 112:1 113:2 118:4 looked ^[3] 97:3 102:25,25 looking ^[10] 36:4 42:9,13 45:2 49: 8 52:20 62:7 80:16 81:11 82:4 looks ^[1] 42:3 losing ^[1] 38:1 lot ^[9] 30:24 36:7 72:9 75:6 77:6 102:6 105:13 113:17 118:20 lots ^[1] 101:12 love ^[1] 18:11 lower ^[2] 39:7 117:17</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made ^[5] 5:8 49:10 77:17 94:11 107:8 magnitude ^[2] 54:25 102:15 mail ^[15] 4:22 5:8 20:7,8 42:18,24 48:2 58:12 71:3,4 118:23 119:2,7, 12,15 mailboxes ^[1] 31:18 mailed-in ^[1] 76:20 main ^[1] 71:17 maintain ^[3] 73:12 89:8 109:4 maintained ^[1] 109:4 maintaining ^[2] 39:19 73:21 majority ^[3] 72:7,13 117:3 mandate ^[4] 15:23 18:14,15,19 mandates ^[1] 64:10 manipulable ^[1] 38:24 manner ^[25] 5:14,17 6:16,20 7:22</p>
---	---	---	--

Official - Subject to Final Review

<p>10:11,14 17:12 20:1 30:22 34:14, 20 35:1,2,3,7 36:3,7 37:1 57:11 61:21 81:23 82:2 87:12 95:21</p> <p>manual [1] 69:3</p> <p>many [15] 45:10 46:2 56:23 60:22 72:7 80:2 84:15,15 85:2,7,8 95:18 97:14,15 116:21</p> <p>March [1] 1:20</p> <p>Maricopa [1] 120:7</p> <p>MARK [5] 1:3 2:5 3:6 39:13 47:9</p> <p>Maryland [1] 25:11</p> <p>matter [14] 1:22 5:23 33:1,10 73:6 84:13,14 86:23 88:2,5,7,21 92:14 102:16</p> <p>matters [1] 59:7</p> <p>maximization [2] 10:12 38:16</p> <p>maximize [2] 7:18,24</p> <p>maximizing [1] 8:6</p> <p>McCutcheon [2] 66:11 84:20</p> <p>McGowan [1] 25:10</p> <p>mean [8] 16:23 17:5 25:9 41:13 53:8,10 77:8 80:11</p> <p>Meaning [1] 78:16</p> <p>meaningful [2] 21:24,25</p> <p>means [13] 7:16 15:18,19 18:24 24:5 25:15,20 31:19,22 36:5 50:11 66:19 71:25</p> <p>meant [6] 17:5,10 54:15 74:6 81:17 87:8</p> <p>measure [2] 13:14 72:15</p> <p>measures [3] 59:24 63:6 73:25</p> <p>mechanism [1] 22:24</p> <p>meet [4] 39:22 41:2 50:6 79:11</p> <p>members [4] 16:20 37:16 96:24 100:18</p> <p>mentioned [3] 6:9 52:2 88:9</p> <p>merely [1] 18:23</p> <p>method [3] 8:21 105:22,24</p> <p>methods [1] 56:22</p> <p>MICHAEL [5] 2:3 3:3,16 4:8 117:11</p> <p>might [3] 13:19 61:17 101:15</p> <p>miles [1] 93:3</p> <p>million [3] 24:8 47:22 58:1</p> <p>minimis [3] 11:20 29:24 62:2</p> <p>minimized [1] 79:8</p> <p>minor [1] 12:6</p> <p>minorities [35] 4:18 5:7,18 7:5,21 9:24 10:5 11:9 14:23 17:15 28:10, 15 30:7 32:6,14 33:5 35:6,11,14 40:24 42:16 55:17 63:8 69:20 74:2 92:2 99:1 100:23 101:20 108:25 109:8 117:21 118:21 119:3 120:1</p> <p>minorities' [1] 7:24</p> <p>minority [25] 5:25 6:22 7:6,18 13:15 41:12 49:13 62:20 65:5 69:8, 14 72:12 75:7 76:14 82:7 89:16 91:9,23 92:8 105:25 113:18 115:4 116:22 117:1,25</p> <p>minority's [1] 118:12</p> <p>minute [5] 38:7 43:12 62:12 93:19 116:6</p> <p>minutes [2] 24:1 26:25</p> <p>Mobile [1] 7:7</p>	<p>modify [1] 101:15</p> <p>money [1] 86:16</p> <p>monitor [1] 40:6</p> <p>months [1] 116:19</p> <p>morning [8] 4:4 27:24 30:20 63:19 82:16 86:22 109:16 111:16</p> <p>most [3] 15:13 41:18 102:17</p> <p>motivated [2] 7:3 96:23</p> <p>motivates [2] 44:17,19</p> <p>motivating [8] 77:25 78:4,23 79:3, 5,10 96:19 99:22</p> <p>motivation [5] 96:17 98:2,9 99:14 100:5</p> <p>motive [1] 44:13</p> <p>motives [2] 44:9 78:15</p> <p>move [3] 5:10 37:8 114:21</p> <p>moved [1] 56:4</p> <p>moves [2] 73:4 113:17</p> <p>Ms [49] 63:16,19 66:4,25 67:13,23 68:7,21,23 69:1,12,22 70:22 72:20 75:1,11 76:5,25 77:21 78:17 79:1,16 81:5 82:13,17,21 83:1,22 84:3,7,10,19 85:5,9,15,25 86:7,22 88:23 90:2,7,9 91:16 92:6,17,20 93:7,16,21</p> <p>much [11] 11:18,23 26:18 27:18 62:2 78:2 85:23 86:4 97:15 98:21 118:9</p> <p>multiple [1] 59:25</p> <p>murkiness [1] 111:20</p> <p>must [10] 7:17,21 23:6 41:20 48:24 63:10 77:16,23 83:6 108:7</p> <p>myriad [1] 4:20</p> <p>myself [1] 81:8</p> <p>mystery [1] 31:7</p>	<p>nine [2] 18:24,25</p> <p>Ninth [15] 11:19 16:9 23:2 43:15, 22 47:12 58:15 95:9 96:4 98:21 102:19 103:1,11 109:5 114:15</p> <p>no-excuse [1] 42:23</p> <p>non-discrimination [1] 9:14</p> <p>non-fraudulent [2] 86:8 95:13</p> <p>non-Hispanic [1] 20:6</p> <p>non-minorities [10] 5:19 9:25 26:1,5 30:7 32:14 117:22,23 118:22 120:8</p> <p>non-minority [2] 76:15 118:1</p> <p>non-race-based [1] 101:25</p> <p>non-race-related [3] 14:21 15:14 45:24</p> <p>none [1] 22:1</p> <p>nonetheless [3] 6:6 8:19 15:25</p> <p>nor [3] 12:5 28:25 95:22</p> <p>normal [2] 17:22 27:17</p> <p>normally [3] 9:13 78:3 97:9</p> <p>Northampton [1] 108:20</p> <p>noted [1] 66:12</p> <p>nothing [7] 10:9 14:2 15:5 17:18 64:20 67:1 119:22</p> <p>notion [4] 16:16 33:23 35:14 119:20</p> <p>nowhere [1] 6:8</p> <p>Number [10] 4:4 23:15 42:7 58:16 64:25 70:3,7 102:13 109:7 114:7</p> <p>numbers [1] 43:4</p> <p>numerous [2] 42:21 104:9</p> <p>nursing [1] 65:20</p>	<p>11 76:17,23 83:11,18 87:1 88:2 90:11 92:7,9,24 98:3,9 100:1 105:4,11 107:3,6 110:15 112:4 115:5 116:13 118:6,7</p> <p>one's [3] 5:4 29:8,8</p> <p>one-way [1] 94:2</p> <p>ones [1] 53:5</p> <p>only [38] 5:16,23 6:20 8:7 11:3 16:9 17:14 21:4 22:6 26:11 31:22 34:16 35:2 39:5,7 40:24 43:2 47:6,22, 25 48:24 50:2 59:20 71:19 72:24 77:18 87:3 96:2,23 97:4,9 98:2 99:15 111:10 112:23 115:25 117:16 119:5</p> <p>OOP [1] 13:4</p> <p>open [12] 10:1,3 24:2,5,22 25:15 26:16 60:19 61:10 80:7 92:5 102:4</p> <p>operate [1] 89:22</p> <p>operates [1] 80:4</p> <p>operatives [3] 21:8 31:20 40:8</p> <p>opinion [1] 91:2</p> <p>opportunities [7] 4:21 28:3 46:23 60:22 74:4 92:19 117:21</p> <p>opportunity [72] 4:14,18,24 5:3, 13,19 6:4,5 9:24 10:2,6 11:9,11, 15,19,24 12:8,9,22 13:15,25 14:3, 5,20 16:21 19:10,14,23 24:10 25:25 26:9 27:2 28:12,18,22 29:7,23 30:1,9 32:21 34:19,20,21 35:11, 15,17 36:5,5,14,19 40:25 41:15,23 48:25 49:2 58:2 61:4,8,9,22 71:7 74:2 87:9,13,23 91:23 108:17,24 111:25 115:11 118:9,13</p> <p>opposed [4] 79:20 81:21 110:23 115:9</p> <p>opposite [1] 99:1</p> <p>options [2] 46:25 58:13</p> <p>oral [9] 1:23 3:2,5,9,12 4:8 39:13 63:17 95:5</p> <p>order [4] 7:17,24 70:18 100:15</p> <p>ordinary [5] 30:21,24 31:1,11 90:15</p> <p>organizational [1] 100:14</p> <p>organizations [1] 37:15</p> <p>organized [1] 5:16</p> <p>ostensibly [1] 61:20</p> <p>other [48] 4:25 6:19 8:7 10:23 11:16 13:4 15:1 25:13 29:9,21 31:13 33:8,22 35:10,12 36:24 42:14 44:19 45:25 49:24 57:19 60:22 61:7, 7,10,24 67:5 71:21 73:22 80:20 85:20 88:11,16 90:21 92:8,15 96:24 97:16,17 100:13 101:15,18 107:5 108:15 110:3 112:10 113:2, 8</p> <p>others [4] 33:1 77:20 91:4 92:25</p> <p>otherwise [1] 17:10</p> <p>out [28] 12:15 13:14 18:23 22:2,11 38:18 41:25 44:8,18 59:4 60:24 62:11 72:10,14 73:24 76:11 77:8 78:19 84:16,16 87:14 88:3 90:18 91:2,6 92:7 101:17 118:3</p> <p>out-of-precinct [31] 16:5 22:20</p>
N			
<p>NATIONAL [3] 1:7,14 4:5</p> <p>nationwide [1] 116:10</p> <p>Native [10] 20:5 65:9 67:15,20 68:14 70:24 80:19 89:23 93:1 94:19</p> <p>nature [1] 98:25</p> <p>nearly [1] 47:22</p> <p>necessarily [3] 23:6 44:19 64:8</p> <p>necessary [3] 89:14 107:8 117:7</p> <p>need [15] 10:10 19:5 22:9 28:5 30:3 32:23 36:16 44:23 45:1 73:24 84:16 110:20 118:4 119:5,15</p> <p>needs [9] 9:25 12:12 17:9,13 20:1 28:21 31:19 81:7 89:8</p> <p>negatively [1] 101:21</p> <p>neighborhoods [4] 61:1,2 117:25 118:1</p> <p>neighbors [4] 85:12,12 94:23,23</p> <p>neither [2] 28:25 95:20</p> <p>neutral [11] 7:17 8:4 34:16 35:9 36:13 61:15,20 80:3 81:22 82:2 117:4</p> <p>neutrality [3] 9:12,17 11:1</p> <p>never [7] 6:9 27:6 31:14 46:6 63:10 69:24 86:6</p> <p>new [7] 33:5 75:14 104:4 105:4,7, 22 106:6</p> <p>next [1] 39:1</p>	<p>O'Scannlain [2] 11:21 114:14</p> <p>objective [1] 59:13</p> <p>obviously [2] 13:8 80:15</p> <p>obviously [8] 11:4 12:12 15:22 24:8 27:1 30:2 60:4 110:5</p> <p>occasion [1] 79:24</p> <p>occur [3] 5:16 32:10 84:5</p> <p>occurred [1] 64:4</p> <p>odd [1] 34:1</p> <p>offered [1] 4:21</p> <p>office [2] 20:8 93:3</p> <p>officer [1] 65:6</p> <p>offices [2] 22:11 24:25</p> <p>officials [1] 40:5</p> <p>often [3] 70:12 99:23 114:11</p> <p>Oftentimes [1] 99:18</p> <p>Okay [25] 24:11 25:14 26:7 27:3,4, 13 29:17 30:13 34:23 35:19 37:5 38:3 48:21 55:9 57:17 61:16 62:10 69:7 82:23 83:10 84:12 93:4, 15 108:21 116:3</p> <p>old [2] 33:6 107:20</p> <p>once [8] 34:4 46:17,22 49:18 56:8, 19 58:6 62:1</p> <p>one [62] 12:13,21 15:5 16:19 18:23 19:24 23:19,20 24:6,7,12 25:18 26:5,13 29:18 30:14 32:15,16 33:4,19 35:16 38:15,25 39:5,7 41:6 43:25 44:13,17 50:17 51:1,23 55:1 58:2 60:8 61:21 62:8 72:17 74:</p>		

Official - Subject to Final Review

<p>37:13,17,19 47:5,24 57:25 64:24 65:8 68:21 69:1,5,9,13,15 70:21 74:15 82:9 88:15 89:6 94:22 95: 12 103:10,21 105:6 106:15 112:9 113:8,11 114:9 outcome [5] 12:4,6,7 16:12 36:24 outcomes [2] 11:17 12:2 outlaw [1] 84:9 outliers [1] 65:3 outlined [2] 68:5 88:22 outright [1] 116:1 outweigh [1] 63:10 over [6] 4:21 94:7 95:18 102:13 104:9 116:17 overall [3] 42:18 47:14 60:18 overcome [2] 80:23 100:15 overnight [1] 10:16 overturms [1] 57:15 overwhelming [1] 111:21 own [4] 19:2 50:14 79:6 84:18 ownership [1] 20:6</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m [2] 91:7,10 PAGE [3] 3:2 28:12 60:24 part [6] 51:6,21 52:7 69:2 105:21 115:23 partially [2] 113:11 115:19 participate [7] 16:21 41:23 48:25 49:14 55:17 61:4 86:13 participation [9] 7:24 8:6 41:12 67:23 68:14 80:7 94:4 100:8 116: 22 particular [10] 20:12 49:6 52:6 65: 3 66:8 67:4 68:15 88:4 93:13 113: 21 particularly [2] 66:15 84:23 parties [3] 40:7 94:6 101:12 parties' [1] 79:18 partisan [2] 21:8 31:20 parts [2] 70:16 87:2 PARTY [5] 1:11 33:19,22 61:5 65: 23 pass [6] 64:21 89:2 90:3 107:4 108:16,17 passage [4] 99:10,15 107:5 108: 21 passed [4] 78:16,24 112:24 117:2 passes [1] 96:18 passing [2] 44:3 78:20 past [5] 12:11 44:12 64:12 76:8 81: 25 path [1] 38:20 paw [2] 43:25 44:6 pejorative [1] 98:25 pejoratively [1] 94:1 pejoratives [1] 99:3 people [39] 5:6 12:22 13:16 24:7,8, 9 26:20 31:8 34:19 42:22 46:23 47:1,14,23 48:1 55:1,1,2,4,21 56: 23,23 58:8,11,13,17 70:16 101:3 103:12,15 105:24,25 107:9,13 117:16 118:7,8,24 119:8 people's [1] 39:18</p>	<p>Perceived [1] 22:1 percent [11] 32:5 41:12,14 42:6 47: 16 48:1 58:11 69:23 73:18 89:9 118:24 percentage [3] 54:12 69:8,19 perfect [2] 12:14 46:7 perhaps [1] 107:8 period [4] 26:16 74:20 75:9,10 permanent [1] 116:10 permissible [1] 104:18 permit [2] 29:24 113:4 pernicious [1] 62:19 person [5] 4:22 37:2 55:1 70:21 71:2 pervasive [1] 97:10 Petitioners [16] 1:5,12 2:4,6 3:4,7, 17 4:9 39:14 64:9,14,21 94:1,11 111:2 117:12 Phoenix [1] 2:5 phrase [1] 113:13 phrases [1] 30:3 pick [3] 20:10 65:24 114:5 picked [2] 52:6 119:9 pickup [1] 20:8 place [38] 5:14,17 6:16,20 7:22 10: 11,14 17:12 19:25 22:24 23:21 24: 7,7,19 30:6,22 34:14,19 35:1,2,3,7 36:3,6 37:1 47:7 53:15,20 57:11 61:21 64:20 66:21 68:22 69:3 81: 23 82:2 87:12 118:8 placed [2] 35:5 37:14 placement [1] 35:4 places [3] 19:24 25:19,22 placing [1] 25:19 plain [4] 5:21 11:7 64:5 95:15 plaintiff [7] 45:16,18 70:4 74:12 76:22 100:13 106:4 plaintiff's [1] 120:5 plaintiffs [8] 49:10 50:20,23 74:21 75:2,17 77:23 102:17 plans [1] 68:25 play [1] 18:7 played [2] 97:12 99:10 plays [2] 59:19,22 pleading [1] 81:25 please [5] 4:11 39:16 56:17 63:20 95:8 plenty [2] 26:12 73:12 plethora [2] 46:25 58:12 point [17] 4:12 13:24 14:8,10 17:8, 14 18:14 33:15 41:25 42:5 48:22 56:3 60:14,16 70:23 104:4 116:17 pointed [6] 50:18 59:3 78:19 87: 14 88:3 91:2 pointing [1] 49:5 points [3] 15:4 28:21 60:24 polar [3] 87:1,10,22 policies [7] 21:6 65:2 69:11,21 88: 24,25 103:3 policy [41] 16:1,9 37:13,14,16 38: 16 45:20 59:6,13 65:8 67:11 68: 22 69:2,5,10,13,16 70:4,7,21 73:7 75:14,15 82:9 88:5,15 89:3,5,7,13, 22 93:10 94:22 95:10 103:10 113: 21 114:9,17,22 115:3,7 political [8] 40:8 49:1 64:13 75:21 77:3 80:6 86:14,15 Politics [1] 37:23 poll [2] 91:14 107:7 polling [11] 23:20 24:6,7 25:19 30: 6 47:7 53:15,20 54:22 80:2 118:7 polls [9] 14:1 25:22 35:4 42:16 54: 21 91:7,9 92:4,4 poor [1] 103:12 population [3] 32:18,22 118:5 populations [1] 32:12 position [16] 18:9 23:18 33:6 34:9, 13 66:2 67:25 71:7 87:5,10,22 90: 24 92:12,20 103:7 109:4 positions [1] 87:1 possible [1] 103:18 post [2] 20:8 93:3 post-election [1] 22:10 postal [1] 71:5 potential [1] 65:19 power [1] 33:20 powers [1] 62:24 practical [4] 5:23 64:11 76:7 80: 10 practice [17] 9:23 18:7 19:18 28: 17,24 49:4 50:4 52:7 63:25 65:23 66:24 75:20 81:12 84:6 92:24 108: 7 115:25 practices [7] 6:3,4 40:24 57:2 83: 17 105:5 115:21 precedent [1] 75:13 precedents [2] 95:17 102:8 precinct [26] 17:17 20:11,12 21:7 22:3,8 23:4,6,7 32:6,16,16 48:5,8, 10 72:8 74:15 107:10,14 114:17, 22 115:15 118:6 119:21,23,24 precinct-based [6] 73:11,14,19, 21 89:8,11 precincts [19] 23:3 31:9,16 32:13, 20,23 35:12,13 40:4 63:4 72:9 113:17 114:11,20 118:21 119:20 120:3,4,6 precious [1] 93:23 precise [1] 32:11 precisely [2] 9:22 10:5 preclear [2] 97:23 98:12 precursor [1] 97:21 predecessor [1] 33:25 preferred [1] 60:4 premised [1] 78:8 present [3] 64:12 67:5 76:8 presented [1] 53:23 presents [1] 90:18 preserves [1] 40:9 President [3] 66:22 68:5 111:22 pressure [4] 30:24 36:3 65:21 66: 21 pressures [1] 68:4 pretty [4] 26:18 60:16 85:17 101: 13 prevail [1] 100:9 prevailed [1] 102:18 prevent [3] 82:25 83:5,8</p>	<p>preventing [3] 83:2 86:2,10 prevents [1] 13:20 principle [1] 102:10 principles [2] 8:4 100:14 prior [3] 19:5 44:17 108:21 Probably [2] 96:21 103:13 problem [7] 6:23 25:8 29:1 108:8, 22 118:2,21 problematic [3] 85:21,22 87:6 problems [1] 68:4 procedure [1] 75:20 procedures [3] 7:15 42:14 69:3 proceeds [1] 109:9 process [12] 5:4 20:18,21,21 49:1 57:13 60:18,19 64:13 77:3 86:14, 15 produce [1] 119:17 producing [1] 72:2 Professor [2] 14:15 45:8 prohibited [4] 11:5,6 16:11 109: 10 prohibiting [1] 85:10 prohibition [2] 55:11 111:9 prohibits [2] 19:13 40:23 project [1] 104:2 promotion [1] 5:3 prong [1] 56:4 prongs [3] 49:9 56:19 98:5 proof [3] 49:11 57:19 101:23 properly [1] 40:12 prophetic [1] 116:16 prophylactic [2] 85:20 86:11 prophylactic-upon-prophylact ic [1] 84:22 prophylactics [1] 85:19 prophylaxis [2] 66:13,14 proportionality [11] 7:10 10:12 15:23 18:14,15,19 66:18,20 67:1, 9 68:1 proportionally [1] 10:7 propose [1] 114:13 proposed [1] 116:20 prospects [1] 94:17 protect [1] 116:23 protected [2] 16:20 48:24 protecting [1] 39:18 protection [1] 116:25 protects [2] 40:8 93:25 prove [5] 7:4 13:19 70:4 73:7 77: 14 proven [2] 95:18 116:14 provide [9] 6:3,5 7:20 12:22 25:25 28:22 32:13 87:13 117:20 provided [8] 6:18 7:5 12:9 32:23 35:18 61:13 104:15 105:12 provides [2] 46:25 58:7 providing [6] 11:9,10 19:14 34:21 74:1 117:16 provision [2] 28:20 41:9 provisional [1] 48:11 proximate [7] 28:6 108:1 109:22 110:3,6,20 111:1 proxy [3] 42:2 44:25 62:21 Public [1] 39:17</p>
---	---	---

Official - Subject to Final Review

<p>pure ^[4] 87:22,23 111:24,25 purpose ^[2] 22:8 78:5 purposes ^[3] 23:4,5 73:6 pursuit ^[1] 66:20 put ^[6] 30:24 32:15 35:13 98:21,22 118:17 puts ^[5] 18:22 33:5 37:21 50:1 88:12</p>	<p>23 76:8 89:9 118:6 really ^[19] 8:6 9:16 28:8 30:8 33:12 35:24 36:3,7 52:25 53:14 54:24 72:5 73:4 76:16 77:7 80:15,23 97:7 103:1 reason ^[18] 6:25 8:24,25 11:11 14:21,25 15:12,14 33:19 45:9,24 51:6,20 52:6 114:25 115:1,2 119:13 reasonable ^[1] 93:18 reasonably ^[1] 101:20 reasons ^[6] 12:13 20:14 40:21 78:20 91:8 96:12 REBUTTAL ^[3] 3:15 117:10,11 received ^[3] 76:20 119:6,12 recognition ^[1] 44:17 recognize ^[2] 70:2 73:5 recognized ^[2] 44:12 83:3 recommend ^[1] 66:23 recommendation ^[1] 112:8 recommendations ^[1] 112:18 recommended ^[1] 65:22 Reconstruction ^[1] 62:25 record ^[9] 26:13 67:14 69:13 78:1 83:6,16 96:25 98:3 107:11 redistricting ^[1] 42:4 reduce ^[1] 92:18 reduces ^[2] 6:15 115:11 reducing ^[4] 61:8,8,23 75:3 reemphasize ^[1] 33:23 refer ^[2] 16:21 47:5 referred ^[3] 32:24 58:16 83:14 refers ^[1] 87:19 reflection ^[1] 88:14 reflects ^[1] 107:11 regarding ^[1] 47:4 regardless ^[3] 7:2,18 46:24 register ^[1] 32:2 registered ^[1] 4:19 registration ^[1] 7:23 regulate ^[4] 36:2,2 40:12 73:13 regulation ^[2] 60:12 64:17 regulation-by-regulation ^[2] 60:13 92:13 regulations ^[8] 30:21 31:1,2 57:12 81:16,23 92:22 95:22 rejection ^[2] 64:8 95:21 rejigger ^[1] 7:21 related ^[1] 71:16 relates ^[2] 5:2 17:25 relating ^[1] 47:17 relationship ^[1] 28:2 relationships ^[1] 44:9 relative ^[4] 20:10 37:22 61:24 118:22 relevant ^[6] 36:1 59:2 87:16,18 88:25 113:3 relies ^[1] 63:24 religions ^[1] 25:13 rely ^[3] 67:16 70:25 105:25 relying ^[1] 115:10 remained ^[1] 116:10 remedied ^[1] 60:2 remedies ^[1] 22:10 remedy ^[2] 21:2,5</p>	<p>remind ^[1] 78:13 remove ^[1] 94:8 render ^[1] 70:8 repeat ^[1] 112:7 repeatedly ^[2] 19:13 93:22 report ^[5] 18:25 50:18 68:6 112:16,19 represent ^[1] 43:19 representative ^[1] 55:7 representatives ^[2] 41:1 49:2 REPUBLICAN ^[2] 1:11 61:5 require ^[16] 5:6 20:9 29:25 46:13,16 49:5,8 50:8 52:20 53:9 66:20 85:24 86:5 102:9,15 104:19 required ^[1] 75:18 requirement ^[7] 36:23 40:23 48:23 57:3 73:1 105:3 109:6 requirements ^[1] 63:3 requires ^[13] 9:16 12:13 31:10,14 38:15 39:23 40:16 50:3 51:4 64:8 67:21 68:3 110:12 Requiring ^[1] 40:3 reservation ^[1] 93:2 reservations ^[1] 67:20 residents ^[2] 61:1,2 resources ^[1] 100:15 respect ^[12] 22:2 70:24 74:14 76:2 78:10 83:23 86:11 89:17 98:1 103:18,21 106:14 Respondent ^[3] 2:8 3:11 63:18 Respondents ^[8] 1:9,16 2:10 3:14 5:10 10:4 16:11 95:6 Respondents' ^[3] 6:1 7:11 42:11 response ^[3] 32:8 49:25 60:17 resting ^[1] 64:15 Restricting ^[1] 40:6 restriction ^[5] 6:20 10:15 17:12 82:2,4 restrictions ^[16] 10:11 34:15 35:1,8 61:21 63:5 80:20 81:2,3 86:11,13,15 87:12 116:16,21 117:5 rests ^[1] 100:13 result ^[19] 9:23 11:4,7,8,10 14:22 15:7 19:18 29:11 38:17 40:24 63:11 96:5 100:19 104:1,6 109:11 115:18,18 resulted ^[4] 84:14 95:20 104:1 107:1 results ^[16] 6:17 8:8,9 11:17 13:21 15:18 19:3 21:1 39:20 41:11 64:15,19 87:4,22 100:20 111:24 retrogression ^[1] 33:15 return ^[2] 27:25 77:12 reverse ^[1] 63:12 review ^[1] 117:7 rewriting ^[1] 19:12 rid ^[2] 24:18 101:18 Rights ^[8] 9:18 49:25 50:15 62:16 94:16 95:14 108:22 117:1 Rigorous ^[1] 116:24 rise ^[2] 41:21 57:20 risks ^[2] 90:25 91:5 RNC ^[5] 37:10,18 100:7,9,21 ROBERTS ^[75] 4:3 6:11,13 7:8 8:3,</p>	<p>5,22 9:1,3,5,7 12:18 16:14,17 19:7 23:8,10,12 27:22 30:16 34:2,6 38:7 39:10 40:15,20 41:4,8,11,17 42:8,12 43:5 45:5 47:2 49:16,21 52:12 56:10,14 58:21 60:6 62:12 63:14 65:15 66:16 67:7,22,24 68:16 71:13 74:8 77:9 79:15 82:14 86:18 89:25 90:5 93:19 95:2 96:7 97:5,14,25 98:14 101:6 103:4 104:24 107:15 109:14 111:14 114:2 116:5 117:9 120:9 role ^[4] 18:7 59:19,22 99:10 roles ^[1] 100:7 room ^[1] 101:22 roughly ^[5] 14:19 17:21 32:22 71:22 72:17 outed ^[1] 95:15 rule ^[25] 10:13,22 13:20 25:1 33:5,6,7 57:3 75:23,23 76:19 80:3 88:8,10,13 91:1,7,14,14 103:8,14,19 106:6 108:10 117:17 rules ^[11] 5:14,17 8:16 15:3 37:20 38:25 47:17 64:9 91:3 112:5,12 ruling ^[2] 91:5 100:23 run ^[6] 23:16 46:1 62:3,4 63:2 80:14 run-on ^[1] 90:8 rural ^[2] 70:15,16</p>
<p style="text-align: center;">Q</p> <p>qualification ^[2] 19:18 62:15 Qualifications ^[1] 34:18 quarrel ^[1] 115:20 question ^[39] 8:17,18 11:5,13,14 12:7,8,21 14:15 29:21 37:9 47:25 48:15,19,20 51:20 52:1,5 56:21 64:3,6,17 72:3,4,5 73:9 77:12 79:3 80:1 85:18 89:13 90:10 92:15 99:16 101:24 110:15 112:7 114:14 115:1 questionable ^[1] 43:23 questions ^[8] 12:20 28:1 40:14 65:14 71:16 96:6 100:7 105:4 quibble ^[2] 29:9 72:24 quickly ^[1] 23:17 quite ^[6] 70:15,17 80:15 97:7 118:7 119:13 quo ^[1] 26:18 quote ^[1] 96:14 quoting ^[1] 61:5</p>		<p style="text-align: center;">S</p> <p>sacred ^[1] 39:17 safe ^[1] 17:13 same ^[32] 6:5 8:1 10:2,6 11:11,12 12:9,22 13:15 14:19 26:20 28:12 35:11,15 40:21 46:4 52:15 55:14 61:25 71:22 72:18 74:17,24 75:9 76:23 77:1 101:11 103:9,22 117:20 118:13 119:19 Saturday ^[3] 25:7,11,12 saying ^[23] 5:5 10:1 19:13 31:25 33:13 35:23 46:4 67:14 68:8 69:19 71:1 81:1,21 82:19 86:1,6,7 88:4 89:2,7 90:25 92:24 108:3 says ^[17] 6:2 9:23,25 10:10 11:16 13:25 19:17 25:19 26:10 30:21 31:13 46:3 60:16 69:25 76:19,22 90:13 scale ^[2] 27:16 88:12 schedules ^[1] 119:25 scrutinizing ^[2] 66:15 84:24 sea ^[1] 10:19 searching ^[2] 64:11 86:12 second ^[6] 33:7 45:18 53:18 56:4 73:9 89:17 secondly ^[2] 88:9 107:4 secrecy ^[1] 40:9 Secretary ^[12] 2:8 3:11 60:15 63:18 65:7 66:23 68:5,25 82:18 90:7 94:18 107:10 Secretary's ^[1] 85:4 Section ^[66] 5:15,22 6:2,2,18 10:3,8,10,23 11:7 12:5 15:6 17:14,19 19:12 28:16 29:2 30:23 33:11,16,</p>	
<p style="text-align: center;">R</p> <p>race ^[20] 9:12,17 13:22 14:24 15:10,15,17,18 19:20 63:1 64:5 70:5 71:25 72:1 73:8 95:23 96:19,23 111:6 114:10 race-conscious ^[1] 8:1 race-neutral ^[3] 30:21 60:3 87:13 races ^[4] 26:13 40:5 67:11 74:5 racial ^[19] 7:10 33:9 36:17 62:16 63:7 66:18,20 67:1,9 68:1 78:8 96:17 97:6 98:2,9 99:13,21 100:4 108:24 racially ^[3] 7:3 78:8 105:13 racist ^[1] 58:19 raised ^[3] 96:9 100:7 114:15 ratchet ^[2] 94:2,3 rate ^[1] 69:14 rates ^[1] 20:7 rather ^[6] 6:17 25:1 63:22 110:20 114:17 117:6 rational ^[1] 32:1 Rayes ^[1] 57:8 reach ^[1] 79:3 reached ^[1] 96:4 read ^[3] 15:24 18:17 108:3 reading ^[3] 15:21 29:10 87:1 Reagan ^[1] 111:22 real ^[6] 21:9 25:8 27:7 29:15 80:17 94:18 realistic ^[1] 32:21 realities ^[7] 30:4 32:9 79:22,24 80:10 81:7 87:16 reality ^[8] 24:6 64:12 71:9 73:16,</p>			

Official - Subject to Final Review

<p>17 34:13 37:25 39:6,23 40:23 41:25 46:16 50:8,8 56:3 62:24 64:5,15,19,22 65:1 69:25 70:8 74:6,11 75:16 76:6,11,21,22 81:11,17,24 87:3,8,19 91:13,15 93:25 94:2 95:14,16 103:9,11 104:18 110:5 111:9,18 116:10,25</p> <p>secure [1] 33:23</p> <p>securing [3] 63:11 66:7 68:9</p> <p>security [1] 33:22</p> <p>see [8] 9:13 13:15 19:10 36:6 73:14 76:16 82:5 91:21</p> <p>seeing [1] 102:3</p> <p>seem [6] 27:9 34:1 61:14 88:1,6,11</p> <p>seemed [1] 61:19</p> <p>Seems [5] 26:17 27:8 45:10 86:25 101:12</p> <p>seen [1] 116:19</p> <p>semantic [1] 29:9</p> <p>Senate [5] 18:25 50:18 108:4 111:4 112:3</p> <p>Senator [2] 78:6 97:10</p> <p>send [2] 5:6 60:20</p> <p>sends [1] 60:25</p> <p>sense [7] 11:3 32:25 33:2 86:25 88:2,7 95:21</p> <p>sent [1] 31:24</p> <p>sequence [1] 98:11</p> <p>seriously [1] 51:5</p> <p>servants [1] 39:17</p> <p>serve [6] 23:3,3,6 59:6,12 63:8</p> <p>serves [1] 23:5</p> <p>service [1] 71:4</p> <p>serving [1] 32:20</p> <p>set [1] 72:25</p> <p>sets [1] 99:3</p> <p>Seventh [1] 40:21</p> <p>several [4] 58:25 98:8 102:13 112:2</p> <p>severe [1] 10:16</p> <p>severely [1] 12:4</p> <p>SG [4] 107:20,21,22 111:1</p> <p>share [1] 61:25</p> <p>she's [1] 61:4</p> <p>Shelby [1] 116:9</p> <p>shift [1] 46:15</p> <p>Shooter [5] 78:6 97:11,17 98:3,10</p> <p>shortening [1] 106:2</p> <p>shouldn't [3] 102:16 108:4 109:5</p> <p>show [18] 17:17 31:8 45:16,18,23 48:24 49:11 74:12,22 76:12 77:18,24 79:9,11 93:8 103:18 109:7 115:15</p> <p>showed [3] 48:4 69:13 76:23</p> <p>showing [1] 101:23</p> <p>showings [1] 62:23</p> <p>shown [4] 55:22 74:14 75:25 103:20</p> <p>shows [2] 67:15 68:12</p> <p>side [5] 11:16 31:13 57:19 90:21 108:15</p> <p>sides [1] 101:12</p> <p>significant [7] 42:15 45:17 55:11</p>	<p>73:1,3 101:17 102:18</p> <p>similar [2] 33:9 99:2</p> <p>similarly [1] 80:9</p> <p>simple [3] 16:4 51:19 85:17</p> <p>simply [19] 8:20 9:2 25:5 34:21 35:20 45:9 47:24 68:7 70:6 71:1,22 72:1 73:2 79:7 82:1 86:9 92:23 99:16 119:24</p> <p>since [5] 4:23 5:12 36:15 71:18 116:18</p> <p>single [3] 64:25 89:19 119:17</p> <p>sir [1] 20:2</p> <p>situation [3] 24:9 38:25 54:11</p> <p>situations [1] 45:14</p> <p>Sixth [1] 40:22</p> <p>size [1] 73:6</p> <p>skeptical [2] 29:12 57:14</p> <p>skew [1] 36:21</p> <p>sliding [1] 27:16</p> <p>slight [1] 58:4</p> <p>small [4] 20:7 58:16 62:2 70:6</p> <p>so-called [1] 81:22</p> <p>social [1] 81:12</p> <p>socioeconomic [14] 6:6 10:17 28:14,23 31:16,18 38:23 74:17 91:8 92:1 103:23 118:11,16 119:20</p> <p>Solicitor [7] 18:3,22 28:4 29:4,14,16 109:18</p> <p>Solicitor's [1] 28:25</p> <p>somehow [8] 6:7 10:7 16:6 17:19 33:24 38:18 58:18 119:3</p> <p>someone [4] 48:4 55:6 70:19 99:1</p> <p>sometimes [2] 100:19 110:3</p> <p>somewhat [3] 15:23 98:22,25</p> <p>sorry [7] 12:16 21:11 27:21 42:12 48:16 50:14 90:8</p> <p>sort [6] 16:3 30:4 41:1 57:15,16 65:18</p> <p>sorts [2] 17:18 19:3</p> <p>Sotomayor [43] 19:8,9,22 20:2,4,20,24 21:10,14,17,20 22:12,16,19,23 49:17,22,23 50:9,13,19,22,25 51:3,11,14,17,25 52:4,10 77:10,11 78:12,18 79:13 96:8 104:25 105:1,17 106:9,13,19,21</p> <p>speaks [5] 9:22 11:19 87:3,9 106:1</p> <p>specific [4] 72:4,16,19 76:9</p> <p>specifically [1] 80:13</p> <p>specious [1] 27:18</p> <p>spectrum [3] 81:2,2,16</p> <p>spending [1] 86:16</p> <p>SPIVA [4] 2:9 3:13 95:4,5,7 96:21 97:8,18 98:4 99:7 100:12 102:5 103:25 104:7 105:15,20 106:11,18,20,24 107:16,17,24 109:3,13,17,20 110:9,18,22,25 112:15 113:10,25 114:4,24 115:7,17 116:5,7 118:16</p> <p>spoke [1] 107:18</p> <p>spot [1] 91:9</p> <p>spread [1] 44:14</p> <p>square [1] 86:24</p> <p>squarely [1] 116:21</p>	<p>stacked [2] 5:17 117:23</p> <p>stage [1] 81:25</p> <p>standard [15] 11:1 72:21,25 75:20 102:9,12 104:8 106:25 108:2,6 109:24 110:13 111:1,10 114:13</p> <p>standards [8] 14:16 71:17,20 72:2,18 79:18 101:13,15</p> <p>standing [8] 37:11,12 43:11,13 100:10,13,14,21</p> <p>stands [1] 100:23</p> <p>stark [1] 38:11</p> <p>start [1] 80:13</p> <p>started [1] 98:12</p> <p>state [70] 5:16,24 8:16 11:14 12:8 14:4,5,20 16:1,13 18:12 19:5 21:2 22:20 23:19 24:16,17 25:19 26:10 31:19 35:18 36:15,20,25 37:3 38:18,21 40:23 43:16,17,19 46:22 50:1,3 52:6 57:15 60:25 63:13 65:7,11 68:25 69:8,20 70:14 74:19 75:14,14,21,23 76:19 79:10 82:11,17,18,24 83:5 84:2,17,18 87:16 88:5,10,13 89:1,5,7 90:3 103:2 104:12,15</p> <p>state's [8] 18:6 45:20 63:2 81:12 86:9 88:8 93:13 102:21</p> <p>stated [2] 107:10 118:5</p> <p>statements [2] 99:17,19</p> <p>STATES [29] 1:1,24 33:8 39:22 40:12 57:10 66:6 67:5 68:8 70:9 72:8 73:10,12,22,24 83:2 84:15 85:7,20 88:11,16,17,17 112:10 113:2,4,8,9 118:17</p> <p>statewide [1] 64:22</p> <p>stations [2] 54:22 80:2</p> <p>statistical [16] 41:14 46:19 57:16,18 58:3,4 62:2 64:16 74:12,24 76:1,10,24 77:1 91:20 103:20</p> <p>statistics [3] 47:4,11,13</p> <p>status [1] 26:18</p> <p>statute [25] 9:14 15:25 16:10 18:18 19:11 24:3 29:8,11 51:10,11,18 61:9 62:4 65:9 69:3 71:24 87:2,7,9 89:18,21 102:7 110:8,10 111:22</p> <p>statutes [6] 15:1 43:18 45:11 49:25 57:9,15</p> <p>statutory [8] 29:13 40:19 46:5 59:3 64:6 86:23,24 90:17</p> <p>step [2] 28:10 62:6</p> <p>Stephanopoulos [3] 46:2 102:10 107:19</p> <p>Stephanopoulos's [2] 14:16 45:9</p> <p>still [8] 38:23 61:10,22 68:22 73:10 90:4 111:2 116:12</p> <p>stop [3] 30:15 53:18 108:15</p> <p>stopped [2] 36:19,20</p> <p>straight [1] 18:19</p> <p>straightjacket [1] 118:18</p> <p>strength [3] 7:18 15:8 18:6</p> <p>strike [2] 66:17 117:7</p> <p>strikes [1] 34:10</p> <p>strong [3] 7:19 93:16 112:11</p>	<p>strongly [2] 60:4 87:5</p> <p>struck [3] 68:2 96:2 104:19</p> <p>subdivision [1] 75:21</p> <p>subjecting [1] 16:1</p> <p>submits [1] 94:18</p> <p>submitted [2] 120:10,12</p> <p>subordinating [1] 8:2</p> <p>substantial [24] 11:22 12:13 39:23 40:17 41:13,16,19 42:7,19 43:3 45:2 49:12 51:2 52:21 54:11 55:16,20 57:6,21 59:21 62:8,23 73:4 90:14</p> <p>substitute [1] 8:15</p> <p>successful [1] 64:22</p> <p>succinctly [1] 57:5</p> <p>sufficient [1] 103:24</p> <p>suggested [3] 28:4 34:5 87:11</p> <p>suggesting [1] 38:21</p> <p>suggests [1] 112:11</p> <p>sum [1] 37:23</p> <p>Sunday [5] 24:18,20,24 25:2,10</p> <p>superiors [1] 44:10</p> <p>support [3] 88:8 104:8 111:21</p> <p>supports [1] 87:5</p> <p>supposed [2] 31:1 72:14</p> <p>supposedly [1] 70:20</p> <p>suppress [1] 7:5</p> <p>SUPREME [2] 1:1,23</p> <p>surely [1] 10:18</p> <p>susceptible [1] 65:21</p> <p>suspect [1] 96:20</p> <p>suspicion [1] 33:3</p> <p>stuff [1] 41:25</p> <p>swath [1] 117:4</p> <p>sympathetic [1] 26:6</p> <p>synonymous [1] 28:11</p> <p>system [30] 7:17 8:18 9:25 10:2 11:8 17:22 22:8 23:3,4,6 24:2,22 26:16 28:21 31:14,22 36:21 58:6 60:10 80:6 89:8,11 92:13,22 114:17 117:20,22 118:23,25 119:2</p> <p>systems [8] 7:1 18:12 23:7 38:12 46:21 73:15,19,21</p>
T			
<p>tad [1] 29:12</p> <p>talked [3] 29:10 80:9 87:17</p> <p>talks [4] 11:22 51:14,18 75:19</p> <p>tape [3] 72:14 73:24,24</p> <p>taught [1] 28:9</p> <p>teeth [1] 48:23</p> <p>tells [2] 11:8 64:5</p> <p>Ten [1] 54:20</p> <p>tenth [1] 47:16</p> <p>tenuousness [2] 16:8 102:22</p> <p>terms [13] 9:20,22 11:19 15:21 32:19 33:15 35:17 97:20 102:9 106:1,11 113:1 119:19</p> <p>territory [1] 26:4</p> <p>test [67] 4:15 6:14,17,17 12:21 13:1,2,3,24 14:16 15:18 19:2 28:3,3,6,25 29:1 31:23 32:8,10 36:13,17 37:3 39:5,21 40:2,11 41:18 44:22,23 45:9 46:11 49:8,24 50:2,14,16,</p>			

Official - Subject to Final Review

<p>21 51:3,7 52:8,20 62:7 64:15,19 72:23 93:6,8 95:10,15,20,25 96:4 97:3 98:6 104:16 107:19,20 108: 13,16,18 109:6,18 110:7,16,21 117:2</p> <p>tests [5] 30:10 46:2,14 108:10,20 text [18] 6:2,9 10:10,23 38:13 39:5 46:15 50:7 51:10 59:3 61:9 64:5 69:25 75:12,19 86:24 95:15 106:1</p> <p>textual [1] 73:3</p> <p>Thanks [2] 77:8 114:1</p> <p>Theirs [1] 38:15</p> <p>theory [2] 43:22,25</p> <p>There's [4] 4:15,23 5:12 6:21 8: 24,25 10:9 13:8,12 15:5 17:18 26: 12 28:8 30:11 32:18 33:18 42:15, 22 43:3,10 46:19 53:11 54:10 55: 10 58:10 59:11 61:10 66:18 68:24 74:24 76:1 81:1 90:16 101:22,23, 24 118:1,3,10,20 119:14</p> <p>therefore [3] 14:22 32:16 65:12</p> <p>they'll [1] 39:1</p> <p>thinking [1] 80:13</p> <p>third [2] 40:7 45:22</p> <p>third-party [1] 115:11</p> <p>Thomas [28] 8:23 9:8,9,21 10:25 11:18 12:1,15 28:1 29:21 43:7,8, 14,21 44:5 68:18,19,24 69:7,18 70:12 71:12 72:6 77:12 98:16,17 100:6 101:8</p> <p>though [5] 9:19 80:2 91:17 96:25 115:24</p> <p>thoughts [2] 57:5 110:6</p> <p>thousand [3] 55:2,4 72:11</p> <p>threat [4] 21:9,24,25 22:1</p> <p>three [11] 45:15 46:1,3,4,9 47:10 53:7,8 76:21 77:18 116:19</p> <p>threshold [3] 36:23 102:16 109:6</p> <p>thresholds [1] 41:3</p> <p>thumb [1] 88:12</p> <p>tinged [1] 105:13</p> <p>Title [14] 5:1,5 14:6,17,17 43:17 45: 12,12 46:14 49:24 74:11 101:14, 15 110:4</p> <p>today [2] 81:22 117:1</p> <p>tolerate [1] 68:3</p> <p>took [2] 58:15 81:20</p> <p>total [1] 62:8</p> <p>totality [36] 16:7 41:21 43:4 45:2 46:20,21 47:14 50:15 51:4,17,18, 21 52:7 56:12,20 58:5 59:1,8,20, 23 62:9 64:7 71:11 81:18 87:17, 19,25 88:19 93:12 102:22 104:16 105:8 108:5 109:9 110:11 112:1</p> <p>touch [1] 96:8</p> <p>touched [2] 28:1 29:21</p> <p>town [1] 20:9</p> <p>tradition [1] 101:25</p> <p>traditionally [2] 24:25 25:23</p> <p>transportation [2] 5:7 119:25</p> <p>travel [3] 26:4,5 70:18</p> <p>treat [1] 117:24</p> <p>treatment [3] 9:16 118:4,11</p> <p>trial [3] 53:24 54:4 57:8</p>	<p>tried [1] 58:17</p> <p>trigger [1] 33:2</p> <p>triggers [1] 91:13</p> <p>true [5] 6:23 31:21 61:6 64:18 84: 25</p> <p>try [4] 38:21 74:9 82:25 86:24</p> <p>trying [7] 5:10 20:22 54:24 90:18 94:7,8 101:3</p> <p>Tuesday [1] 1:20</p> <p>turn [3] 23:11 72:9 88:24</p> <p>Twain [1] 47:10</p> <p>two [30] 12:13,20 15:4 19:24 24:16, 19 28:21 32:25 33:1,10 38:12 44: 15 52:22 57:2 71:15 72:18 74:20 77:18 78:15 85:13 86:25 87:25,25 88:20 96:16,23 105:4,5 112:15 115:5</p> <p>two-and-a-half [1] 23:25</p> <p>two-prong [1] 44:23</p> <p>twofold [1] 51:23</p> <p>types [1] 47:10</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ubiquitous [1] 10:18</p> <p>ubiquity [1] 118:16</p> <p>Ultimately [1] 55:5</p> <p>unable [1] 75:7</p> <p>unconstitutional [2] 58:19 61:14</p> <p>Under [36] 5:1 6:18 7:10 9:11,15, 14:5 15:17 16:7 18:20 26:6 28:16, 25 29:1 30:1 32:10 33:6,11,16,17 36:4 40:1 41:20 49:7,24 50:15,21 54:9,9 71:10 87:7 93:7 102:22,22 103:9 109:9 119:4</p> <p>undermine [1] 100:10</p> <p>undermined [1] 117:4</p> <p>understand [17] 4:13 6:14 7:12 9: 12 16:10 17:6 18:4 34:9,24 48:19 61:23 67:25 69:18 77:7 86:3 100: 21 110:25</p> <p>understanding [3] 18:8 23:17 105:10</p> <p>understood [2] 34:12 79:19</p> <p>undertake [1] 81:18</p> <p>underutilization [1] 28:15</p> <p>unequal [3] 7:1,2 19:14</p> <p>unfairness [2] 7:20 8:19</p> <p>Unfortunately [1] 94:11</p> <p>uniform [1] 22:9</p> <p>uniformity [1] 72:2</p> <p>UNITED [3] 1:1,24 70:9</p> <p>unjustified [2] 16:6 94:9</p> <p>unlawful [2] 6:6 37:24</p> <p>unless [1] 10:6</p> <p>unrealistic [1] 35:17</p> <p>unsolicited [1] 60:25</p> <p>until [2] 69:4 97:23</p> <p>untrue [1] 119:4</p> <p>up [24] 8:8 17:17 20:10 27:21 31:8 38:5,8 42:25 48:4 49:20 62:13 65: 24 71:20 77:17 85:13 86:24 93:20 94:3 104:4,23 114:5 115:15 116:6 119:9</p> <p>upheld [1] 104:13</p>	<p>uphold [1] 57:12</p> <p>upsetting [1] 60:2</p> <p>uptick [1] 116:20</p> <p>urge [1] 63:12</p> <p>urges [1] 40:10</p> <p>uses [3] 14:18 110:3,4</p> <p>using [6] 13:20 15:3 72:17 84:5 95: 25 104:16</p> <p>usual [10] 16:22,25 17:6,10,15,23 26:24 31:6,11 32:1</p> <p>utilization [3] 6:8 10:17 28:24</p> <p>utilize [4] 4:20 10:6 11:12 118:12</p> <p>utilized [1] 118:24</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacuum [1] 19:17</p> <p>valid [2] 22:14 40:1</p> <p>valuable [3] 8:13 23:4,5</p> <p>variety [1] 88:17</p> <p>Veasey [1] 104:21</p> <p>versus [8] 4:5 7:7 42:5 55:1,2 75: 14 90:11 104:11</p> <p>VI [2] 14:17 45:12</p> <p>via [1] 60:21</p> <p>viability [1] 12:5</p> <p>video [2] 97:11 98:10</p> <p>view [11] 6:1 32:15 33:11 64:13 72: 17 77:3,4 85:4 94:15 100:25 112: 14</p> <p>views [1] 105:19</p> <p>VII [9] 5:1,5 14:6,17 45:12 46:14 49: 24 101:14 110:4</p> <p>violate [4] 5:15 30:23 91:14 103: 11</p> <p>violates [1] 95:13</p> <p>violation [2] 56:2 76:11</p> <p>Virginia [2] 104:12,17</p> <p>virtually [2] 10:14 17:11</p> <p>virtually [1] 94:12</p> <p>vote [89] 4:16,16,20,22 7:6 13:25, 25 14:1,3 16:8 19:14,19 20:5,10, 11,13,14,15 21:1,7 24:10,20 26:15 28:10 33:20 34:19,21 35:2,15 36: 14,22 37:2,24 39:18,23 40:5,25 41:16,23 42:18,22,23,25 44:18,20 46:23 48:9 56:23 57:4 58:8,9,12 61:7,24 63:24,25 64:1 65:20 70:5, 18,25 71:1,2,3 75:8,25 81:10 91:4 93:9,11,24,24 94:5,21 95:18 100: 20,24 101:1,4,5 102:14 106:2 107: 1 108:16 115:10,12,14 116:2 119: 18</p> <p>voted [11] 21:22 37:17 47:8,15,23 48:2 58:17 73:18 89:10 107:9 119: 10</p> <p>voter [17] 37:19 40:8,11 63:21,23, 24 64:23 65:19 70:1 77:5 93:2,8 104:11,12,17 112:22 119:17</p> <p>voters [56] 6:22,22 23:23,25 24:20, 21 25:21 26:13 28:22 37:15 40:3 41:13 46:18 47:6,8 54:13,14 55: 23 60:20 61:7,11,24,25 62:20 65: 5,10 67:3,17 69:8,14 70:3,7,25 71: 2,10 73:18 75:7 76:2,14 80:1,5,5,</p>	<p>18,19,20 82:7 89:10,16,24 91:9,24 92:8 94:7,8 95:11 105:13</p> <p>voters' [1] 49:13</p> <p>votes [6] 5:20 47:22 54:7 57:24 114:18 115:4</p> <p>voting [104] 4:14,17 5:12,25 6:3,4 7:18,23 8:21 9:18,23 16:5,22 17:1, 7,16,24 18:6 19:18 22:2 24:17,18 26:11 28:17,24 30:22 31:6,8,11, 12 32:2 36:16,19,21 39:8 40:23 42:16,24 45:4 46:21 47:5,18,25 48:4,7,9,14,14,18,19 50:15,15 54: 13 56:21,24 57:2,25 58:6,7,8 60: 22 62:16,17 63:1,10 64:23,24 67: 20 72:9 73:11,14 74:15,20 78:7 80:4 86:14 90:15 92:9 94:16 95: 14,21,23 103:8,14,19,21 105:3,6, 23,24 106:8,15 108:10,15,22 116: 11,12,16,20 117:1,4,8,20,22</p> <p>vulnerable [1] 103:8</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait [3] 23:24 54:7 84:5</p> <p>wake [1] 111:19</p> <p>wanted [1] 80:24</p> <p>wants [2] 33:23 94:5</p> <p>war [1] 6:2</p> <p>warmly [1] 29:12</p> <p>Washington [4] 1:19 2:3,7,9</p> <p>way [14] 5:18 13:14 21:4 22:6 31:4 43:2 52:15 80:4 89:22 99:5,20 101:5,18 107:5</p> <p>ways [5] 42:21 45:25 56:23 58:13 61:7</p> <p>wealth [1] 100:3</p> <p>week [1] 76:23</p> <p>weeks [3] 24:16,19 74:20</p> <p>weigh [1] 112:13</p> <p>weight [3] 36:8 98:21,22</p> <p>welcome [3] 65:13 96:6 102:3</p> <p>whatever [3] 11:11 14:22 33:25</p> <p>whatsoever [1] 22:1</p> <p>Whereas [2] 31:13 107:6</p> <p>Whereupon [1] 120:11</p> <p>whether [31] 7:2 13:3,4 16:19 26:8 29:13 33:7 43:3 44:24 45:3 52:21 54:10 56:5 60:10,11 64:3 73:7,10 78:13,13 82:5 89:4,13 91:21 92: 15 99:13,21 104:3 109:10 110:13 118:3</p> <p>white [10] 4:17 6:22 23:24 24:21 54:13 61:1,24 67:17 80:5 113:19</p> <p>whites [3] 35:12 54:8 99:3</p> <p>who've [1] 119:8</p> <p>whole [7] 22:24 41:25 58:12 60:11 80:14 92:14,23</p> <p>whom [2] 32:19,19</p> <p>wide [1] 88:17</p> <p>widely [1] 97:12</p> <p>will [24] 4:3 12:10 16:15 17:13 18: 20 19:3 26:24 30:23 46:7,8 55:23 64:16 72:9 73:6 82:19 89:22,23 100:24 101:1,1,3 103:13,18 104:5</p> <p>win [2] 72:6 94:7</p>
---	---	---	--

Official - Subject to Final Review

winning ^[1] 38:1
withdrawn ^[3] 29:19 97:21 109:21
within ^[6] 9:18 10:7 46:21 75:8,10
 76:20
without ^[7] 33:21 59:13 60:2 62:
 15,23 78:25 119:18
wonder ^[1] 70:13
wonderful ^[1] 15:13
wondering ^[1] 98:23
word ^[3] 29:7 30:24 101:17
words ^[9] 6:19 8:7 15:9 35:10,13
 36:24 42:15 61:8 77:7
work ^[8] 26:14 55:21 91:11 92:2
 99:21 100:5 113:20 119:25
workable ^[3] 40:11 41:18 95:18
workers ^[3] 25:2,7 65:23
working ^[2] 26:21 106:16
workplace ^[1] 65:20
world ^[2] 15:14 27:7
worse ^[1] 33:5
wrap ^[4] 38:8 62:13 93:20 116:6
written ^[1] 20:3

Y

yards ^[2] 72:10,11
year ^[1] 69:4
years ^[4] 64:20 85:13 95:18 102:
 13

Z

zero ^[1] 37:23