



1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   THOMAS E. DOBBS, STATE HEALTH           )  
4   OFFICER OF THE MISSISSIPPI            )  
5   DEPARTMENT OF HEALTH, ET AL.,        )  
6                            Petitioners,            )  
7                            v.                        ) No. 19-1392  
8   JACKSON WOMEN'S HEALTH                )  
9   ORGANIZATION, ET AL.,                )  
10                            Respondents.            )  
11   - - - - -

12  
13                            Washington, D.C.  
14                            Wednesday, December 1, 2021

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16                            The above-entitled matter came on for  
17   oral argument before the Supreme Court of the  
18   United States at 10:00 a.m.

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3 Mississippi; on behalf of the Petitioners.  
4 JULIE RIKELMAN, ESQUIRE, New York, New York; on behalf  
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8 United States, as amicus curiae, supporting the  
9 Respondents.  
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21  
22  
23  
24  
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SCOTT G. STEWART, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	JULIE RIKELMAN, ESQ.	
7	On behalf of the Respondents	47
8	ORAL ARGUMENT OF:	
9	GEN. ELIZABETH B. PRELOGAR, ESQ.	
10	For the United States, as amicus	
11	curiae, supporting the Respondents	84
12	REBUTTAL ARGUMENT OF:	
13	SCOTT G. STEWART, ESQ.	
14	On behalf of the Petitioners	110
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2  
3  
4  
5  
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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 19-1392, Dobbs versus Jackson Women's Health Organization.

General Stewart.

ORAL ARGUMENT OF SCOTT G. STEWART

ON BEHALF OF THE PETITIONERS

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

Roe versus Wade and Planned Parenthood versus Casey haunt our country. They have no basis in the Constitution. They have no home in our history or traditions. They've damaged the democratic process. They've poisoned the law. They've choked off compromise. For 50 years, they've kept this Court at the center of a political battle that it can never resolve. And 50 years on, they stand alone. Nowhere else does this Court recognize a right to end a human life.

Consider this case: The Mississippi law here prohibits abortions after 15 weeks. The law includes robust exceptions for a woman's life and health. It leaves months to obtain an

1 abortion. Yet, the courts below struck the law  
2 down. It didn't matter that the law apply --  
3 that the law applies when an unborn child is  
4 undeniably human, when risks to women surge, and  
5 when the common abortion procedure is brutal.  
6 The lower courts held that because the law  
7 prohibits abortions before viability, it is  
8 unconstitutional no matter what.

9 Roe and Casey's core holding,  
10 according to those courts, is that the people  
11 can protect an unborn girl's life when she just  
12 barely can survive outside the womb but not any  
13 earlier when she needs a little more help. That  
14 is the world under Roe and Casey.

15 That is not the world the Constitution  
16 promises. The Constitution places its trust in  
17 the people. On hard issue after hard issue, the  
18 people make this country work. Abortion is a  
19 hard issue. It demands the best from all of us,  
20 not a judgment by just a few of us. When an  
21 issue affects everyone and when the Constitution  
22 does not take sides on it, it belongs to the  
23 people.

24 Roe and Casey have failed, but the  
25 people, if given the chance, will succeed. This

1 Court should overrule Roe and Casey and uphold  
2 the state's law.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: General Stewart, you  
5 focus on the right to abortion, but our  
6 jurisprudence seems to -- seem to focus on, in  
7 Casey, autonomy; in Roe, privacy. Does it make  
8 a difference that we focus on privacy or  
9 autonomy or more specifically on abortion?

10 MR. STEWART: I think whichever one of  
11 those you're focusing on, Your Honor,  
12 particularly if you're focusing on -- on the  
13 right to abortion, each of those starts to  
14 become a step removed for what's provided in the  
15 Constitution. Yes, the Constitution does  
16 provide certain -- protect certain aspects of  
17 privacy, of autonomy, and the like, but, as this  
18 Court said in Glucksberg, going directly from  
19 general concepts of autonomy, of privacy, of  
20 bodily integrity, to -- to a right is not how we  
21 traditionally, this Court traditionally, does  
22 due process analysis.

23 So I think it just confirms, whichever  
24 one of those you look at, Your Honor, a right to  
25 abortion is -- is not grounded in the text, and

1 it's grounded on abstract concepts that this  
2 Court has rejected in -- in other contexts as  
3 supplying a substantive right.

4 JUSTICE THOMAS: You say that this is  
5 the only constitutional right that involves the  
6 taking of a life. What difference does that  
7 make in your analysis?

8 MR. STEWART: Sure, Your Honor. I --  
9 I -- I think it -- it makes a -- a number of  
10 differences. One, I -- I'd mention two in  
11 particular.

12 One is it -- it really does mark out  
13 the unbelievably profound ramifications of this  
14 area, which, in many other areas, assisted  
15 suicide, a whole host of important areas that  
16 are important to dignity, autonomy, freedom, and  
17 important to matters of conscience, it -- it  
18 marks it out as one of the unique areas where  
19 this Court has taken that important issue to the  
20 people, and it's -- it's something that  
21 implicates life and it just, I think, marks off,  
22 Justice Thomas, how problematic and unusual and  
23 how much of a break the Court's abortion  
24 jurisprudence is from those other cases.

25 JUSTICE THOMAS: If we don't overrule



1 Casey or Roe, do you have a standard that you  
2 propose other than the viability standard?

3 MR. STEWART: It would be, Your Honor,  
4 a clarified version of the undue burden  
5 standard. I -- I -- I would -- I would  
6 emphasize, I -- I think, as Your Honor is  
7 alluding to, that no standard other than the  
8 rational basis review that applies to all laws  
9 will promote an administrable, workable,  
10 practicable, consistent jurisprudence that puts  
11 matters back with the people. I think anything  
12 heightened here is going to be problematic.

13 But I would say, if the Court were not  
14 inclined to -- to overrule Casey, the -- the  
15 choice would be undue burden standard,  
16 untethered from any bright-line viability rule.

17 JUSTICE THOMAS: Thank you.

18 JUSTICE BREYER: Well, I'd -- I'd like  
19 to go to a different topic, back to Casey.

20 MR. STEWART: Yes, Your Honor.

21 JUSTICE BREYER: I assume you've read  
22 Casey pretty thoroughly.

23 MR. STEWART: Yes, Your Honor.

24 JUSTICE BREYER: And there are two  
25 parts. One is they reaffirm Roe. Put that to

1 the side. The second is an opinion for the  
2 Court, not for three people but for the Court,  
3 and that second part is about what stare decisis  
4 principles should be used to overrule a case  
5 like Roe.

6 And they say Roe is special. What's  
7 special about it? They say it's rare. They  
8 call it a watershed. Why? Because the country  
9 is divided? Because feelings run high? And yet  
10 the country, for better or for worse, decided to  
11 resolve their differences by this Court laying  
12 down a constitutional principle, in this case,  
13 women's choice. That's what makes it rare.

14 That's not what I'm asking about. I  
15 want your reaction to what they said follows  
16 from that. What the Court said follows from  
17 that is that it should be more unwilling to  
18 overrule a prior case, far more unwilling we  
19 should be, whether that case is right or wrong,  
20 than the ordinary case.

21 And why? Well, they have a lot of  
22 words there, but I'll give you about 10 or 20.  
23 There will be inevitable efforts to overturn it.  
24 Of course, there will. Feelings run high. And  
25 it is particularly important to show what we do

1 in overturning a case is grounded in principle  
2 and not social pressure, not political pressure.

3 Only "the most convincing  
4 justification can show that a later decision  
5 overruling," if that's what we did, "was  
6 anything but a surrender to political pressures  
7 or new members." And that is an unjustified  
8 repudiation of principles on which the Court  
9 stakes its authority.

10 And then there are two sentences I'd  
11 like to read because they say they really mean  
12 this, the -- the Court, not just three: To  
13 overrule under fire in the absence of the most  
14 compelling reason, to reexamine a watershed  
15 decision, would subvert the Court's legitimacy  
16 beyond any serious question.

17 And the last sentence, after they  
18 quote Potter Stewart on the same point, they say  
19 overruling unnecessarily and under pressure  
20 would lead to condemnation, the Court's loss of  
21 confidence in the judiciary, the ability of the  
22 Court to exercise the judicial power and to  
23 function as the Supreme Court of a nation  
24 dedicated to the rule of law.

25 Now that's the opinion of the Court,

1 all right? And it's about stare decisis and how  
2 we approach it, and I hope everybody reads this.  
3 It's at 505 U.S. 854 to 869.

4 All right. What do you say to that?

5 MR. STEWART: Sure, Your -- sure  
6 Justice Breyer. I -- I would say a couple  
7 things. I would say we have very closely gone  
8 through the factors that the Casey court itself  
9 went through in stare decisis. More than half  
10 of our brief is devoted to stare decisis. We  
11 now have 30 years in the wake of Casey to see  
12 what Casey has done and what it hasn't done.

13 JUSTICE BREYER: Well, it's caused  
14 some bad things and -- in the eyes of some  
15 people and some good things in the eyes of some  
16 people.

17 MR. STEWART: Your Honor --

18 JUSTICE BREYER: All right. All  
19 right. Go ahead.

20 MR. STEWART: I'm -- I'm sorry, Your  
21 Honor. What I'd emphasize, Your Honor, is that  
22 to the extent that -- that the -- I would not  
23 say it was the people that -- that called this  
24 Court to end the controversy. The people -- you  
25 know, many, many people vocally really just

1 wanted to have the matter returned to them so  
2 that they could decide it -- decide it locally,  
3 deal with it the way they thought best and at  
4 least have a fighting chance to have their view  
5 prevail, which was not given to them under Roe  
6 and then, as a result, under Casey.

7           And -- and I'd also emphasize, Your  
8 Honor, that on -- on stare decisis, just as I  
9 said, the last 30 years, workability,  
10 developments in the law, factual developments  
11 that states can't account for. I think the  
12 workability, the undue burden standard alone,  
13 many problems.

14           On all the metrics that Casey was  
15 describing or the vast bulk of them, Casey  
16 fails. And I'd also emphasize this as well,  
17 Justice Breyer, that Casey was not -- was -- was  
18 not a -- a great example of simply letting  
19 precedents stand. It -- it recast Roe's  
20 reasoning, it overruled two of the Court's most  
21 important abortion decisions. It jettisoned the  
22 trimester framework of Roe itself and adopted a  
23 new standard unknown to other parts of the law.

24           Those are not the hallmarks of  
25 precedent, and they failed under this Court's

1 stare decisis factors.

2 JUSTICE BREYER: Okay. Can I take it  
3 that your answer is, yes, you accept the way the  
4 special rule, the rule for the rare watershed,  
5 the stare decisis principles for deciding  
6 whether to overturn such a case as Roe, you  
7 accept that and you think it's met?

8 MR. STEWART: I would --

9 JUSTICE BREYER: Is that right?

10 MR. STEWART: -- I would say yes in  
11 part, Your -- Justice Breyer, and here's what  
12 I'd emphasize, is that I -- I do think,  
13 particularly when Casey looked outward and  
14 looked to what it see -- saw as pressure, there  
15 were pressure on all sides. As -- as Your Honor  
16 noted, this is a hot, difficult issue for  
17 everyone. It's -- that's why it belongs to the  
18 people.

19 And I think the conclusion the Court  
20 drew from that, that it couldn't provide a -- a  
21 good enough example, that it would look on  
22 principle, those conclusions were, with respect,  
23 Justice Breyer, mistaken, and the -- the last 30  
24 years has -- has not seen any calming of that.  
25 It's been very different than some of the

1 others -- the Court's other controversial  
2 decisions that -- that have seen --

3 JUSTICE SOTOMAYOR: Counsel --

4 MR. STEWART: -- much more calm --

5 JUSTICE SOTOMAYOR: -- what hasn't  
6 been at issue in the last 30 years is the line  
7 that Casey drew of viability. There has been  
8 some difference of opinion with respect to undue  
9 burden, but the right of a woman to choose, the  
10 right to control her own body, has been clearly  
11 set for -- since Casey and never challenged.

12 You want us to reject that line of  
13 viability and adopt something different.  
14 Fifteen justices over 50 years have -- or I  
15 should say 30 since Casey have reaffirmed that  
16 basic viability line. Four have said no, two of  
17 them members of this Court. But 15 justices  
18 have said yes, of varying political backgrounds.

19 Now the sponsors of this bill, the  
20 House bill, in Mississippi, said we're doing it  
21 because we have new justices. The newest ban  
22 that Mississippi has put in place, the six-week  
23 ban, the Senate sponsor said we're doing it  
24 because we have new justices on the Supreme  
25 Court.

1                   Will this institution survive the  
2                   stench that this creates in the public  
3                   perception that the Constitution and its reading  
4                   are just political acts?

5                   MR. STEWART: I --

6                   JUSTICE SOTOMAYOR: I -- I -- I don't  
7                   see how it is possible. It's what Casey talked  
8                   about when it talked about watershed decisions.  
9                   Some of them, Brown versus Board of Education it  
10                  mentioned, and this one have such an entrenched  
11                  set of expectations in our society that this is  
12                  what the Court decided, this is what we will  
13                  follow, that the -- that we won't be able to  
14                  survive if people believe that everything,  
15                  including New York versus Sullivan -- I could  
16                  name any other set of rights, including the  
17                  Second Amendment, by the way. There are many  
18                  political people who believe the Court erred in  
19                  seeing this as a personal right as -- as opposed  
20                  to a militia right. If people actually believe  
21                  that it's all political, how will we survive?  
22                  How will the Court survive?

23                  MR. STEWART: Justice Sotomayor, I --  
24                  I think the concern about appearing political  
25                  makes it absolutely imperative that the Court



1 reach a decision well grounded in the  
2 Constitution, in text, structure, history, and  
3 tradition, and that carefully goes through the  
4 stare decisis factors that we've laid out.

5 JUSTICE SOTOMAYOR: Casey did that.

6 MR. STEWART: No, it didn't, Your  
7 Honor, respectfully.

8 JUSTICE SOTOMAYOR: Casey went through  
9 every one of them. You think it did it wrong.  
10 That's your belief. But Casey did that.

11 MR. STEWART: Well, Your --

12 JUSTICE SOTOMAYOR: And you haven't  
13 added --

14 MR. STEWART: Sorry, Your Honor.

15 JUSTICE SOTOMAYOR: -- much to the  
16 discussion in your papers as to the errors that  
17 Casey made, other than "I disagree with Casey."

18 MR. STEWART: Well, Justice Sotomayor,  
19 maybe I can -- I can highlight two.

20 Casey gave one paragraph to the  
21 workability of Roe. It then adopted the undue  
22 burden standard, which is perhaps the most  
23 unworkable standard in American law. It gave  
24 about three paragraphs, if memory serves, to  
25 reliance, which doesn't account for the last 30

1 years and the changes that have occurred since  
2 Casey. It did -- it -- it gave a brief factual  
3 view to things that have changed since Roe.  
4 Those, of course, are not going to take account  
5 of the last 30 years of advancements in  
6 medicine, science, all of those things.

7 JUSTICE SOTOMAYOR: What are the --

8 JUSTICE ALITO: What is --

9 JUSTICE SOTOMAYOR: -- advancements in  
10 medicine?

11 MR. STEWART: I think it's an  
12 advancement in -- in knowledge and concern about  
13 such things as fetal pain, what we know the  
14 child is doing and looks like and is fully  
15 human from a very early --

16 JUSTICE SOTOMAYOR: You know --

17 MR. STEWART: I'm sorry.

18 JUSTICE SOTOMAYOR: -- in -- in  
19 regular cases, courts decide whether science  
20 fits the Daubert standard. Obviously, the --  
21 under the Daubert standard, the minority of  
22 people, a -- a gross minority of doctors who  
23 believe fetal pain exists before 24, 25 weeks,  
24 it's a huge minority and one not well founded in  
25 science at all.

1           So I don't see how that really adds  
2 anything to the discussion.

3           MR. STEWART: Well --

4           JUSTICE SOTOMAYOR: That a small  
5 fringe of doctors believe that pain could be  
6 experienced between -- before a cortex is formed  
7 --

8           MR. STEWART: Well, I --

9           JUSTICE STEWART: -- doesn't mean that  
10 there's been that much of a difference since  
11 Casey.

12           MR. STEWART: We -- we pointed out as  
13 an example, Your Honor, of where Roe and Casey  
14 improperly preclude states from taking account  
15 for these things. And they should be able to be  
16 concerned about the -- about a fact of a -- a --  
17 an unborn life being poked and then recoiling in  
18 the way one of us would recoil.

19           JUSTICE SOTOMAYOR: Sir, I -- I don't  
20 --

21           CHIEF JUSTICE ROBERTS: General, does  
22 -- was -- I know what it said about viability in  
23 Roe, but was viability an issue in the case? I  
24 know it wasn't briefed or argued.

25           MR. STEWART: It -- it was -- it was

1 not issue -- an issue certainly the way it is an  
2 issue here, Your Honor. I think it was -- to  
3 the extent that the Court had to over -- had to  
4 reaffirm Roe, the way to read that as something  
5 other than dicta would be to under --

6 CHIEF JUSTICE ROBERTS: I'm sorry, I  
7 don't know whether I said, was it an issue in  
8 Roe?

9 MR. STEWART: Oh, in Roe.

10 CHIEF JUSTICE ROBERTS: Yeah.

11 MR. STEWART: I'm sorry, Your Honor.  
12 My understanding is no. The law there was --  
13 didn't have a viability tag. That was inserted  
14 by --

15 CHIEF JUSTICE ROBERTS: In fact, if I  
16 remember correctly, and I -- it's an unfortunate  
17 source, but it's there -- in his papers, Justice  
18 Blackmun said that the viability line was --  
19 actually was dicta. And, presumably, he had  
20 some insight on the question.

21 MR. STEWART: I -- I think -- and I'd  
22 -- I'd add, Your Honor, Justice Blackmun in --  
23 in, I think, as well his papers pointed out the  
24 arbitrary nature of it and -- and the  
25 line-drawing problems --

1 CHIEF JUSTICE ROBERTS: And then --

2 MR. STEWART: -- in it too.

3 CHIEF JUSTICE ROBERTS: -- and then,  
4 in Casey, Casey said that that was the core  
5 principle or a central principle in Roe,  
6 viability. It said that after tossing out the  
7 trimester formula, which many people thought was  
8 the core -- core principle. But was viability  
9 at issue in Casey?

10 MR. STEWART: I don't think it was  
11 squarely at issue, Your Honor. Again, it's --  
12 it's a little hard not to take the Court at its  
13 word when it emphasized that viability -- the --  
14 that viability is -- is the central part of Roe  
15 -- Roe's holding and saying that it is  
16 reaffirming that, so we kind of take that as it  
17 -- as it stands. But the Court has not -- it  
18 did not face a law like this certainly,  
19 Mr. Chief Justice.

20 JUSTICE SOTOMAYOR: May I finish my  
21 inquiry?

22 MR. STEWART: Of course, Justice  
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Virtually every  
25 state defines a brain death as death. Yet, the

1 literature is filled with episodes of people who  
2 are completely and utterly brain dead responding  
3 to stimuli. There's about 40 percent of dead  
4 people who, if you touch their feet, the foot  
5 will recoil. There are spontaneous acts by dead  
6 brain people. So I don't think that a response  
7 to -- by a fetus necessarily proves that there's  
8 a sensation of pain or that there's  
9 consciousness.

10 So I go back to my question of, what  
11 has changed in science to show that the  
12 viability line is not a real line, that a fetus  
13 cannot survive? And I think that's what both  
14 courts below said, that you had no expert say  
15 that there is any viability before 23 to 24  
16 weeks.

17 MR. STEWART: And what I'd say -- say  
18 is this, Justice Sotomayor, is that the  
19 fundamental problem with viability, it's not  
20 really something that rests on -- on science so  
21 much. It's that viability is not tethered to  
22 anything in the Constitution, in history, or  
23 tradition. It's a quintessentially legislative  
24 line.

25 A legislature could think that

1 viability makes sense as -- as a place to draw  
2 the line, but it's quite reasonable for a  
3 legislature to draw the line elsewhere.

4 JUSTICE SOTOMAYOR: Counsel, there's  
5 so much that's not in the Constitution,  
6 including the fact that we have the last word.  
7 Marbury versus Madison. There is not anything  
8 in the Constitution that says that the Court,  
9 the Supreme Court, is the last word on what the  
10 Constitution means. It was totally novel at  
11 that time. And yet, what the Court did was  
12 reason from the structure of the Constitution  
13 that that's what was intended.

14 And, here, in Casey and in Roe, the  
15 Court said there is inherent in our structure  
16 that there are certain personal decisions that  
17 belong to individuals and the states can't  
18 intrude on them. We've recognized them in terms  
19 of the religion parents will teach their  
20 children. We've recognized it in -- in their  
21 ability to educate at home if they choose. They  
22 just have to educate them. We have recognized  
23 that sense of privacy in people's choices about  
24 whether to use contraception or not. We've  
25 recognized it in their right to choose who

1 they're going to marry.

2 I fear none of those things are  
3 written in the Constitution. They have all,  
4 like Marbury versus Madison, been discerned from  
5 the structure of the Constitution.

6 Why do we now say that somehow Roe  
7 versus Casey is -- Roe and Casey are so unusual  
8 that they must be overturned?

9 MR. STEWART: Well, Your -- Justice  
10 Sotomayor, I would -- I would emphasize two  
11 things. When you're going beyond the  
12 Constitution, this Court has looked closely  
13 to --

14 JUSTICE SOTOMAYOR: No, what I'm  
15 saying is they didn't go beyond the  
16 Constitution.

17 MR. STEWART: Your Honor, they did not  
18 deduce those from the structure of the  
19 Constitution. They -- they pointed to the  
20 Fourteenth Amendment and -- and reasoned that  
21 privacy in Roe, autonomy and similar values in  
22 Casey led to a right to abortion.

23 That's not how this Court  
24 traditionally does things, including in the vast  
25 run of cases that Your Honor ran through. The



1 Court looks to history and tradition. And,  
2 here, those decisively reject the proposition  
3 that states cannot legislate comprehensively on  
4 abortion before, after viability, and all  
5 throughout. So it's -- it's history and  
6 tradition, Your Honor.

7 And I would also add, Your -- Your  
8 Honor, that those -- those decisions, a great  
9 many of them, draw -- you know, not just draw  
10 from text -- text, history, and tradition, but  
11 they draw often clear lines, very workable, have  
12 not led to the many negative stare decisis  
13 factors that we identify here.

14 JUSTICE KAGAN: General --

15 JUSTICE BARRETT: General, would -- go  
16 ahead. Go ahead.

17 JUSTICE KAGAN: Go ahead, Justice  
18 Barrett.

19 JUSTICE BARRETT: Would a decision in  
20 your favor call any of the questions -- any of  
21 the cases, sorry, that Justice Sotomayor is  
22 identifying into question?

23 MR. STEWART: No, Your Honor, I -- I  
24 think for a couple reasons. First of all, I  
25 think the vast run of those cases, and some

1 mentioned from time to time are Griswold,  
2 Lawrence, Obergefell, these are -- these are  
3 cases that draw clear rules: you can't ban  
4 contraception, you can't ban intimate romantic  
5 relationships between consenting adults, can't  
6 ban marriage of people of the same sex. Clear  
7 rules that have engendered strong reliance  
8 interests and that have not produced negative  
9 consequences or all the many other negative  
10 stare decisis considerations we pointed out,  
11 Your Honor.

12           Also, I -- I'd add none of them  
13 involve the purposeful termination of a human  
14 life. So those two -- those two features, stare  
15 decisis and termination of a human life, Your  
16 Honor, puts all of those safely out of reach if  
17 the Court overrules here.

18           JUSTICE BREYER: Okay. So we -- I'm  
19 sorry to interrupt again, but we really might be  
20 making progress. I mean, in the part that --  
21 that I read, you know, of Casey --

22           MR. STEWART: Yes, Your Honor.

23           JUSTICE BREYER: -- I think they think  
24 go back 150 years, maybe now we can go back 200.  
25 You think there have been only two cases which

1 were what they call the watershed and where the  
2 special tough overruling rules apply.

3 You want this to be the third, or do  
4 you think there were more and, if so, what were  
5 they?

6 MR. STEWART: Well, Your Honor, I --  
7 I -- I think there's quite a bit of difference.  
8 I -- I think the question is never is it bad to  
9 overrule, period. You know, surely, stare --

10 JUSTICE BREYER: This is why I'm  
11 asking you to think -- think in their terms.  
12 There were two they mentioned, you see.

13 MR. STEWART: But --

14 JUSTICE BREYER: And they don't want  
15 Casey -- they don't want Roe to be the third.

16 MR. STEWART: And --

17 JUSTICE BREYER: Now, in your opinion,  
18 you just answered Justice Barrett, hey, all  
19 these are not rising to that level. Okay.

20 MR. STEWART: Right, Your Honor.

21 JUSTICE BREYER: Are there any that do  
22 rise to the level in your opinion?

23 MR. STEWART: I think -- and I -- and  
24 I'm not sure that I necessarily agree with the  
25 watershed characterization, Your Honor. What

1 I'd say, though, I -- I can't think of another  
2 that kind of hits the radar. But -- but I'd  
3 emphasize that a problem here is we're -- we're  
4 dealing with a right that doesn't have a basis  
5 in constitutional text and, again, very much in  
6 conflict with those -- with those values,  
7 Justice Breyer.

8 JUSTICE SOTOMAYOR: I'm not sure how  
9 your answer makes any sense. All of those other  
10 cases -- Griswold, Lawrence, Obergefell -- they  
11 all rely on substantive due process. You're  
12 saying there's no substantive due process in the  
13 Constitution, so they're just as wrong according  
14 to your theory.

15 MR. STEWART: No, Your Honor, we're  
16 quite comfortable with Washington versus  
17 Glucksberg and how it analyzes substantive due  
18 process and it looks to text, history. It looks  
19 to history and tradition to discipline the  
20 inquiry to make sure --

21 JUSTICE SOTOMAYOR: Well, I mean, in  
22 Obergefell, there was no history of -- of -- of  
23 same-sex marriage.

24 MR. STEWART: And I think the Court --  
25 the -- the Court pointed out, look, when we --

1 when we were facing Loving versus Virginia --

2 JUSTICE SOTOMAYOR: I -- I'm not  
3 trying to argue that we should overturn those  
4 cases. I just think you're dissimilating when  
5 you say that any ruling here wouldn't have an  
6 effect on those.

7 MR. STEWART: Respectfully, I -- I --  
8 that's -- that's -- I respectfully --

9 JUSTICE SOTOMAYOR: Do you think no --  
10 that no state is going to think otherwise, that  
11 no people in the population aren't going to  
12 challenge those cases in Court?

13 MR. STEWART: I mean, Your -- Your  
14 Honor, we'll always have a diversity of views,  
15 but I think -- I think --

16 JUSTICE SOTOMAYOR: That's the point.

17 MR. STEWART: -- I think -- I think  
18 that's one --

19 JUSTICE SOTOMAYOR: That -- isn't that  
20 the -- isn't --

21 MR. STEWART: -- of the benefits of  
22 our society.

23 JUSTICE SOTOMAYOR: -- isn't that the  
24 point?

25 MR. STEWART: That there's -- that

1 there's a diversity of views and people  
2 can vigorously debate and make --

3 JUSTICE SOTOMAYOR: Exactly.

4 MR. STEWART: -- decisions for  
5 themselves?

6 JUSTICE SOTOMAYOR: And that's what  
7 we're still doing --

8 MR. STEWART: I think that's a good  
9 thing, Your Honor.

10 JUSTICE SOTOMAYOR: -- and that's what  
11 we're doing under undue burden, but we haven't  
12 been doing it on the viability line.

13 MR. STEWART: And -- and neither one  
14 has worked well. The viability line discounts  
15 and disregards state interests, and the undue  
16 burden standard has all -- all of the  
17 problems that we've emphasized.

18 JUSTICE SOTOMAYOR: How is your  
19 interest anything but a religious view? The  
20 issue of when life begins has been hotly debated  
21 by philosophers since the beginning of time.  
22 It's still debated in religions.

23 So, when you say this is the only  
24 right that takes away from the state the ability  
25 to protect a life, that's a religious view,

1 isn't it --

2 MR. STEWART: Respectfully --

3 JUSTICE SOTOMAYOR: -- because it  
4 assumes that a fetus's life at -- when? You're  
5 not drawing -- you're -- when do you suggest we  
6 begin that life?

7 MR. STEWART: Your Honor, I -- aside  
8 from --

9 JUSTICE SOTOMAYOR: Putting it aside  
10 from religion.

11 MR. STEWART: I -- I'll -- I'll try to  
12 -- I think there might be more than one  
13 question. I'll do my very best, Justice  
14 Sotomayor.

15 I -- I think this Court in Gonzales  
16 pretty clearly recognized that before viability,  
17 we are talking with unborn life with a human  
18 organism. And I think the philosophical  
19 questions Your Honor mentioned, all those  
20 reasons, that they're hard, they've been  
21 debated, they're -- they're -- they're  
22 important, those are all reasons to return this  
23 to the people because the people should get to  
24 debate these hard issues, and this Court does  
25 not in that kind of a circumstance --

1 JUSTICE SOTOMAYOR: So when does the  
2 life of a woman and putting her at risk enter  
3 the calculus? Meaning, right now, forcing women  
4 who are poor -- and that's 75 percent of the  
5 population and much higher percentage of those  
6 women in Mississippi who elect abortions before  
7 viability -- they are put at a tremendously  
8 greater risk of medical complications and ending  
9 their life, 14 times greater to give birth to a  
10 child full term, than it is to have an abortion  
11 before viability.

12 And now the state is saying to these  
13 women, we can choose not only to physically  
14 complicate your existence, put you at medical  
15 risk, make you poorer by the choice because we  
16 believe what? That --

17 MR. STEWART: Sure, Your Honor. I --  
18 I think, to -- to answer, I think, the -- the  
19 question I think you -- you led with and -- and  
20 then I think expanded on but is still on the  
21 same issue is as to when does a woman's interest  
22 enter, as far as we're concerned, it's there the  
23 entire time. Our point is that all of the  
24 interests are there the entire time, and Roe and  
25 Casey improperly prevent states from taking



1 account and weighing those interests however  
2 they think best.

3 We're not saying --

4 JUSTICE KAGAN: General --

5 JUSTICE ALITO: General, are there --  
6 are there secular philosophers and bioethicists  
7 who take the position that the rights of  
8 personhood begin at conception or at some point  
9 other than viability?

10 MR. STEWART: I -- I believe so. I  
11 mean, I think there's a wide array, I mean,  
12 of -- of -- of people of kind of all different  
13 views and -- and of no faith views who -- who  
14 would reasonably have that view, Your Honor.

15 It's -- it's -- it's not tied to a  
16 religious view and I don't think, were it  
17 otherwise, this Court's jurisprudence would --  
18 on this issue would run right into some of its  
19 religious exercise jurisprudence.

20 JUSTICE KAGAN: General, Justice  
21 Breyer started with stare decisis, an important  
22 principle in any case, and, here, for the  
23 reasons that Casey mentioned, especially so, to  
24 prevent people from thinking that this Court is  
25 a political institution that will go back and

1     forth depending on what part of the public yells  
2     loudest and -- and -- and preventing people from  
3     thinking that the Court will go back and forth  
4     depending on changes to the Court's membership.

5             And what strikes me about this case --  
6     and -- and -- and you come here very honestly  
7     saying, you know, we want you to discard the  
8     entire setup and then, even if you don't do  
9     that, we want you to discard the viability line,  
10    which you've acknowledged again today Casey says  
11    is the -- the heart, the central principle of  
12    Roe.

13            And so usually there has to be a  
14    justification, a strong justification in a case  
15    like this beyond the fact that you think the  
16    case is wrong. And I guess what strikes me when  
17    I look at this case is that, you know, not much  
18    has changed since Roe and Casey, that people  
19    think it's right or wrong based on the things  
20    that they have always thought it was right and  
21    wrong for.

22            So the -- the -- the -- the -- the  
23    rationale behind those cases has something to do  
24    with the autonomy and the freedom and the  
25    dignity of women to pursue their lives as they

1 wish, to protect their bodily integrity, to make  
2 the decisions that are most fundamental to the  
3 course of their lives.

4           And -- and always, in those cases,  
5 there was an understanding that there were  
6 important interests on the other side in  
7 protecting life or protecting the potential for  
8 life, whether people saw it one way or the other  
9 way, and that there was a difficult question  
10 here and a balance to be made.

11           And, I mean, it strikes me that  
12 people -- some people think those decisions made  
13 the right balance and some people thought they  
14 made the wrong balance, but, in the end, we are  
15 in the same exact place as we were then, except  
16 that we're not because there's been 50 years of  
17 water under the bridge, 50 years of decisions  
18 saying that this is part of our law, that this  
19 is part of the fabric of women's existence in  
20 this country, and that that places us in an  
21 entirely different situation than if you had  
22 come in 50 years ago and made the same  
23 arguments.

24           So I guess I just wanted to hear you  
25 react to that.

1           MR. STEWART: Of course, Justice  
2 Kagan. Thank you. I -- I would emphasize a  
3 couple things, Your Honor. The fact that so  
4 much time has passed, let's say nothing had  
5 changed, that's not a point in Roe and Casey's  
6 favor. They have no basis in the Constitution.  
7 They -- they adopt a right that purposefully  
8 leads to the termination of now millions of  
9 human lives. The -- if nothing had changed,  
10 they'd be just as bad as they were 30 years ago,  
11 50 years ago. And now we just have decades of  
12 damage, and we have a situation where nearly 30  
13 years after Casey, the Court unfortunately  
14 divides over what Casey, the lead case on -- on  
15 -- in the abortion area, even means.

16           The lower courts are left not knowing  
17 what to do, as I think -- and I think kind of a  
18 fundamental problem here is, I think, as Justice  
19 Gorsuch mentioned, emphasized in his -- his  
20 opinion in -- in June Medical, that the problem  
21 for lower court judges is the Constitution  
22 doesn't give them an answer to this. There's no  
23 neutral rule of law, so judges unfortunately  
24 have to look within themselves. And that's just  
25 never going to solve this issue.

1           But, if the matter is returned to the  
2 people, the people can deal with it, they can  
3 work, they can compromise and reach different  
4 solutions. But, if we don't do that, we're just  
5 going to have all this sort of damage, and at  
6 some point, it's appropriate for the Court to  
7 say enough, as it has in some of its -- the  
8 great overrulings in -- in Brown and in other  
9 cases, where it said this is just enough.

10           Justice Harlan had it right in dissent  
11 in Plessy when he recognized that -- that --  
12 that, you know, all are -- all are equal. And,  
13 here -- similarly here, the state should be able  
14 to recognize, hey, there are real values on both  
15 sides here. We -- we -- we think that this one  
16 slightly outweighs, we think that this one  
17 slightly outweighs, or we think that there's  
18 some balance to be drawn here.

19           But, if the Court doesn't do that,  
20 Justice Kagan, it's just going to be continued  
21 damage, and the Court will continue to plunge in  
22 this political issue.

23           I apologize, Mr. Chief Justice. I've  
24 gone over.

25           CHIEF JUSTICE ROBERTS: No, no, that's

1 all right. I have just a few little -- well,  
2 not little, I hope, questions, and the first  
3 gets back to the issue of viability.

4           You know, in your petition for cert,  
5 your first question and the only one on which we  
6 granted review was whether all pre-viability  
7 prohibitions on elective abortions are  
8 unconstitutional. And then I think it's fair to  
9 say that when you got to the brief on the  
10 merits, you kind of shifted gears and talked a  
11 lot more about whether or not Roe and Casey  
12 should be overruled, and I wanted to give you a  
13 chance to explain that.

14           MR. STEWART: Sure, Your Honor. So a  
15 couple points. You know, at the petition stage,  
16 we were, of course, identifying -- we identified  
17 for the Court three questions. We emphasized,  
18 as you do at the cert stage, hey, this is  
19 important; only this Court can resolve it. We  
20 emphasized, I believe it was five times, that  
21 the Court was at the least going need -- going  
22 to need to reconsider, revisit, or reevaluate  
23 its precedents. And we asked the Court to at  
24 least get rid of a viability line or any  
25 suggestion of a viability line.

1           So we added, however -- and we had to  
2     take account of the reality that this argument  
3     has not fared well in the lower courts. It --  
4     it -- it's lost in every court of appeals. So,  
5     you know, we -- we raised the issue in addition,  
6     but, once the Court granted only the first  
7     question, we presented every argument as we, you  
8     know, signaled we -- we would present the -- the  
9     -- the full-blown constitutional merits argument  
10    with that fundamental question.

11           So I -- I'd emphasize that, Your  
12    Honor. It was kind of the shift you go from  
13    cert state to merits stage. The Court granted  
14    one question. That question fairly includes  
15    what is the correct standard.

16           CHIEF JUSTICE ROBERTS: Well, it  
17    fairly includes the broader arguments you  
18    raised. I'm not suggesting that. But, on the  
19    other hand, it presumably included the viability  
20    question as well, because that's what you talked  
21    about in that one sentence.

22           MR. STEWART: And -- and -- and we --  
23    we've addressed that as well, Your Honor. What  
24    I -- what I'd emphasize here is that the merits  
25    arguments of, you know, the validity of Roe and

1 Casey as an original matter, is there a  
2 viability rule based on the Constitution, those  
3 are not that complicated or -- or -- or lengthy.  
4 The harder questions are, you know, should the  
5 Court overrule and -- and take that momentous  
6 step? And that's why we devote a lot of space  
7 to that very important issue. We respect stare  
8 decisis and have walked through all those  
9 points. But, again, focusing on the question  
10 presented and arguing -- presenting our best  
11 arguments for that, that's -- that's what we've  
12 done, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: On stare  
14 decisis, I think the first issue you look at is  
15 whether or not the decision at issue was wrongly  
16 decided. I've actually never quite understood  
17 how you evaluate that. Is it wrongly decided  
18 based on legal principles and doctrine when it  
19 was decided or -- or in retrospect?

20 Because Roe -- I mean, there are a lot  
21 of cases around the time of Roe, not of that  
22 magnitude but the same type of analysis, that --  
23 that went through exactly the sorts of things we  
24 today would say were erroneous, but do we look  
25 at it from today's -- if we look at it from



1 today's perspective, it's going to be a long  
2 list of cases that we're going to say were  
3 wrongly decided.

4 MR. STEWART: Well, I'd say -- I'd  
5 say, Mr. Chief Justice, that you -- you look --  
6 you can look both was it wrong at the time, has  
7 it been unmasked as wrong by -- by new  
8 understandings, new knowledge, any developments.

9 But I -- I don't think -- as I -- I  
10 think the colloquy -- my colloquy with Justice  
11 Barrett indicated, the Court won't have -- have  
12 to be looking at -- at -- at much other -- many  
13 other areas because this is an area that has a  
14 uniquely problematic set of stare decisis  
15 considerations. A lot of other controversial  
16 areas or once controversial areas are -- are  
17 quite settled clear rules and don't have those  
18 considerations against them.

19 So, really, by -- by overruling Roe  
20 and Casey, the Court won't have to go down that  
21 road, and a lot of those decisions are quite  
22 readily groundable in history, tradition, and  
23 the Court's traditional factors, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 JUSTICE THOMAS: No questions.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Breyer?

4 Justice Alito?

5 Justice Sotomayor?

6 Justice Kagan?

7 JUSTICE KAGAN: General, I -- I just  
8 wanted to get your quick sense of how your  
9 intermediate positions would work, you know, if  
10 basically the viability line was discarded and  
11 undue burden became the standard overall, a  
12 standard that according to you is an unclear  
13 one, what that would leave the Court with going  
14 forward.

15 You know, I'm just sort of thinking  
16 about the great variety of different -- of  
17 regulations that states could pass, so whether  
18 one is 15 weeks and one is 12 weeks and one is 9  
19 weeks or variation across a wide variety of  
20 other dimensions. What would that look like  
21 coming to the Court? How would we -- how -- how  
22 do you think we should -- we would be able to  
23 deal with that or -- or how would you counsel us  
24 to deal with that if the Court were to go down  
25 that road?

1           MR. STEWART: Well, I think I -- that  
2 this is -- not to push back against the end --  
3 and I will -- will answer your question, Justice  
4 Kagan, but part of why we've counseled to  
5 overrule full scale is that that's the only way  
6 to get rid of a number of the problems that I  
7 think Your Honor's alluding to.

8           And that's that when you have the  
9 undue burden standard, it's -- it's a very hard  
10 standard to apply. It's not objective. The  
11 Court looks to the record in each case and  
12 what's going on. I mean, the Court in Casey  
13 itself said, under this record, this is not an  
14 undue burden. You -- you couldn't say  
15 necessarily for certain that a certain number of  
16 weeks one place would be an undue burden but  
17 would be okay another place.

18           But, again, that is the world we have  
19 under Casey. So, if the Court upholds this law  
20 under the undue burden standard, it would be  
21 carrying forward with those features, which I --  
22 and I hope I've answered your question, but I  
23 think that's one of the very strong reasons to  
24 just go all the way and overrule Roe and Casey,  
25 Your Honor. I -- anyway.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: I want to be clear  
5 about what you're arguing and not arguing.

6 MR. STEWART: Yes, Your Honor.

7 JUSTICE KAVANAUGH: And to be clear,  
8 you're not arguing that the Court somehow has  
9 the authority to itself prohibit abortion or  
10 that this Court has the authority to order the  
11 states to prohibit abortion as I understand it,  
12 correct?

13 MR. STEWART: Correct, Your Honor.

14 JUSTICE KAVANAUGH: And as I  
15 understand it, you're arguing that the  
16 Constitution is silent and, therefore, neutral  
17 on the question of abortion? In other words,  
18 that the Constitution is neither pro-life nor  
19 pro-choice on the question of abortion but  
20 leaves the issue for the people of the states or  
21 perhaps Congress to resolve in the democratic  
22 process? Is that accurate?

23 MR. STEWART: Right. We're -- we're  
24 saying it's left to the people, Your Honor.

25 JUSTICE KAVANAUGH: And so, for the --

1 if you were to prevail, the states, a majority  
2 of states or states still could or -- and  
3 presumably would continue to freely allow  
4 abortion, many states; some states would be able  
5 to do that even if you prevail under your view,  
6 is that correct?

7 MR. STEWART: That's consistent with  
8 our view, Your Honor. It's -- it's one that  
9 allows all interests to have full voice and --  
10 and many of the abortions we see in certain  
11 states that I don't think anybody would think  
12 would be moving to change their laws in a more  
13 restrictive direction.

14 JUSTICE KAVANAUGH: Thank you.

15 MR. STEWART: Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Barrett.

18 JUSTICE BARRETT: General, I have a  
19 question that is a little bit of a follow-up to  
20 that Justice Breyer was asking you. That's  
21 about stare decisis. And I think a lot of the  
22 colloquy you've had with all of us has been  
23 about the benefits of stare decisis, which I  
24 don't think anyone disputes, and, of course, no  
25 one can dispute because it's part of our stare

1       decisis doctrine that it's not an inexorable  
2       command and that there are some circumstances in  
3       which overruling is possible. You know, we have  
4       Plessy, Brown. We have Bowers versus Hardwick,  
5       to Lawrence.

6                 But, in thinking about stare decisis,  
7       which is obviously the core of this case, how  
8       should we be thinking about it -- I mean,  
9       Justice Breyer pointed out that in Casey and in  
10      some respects, well, it was a different  
11      conception of stare decisis insofar as it very  
12      explicitly took into account public reaction.  
13      Is that a factor that you accept, or are you  
14      arguing that we should minimize that factor?

15                And is there a different set of rules  
16      -- it is true that Casey identified Brown and  
17      West Coast Hotel as watershed decisions. But is  
18      there a distinct set of stare decisis  
19      considerations applicable to what the Court  
20      might decide is a watershed distinction.

21                MR. STEWART: I don't think there  
22      should be a distinct set of -- of -- of  
23      considerations there, Your Honor. I think what  
24      I -- what I emphasize, and just to make sure, on  
25      -- on the kind of legitimacy, the Court looking

1 outward, I -- I think Casey was unusual in that  
2 regard. I think it was a mistake. And I think  
3 it's something that is kind of in conflict with  
4 this Court's structure and approach as an  
5 independent branch looking to the Constitution  
6 rather than looking without.

7           And I -- I think that's one reason why  
8 traditionally the Court is -- is -- is -- in  
9 some of its greatest overrulings, it's -- it's  
10 not looking without. It's saying this was  
11 wrong. It was wrong the day it was decided. We  
12 know it's wrong today. And it's led to all  
13 these terrible consequences. We should get --  
14 we should get rid of it.

15           I -- so I -- I think that that was an  
16 unfortunate break, and I think the Court -- even  
17 if the Court were to -- were to still look at  
18 legitimacy, though, Justice Barrett, I think the  
19 Court could very, very powerfully say, look,  
20 our -- our legitimacy really derives from our  
21 willingness to stand strong and stand firm in  
22 the face of whatever is going on and stand for  
23 constitutional principle and follow our  
24 traditional stare decisis factors to overrule  
25 when it's appropriate.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MR. STEWART: Thank you, Mr. Chief  
5 Justice.

6 CHIEF JUSTICE ROBERTS: Ms. Rikelman.

7 ORAL ARGUMENT OF JULIE RIKELMAN

8 ON BEHALF OF THE RESPONDENTS

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

11 Mississippi's ban on abortion two  
12 months before viability is flatly  
13 unconstitutional under decades of precedent.  
14 Mississippi asks the Court to dismantle this  
15 precedent and allow states to force women to  
16 remain pregnant and give birth against their  
17 will.

18 The Court should refuse to do so for  
19 at least three reasons.

20 First, stare decisis presents an  
21 especially high bar here. In Casey, this Court  
22 carefully examined and rejected every possible  
23 reason for overruling Roe, holding that a  
24 woman's right to end a pregnancy before  
25 viability was a rule of law and a component of



1 liberty it could not renounce. The question  
2 then is not whether Roe should be overturned but  
3 whether Casey was egregiously wrong to adhere to  
4 Roe's central holding.

5           Second, Casey and Roe were correct.  
6 For a state to take control of a woman's body  
7 and demand that she go through pregnancy and  
8 childbirth with all the physical risks and  
9 life-altering consequences that brings is a  
10 fundamental deprivation of her liberty.  
11 Preserving a woman's right to make this decision  
12 until viability preserve -- protects her liberty  
13 while logically balancing the other interests at  
14 stake.

15           Third, eliminating or reducing the  
16 right to abortion will propel women backwards.  
17 Two generations have now relied on this right,  
18 and one out of every four women makes the  
19 decision to end a pregnancy.

20           Mississippi's ban would particularly  
21 hurt women with a major health or life change  
22 during the course of a pregnancy, poor women,  
23 who are twice as likely to be delayed in  
24 accessing care, and young people or those in  
25 contraception, who take longer to recognize a

1 pregnancy.

2 To avoid profound damage to women's  
3 liberty, equality, and the rule of law, the  
4 Court should affirm.

5 JUSTICE THOMAS: Counsel, I just have  
6 one question. I assume you -- from your brief,  
7 you're relying on an autonomy theory?

8 MS. RIKELMAN: Both bodily integrity  
9 and the ability to make decisions related to  
10 family, marriage, and childbearing, Your Honor.

11 JUSTICE THOMAS: Shortly, some years  
12 after we decided Casey, we had a case out of  
13 South Carolina, I believe, and it involved a  
14 woman who had been convicted of criminal child  
15 neglect because she ingested cocaine during  
16 pregnancy, and her case was post-viability, so  
17 it doesn't fit in the facts of this case.

18 If she had ingested cocaine  
19 pre-viability and had the same negative  
20 consequences to her child, do you think the  
21 state had an interest in enforcing that law  
22 against her?

23 MS. RIKELMAN: The state may have,  
24 Your Honor. The state can certainly regulate to  
25 serve its interests in fetal life and in women's

1 health. Those particular laws tend to undermine  
2 both of those interests because they deter women  
3 from seeking prenatal care, which is  
4 counterproductive to both their health.

5 JUSTICE THOMAS: But pre-viability as  
6 well as post-viability?

7 MS. RIKELMAN: No, Your Honor. The --  
8 the Court has been clear that after  
9 viability states can prohibit abortion, except  
10 to save a woman's life.

11 JUSTICE THOMAS: No, I mean the -- in  
12 my example of criminal child neglect. I  
13 understand you -- your argument is about  
14 abortion. I am trying to look at the issue of  
15 bodily autonomy and whether or not she has a  
16 right also to bodily autonomy in the case of  
17 ingesting an illegal substance and causing harm  
18 to a pre-viability fetus.

19 MS. RIKELMAN: Your Honor, of course,  
20 those issues aren't posed in this case, and,  
21 again, I would say that the states can certainly  
22 regulate throughout pregnancy, both before and  
23 after viability, to preserve fetal life and to  
24 preserve the woman's health.

25 The Court has said, however, there

1 is -- there are other constitutional issues at  
2 stake, for instance, in the Ferguson case, that  
3 states still can't violate women's Fourth  
4 Amendment rights. But, again, that's not what  
5 this case is about.

6 This case is about a ban on abortion  
7 that the state concedes is weeks before  
8 viability, and the Court has been clear for 50  
9 years that the one thing that states cannot do  
10 is to take the decision completely away from the  
11 woman until viability, that, until that point,  
12 it is her decision to make given the unique  
13 physical demands of pregnancy and the,  
14 life-altering consequences of pregnancy and  
15 having a child.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: You -- the  
18 point you made about the impact on -- on women  
19 and their place in society, those -- those words  
20 are certainly made in Roe as well. What we have  
21 before us, though, is a 15-week standard.

22 Are -- are you suggesting that the  
23 difference between 15 weeks and viability are  
24 going to have the same sort of impacts as you  
25 were talking about -- or as we were talking

1 about in Roe?

2 MS. RIKELMAN: Yes, Your Honor, I  
3 believe they would because people who need  
4 abortion after 15 weeks are often in the most  
5 challenging circumstances. As I mentioned,  
6 they're people who have made -- perhaps had a  
7 major health or life change, a family illness, a  
8 job loss, a separation, young people or people  
9 who are on contraception or pregnant for the  
10 first time and who are delayed in recognizing  
11 the signs of pregnancy, or poor women, who often  
12 have much more trouble navigating access to  
13 care, and if they're denied the ability to make  
14 this decision because there's a ban after 15  
15 weeks, they will suffer all of the consequences  
16 that the Court has talked about in the past.

17 And, in fact, the data has been very  
18 clear over the last 50 years that abortion has  
19 been critical to women's equal participation in  
20 society. It's been critical to their health, to  
21 their lives, their ability to pursue --

22 CHIEF JUSTICE ROBERTS: I'm sorry,  
23 what -- what kind of data is that?

24 MS. RIKELMAN: I would refer the Court  
25 to the brief of the economists in this case,

1 Your Honor, and it compiles data showing studies  
2 based actually on causal inference, showing that  
3 it's the legalization of abortion and not other  
4 changes that have had these benefits for women  
5 in society, and, again, those benefits are clear  
6 for education, for the ability to pursue a  
7 profession, for the ability to have --

8 CHIEF JUSTICE ROBERTS: Well, putting  
9 that data aside, if you think that the issue is  
10 one of choice, that women should have a choice  
11 to terminate their pregnancy, that supposes that  
12 there is a point at which they've had the fair  
13 choice, opportunity to choice, and why would 15  
14 weeks be an inappropriate line?

15 Because viability, it seems to me,  
16 doesn't have anything to do with choice. But,  
17 if it really is an issue about choice, why is 15  
18 weeks not enough time?

19 MS. RIKELMAN: For -- for a few  
20 reasons, Your Honor. First, the state has  
21 conceded that some women will not be able to  
22 obtain an abortion before 15 weeks and this law  
23 will bar them from doing so. And a reasonable  
24 possibility standard would be completely  
25 unworkable for the courts. It would be both

1 less principled and less workable than  
2 viability, and some of the reasons for that are,  
3 without viability, there will be no stopping  
4 point.

5 States will rush to ban abortion at  
6 virtually any point in pregnancy. Mississippi  
7 itself has a six-week ban that it's defending  
8 with very similar arguments as it's using to  
9 defend the 15-week ban. And there are states  
10 that have bans --

11 CHIEF JUSTICE ROBERTS: Well, I know,  
12 but I'd like to focus on the 15-week ban because  
13 that's not a dramatic departure from viability.  
14 It is the standard that the vast majority of  
15 other countries have.

16 When you get to the viability  
17 standard, we share that standard with the  
18 People's Republic of China and North Korea. And  
19 I don't think you have to be in favor of looking  
20 to international law to set our constitutional  
21 standards to be concerned if those are your --  
22 share that particular time period.

23 MS. RIKELMAN: I think there's two  
24 questions there, Your Honor, if I may. First,  
25 that is not correct about international law. In

1 fact, the majority of countries that permit  
2 legal access to abortion allow access right up  
3 until viability, even if they have nominal lines  
4 earlier.

5 So, for example, Canada, Great Britain  
6 and most of Europe allows access to abortion  
7 right up until viability, and it also doesn't  
8 have the same barriers in place.

9 CHIEF JUSTICE ROBERTS: What do you  
10 mean, even if they have nominal lines earlier?

11 MS. RIKELMAN: Some countries, Your  
12 Honor, have a nominal line of 12 weeks or 18  
13 weeks, but they permit legal access to abortion  
14 after that point for broad social reasons,  
15 health reasons, socioeconomic reasons, so their  
16 regimes really aren't comparable, and they also  
17 don't have the same type -- types of barriers  
18 that we have here. So, if the Court were to  
19 move the line substantial -- substantially  
20 backwards -- and 15 weeks is 9 weeks before  
21 viability, Your Honor, it's quite a bit  
22 backwards -- it may need to reconsider the rules  
23 around regulations because, if it's cutting the  
24 time period to obtain an abortion roughly in  
25 half, then those barriers are going to be much



1 more important.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 JUSTICE BARRETT: Ms. Rikelman, I have  
4 a question about the safe haven laws. So  
5 Petitioner points out that in all 50 states, you  
6 can terminate parental rights by relinquishing a  
7 child after abortion, and I think the shortest  
8 period might have been 48 hours if I'm  
9 remembering the data correctly.

10 So it seems to me, seen in that light,  
11 both Roe and Casey emphasize the burdens of  
12 parenting, and insofar as you and many of your  
13 amici focus on the ways in which forced  
14 parenting, forced motherhood, would hinder  
15 women's access to the workplace and to equal  
16 opportunities, it's also focused on the  
17 consequences of parenting and the obligations of  
18 motherhood that flow from pregnancy.

19 Why don't the safe haven laws take  
20 care of that problem? It seems to me that it  
21 focuses the burden much more narrowly. There  
22 is, without question, an infringement on bodily  
23 autonomy, you know, which we have in other  
24 contexts, like vaccines. However, it doesn't  
25 seem to me to follow that pregnancy and then

1 parenthood are all part of the same burden.

2           And so it seems to me that the choice  
3 more focused would be between, say, the ability  
4 to get an abortion at 23 weeks or the state  
5 requiring the woman to go 15, 16 weeks more and  
6 then terminate parental rights at the  
7 conclusion. Why -- why didn't you address the  
8 safe haven laws and why don't they matter?

9           MS. RIKELMAN: I think they don't  
10 matter for a couple of reasons, Your Honor.  
11 First, even if some of those laws are new since  
12 Casey, the idea that a woman could place a child  
13 up for adoption has, of course, been true since  
14 Roe, so it's a consideration that the Court  
15 already had before it when it decided those  
16 cases and adhered to the viability line.

17           But, in addition, we don't just focus  
18 on the burdens of parenting, and neither did Roe  
19 and Casey. Instead, pregnancy itself is unique.  
20 It imposes unique physical demands and risks on  
21 women and, in fact, has impact on all of their  
22 lives, on their ability to care for other  
23 children, other family members, on their ability  
24 to work. And, in particular, in Mississippi,  
25 those risks are alarmingly high. It's 75 times

1 more dangerous to give birth in Mississippi than  
2 it -- than it is to have a pre-viability  
3 abortion, and those risks are disproportionately  
4 threatening the lives of women of color.

5 JUSTICE BARRETT: So are you saying --  
6 I mean, actually, as I read Roe and Casey, they  
7 don't talk very much about adoption. It's a  
8 passing reference that that means out of the  
9 obligations of parenthood. But, as I hear this  
10 answer then, are you saying that the right as  
11 you conceive of it is grounded primarily in the  
12 bearing of the child, in the carrying of a  
13 pregnancy, and not so much looking forward into  
14 the consequences on professional opportunities  
15 and work life and economic burdens?

16 MS. RIKELMAN: No, Your Honor, I  
17 believe it's both, and -- and that is exactly  
18 how Casey talked about it. It talked about the  
19 two strands of cases that supported the right.  
20 One was the strand of cases supporting bodily  
21 integrity, and it cited to cases like Curzan and  
22 Riggins versus Nevada. And the second was the  
23 strand of cases supporting decisional autonomy  
24 and specifically decisions related to  
25 childbearing, marriage, and procreation,

1 decisions like Griswold, Loving.

2 And so it's really both strands that  
3 we're relying on here.

4 JUSTICE GORSUCH: May I ask you a  
5 question about stare decisis, counsel? Your --  
6 your colleagues on the other side have  
7 emphasized that Casey rejected Roe's trimester  
8 framework and replaced it with an undue burden  
9 standard. They argue that the undue burden  
10 standard was not well known to the law before  
11 that, and then they argue that the undue burden  
12 standard has evolved over time too in ways the  
13 Court has found difficult to agree upon.

14 In Hellerstedt, for example, they --  
15 they point out in their briefs that the Court  
16 seemed to suggest that a court should consider  
17 both the benefits and the burdens associated  
18 with the proposed restriction. In June Medical  
19 more recently, the Court splintered on -- on --  
20 on that same question, whether benefits could be  
21 considered or only burdens.

22 And so the argument goes that this has  
23 proved to be, putting aside all the other  
24 obviously difficult questions in the case, that  
25 -- that the standard itself has proved difficult

1 to administer and that that is relevant to the  
2 stare decisis analysis, and I just wanted to  
3 give you an opportunity to respond.

4 MS. RIKELMAN: Yes, Your Honor. The  
5 first point I'd like to make is the undue burden  
6 test is not at issue in this case. That is the  
7 test that applies to regulations, not  
8 prohibitions. And the state has conceded that  
9 this is a prohibition. In fact, that's the  
10 title of this law, is an Act to prohibit  
11 abortion after 15 weeks.

12 And the only thing that's at issue in  
13 this case is the viability line, and the  
14 viability line has been enduringly workable.  
15 The lower federal courts have applied it  
16 consistently and uniformly for 50 years. And  
17 the Fifth Circuit here below had no difficulty  
18 striking down this law unanimously, 3-0. So  
19 it's been an exceedingly workable standard.

20 And if I may return to your question,  
21 Mr. Chief Justice, a reasonable possibility  
22 standard would not be workable. It would  
23 ultimately boil down to an argument that states  
24 can prohibit a category of women from exercising  
25 a constitutional right merely because of the

1 number of people in the category. And that's  
2 just not how constitutional rights work. A  
3 state would never say that it could ban  
4 religious services on a Wednesday evening, for  
5 example, simply because most people could attend  
6 religious services on another night of the week.

7 JUSTICE GORSUCH: So -- so I actually  
8 just wanted to -- that's helpful, I think. I  
9 just want to make sure I understand what you're  
10 telling me, counsel, that -- that if the Court  
11 were to, in this case, step past viability and  
12 apply undue burden, the undue burden test, to  
13 regulations prior to viability, you would agree  
14 with the other side, I think, that that's not a  
15 workable standard. Is -- is that -- is that a  
16 fair understanding of what you're -- you're  
17 telling the Court?

18 MS. RIKELMAN: No, Your Honor. I -- I  
19 believe --

20 JUSTICE GORSUCH: Do you think that  
21 would be workable?

22 MS. RIKELMAN: -- I believe -- if I  
23 may clarify, I believe the undue burden test has  
24 been workable for regulations that it is --

25 JUSTICE GORSUCH: I -- I -- I

1 understand that. I'm -- if it were to apply --  
2 if the Court were to -- and I thought this was  
3 what you were saying in response to the Chief  
4 Justice, but maybe I'm mistaken, and please  
5 correct me if I am -- but what -- what is your  
6 argument against applying the undue burden  
7 standard prior to viability?

8 MS. RIKELMAN: If the undue burden  
9 standard, as this Court laid out in Casey, which  
10 includes the viability line, is applied --

11 JUSTICE GORSUCH: No, no, I'm asking  
12 -- I know -- we're fighting the hypothetical  
13 here, counsel, all right? Accept the  
14 hypothetical. If, hypothetically, the Court  
15 were to extend the undue burden standard to  
16 regulations prior to viability, would that be  
17 workable or would that not be workable in your  
18 view?

19 MS. RIKELMAN: Without viability, it  
20 would not be workable, Your Honor, because it  
21 would ultimately, again, always come down to a  
22 claim that states can bar a certain category of  
23 people from exercising this right simply because  
24 of the number of people in the category, and  
25 that's not a workable standard and it's not a

1 constitutional standard.

2 JUSTICE GORSUCH: I appreciate that  
3 clarification. Thank you.

4 JUSTICE ALITO: Just to follow up on  
5 that, I read your briefs -- your brief to say  
6 that the only real options we have are to  
7 reaffirm Roe and Casey as they stand or to  
8 overrule them in their entirety. You say that  
9 "there are no half-measures here." Is that a  
10 correct understanding of your brief?

11 MS. RIKELMAN: Your Honor, it --  
12 certainly, the arguments that the state has  
13 presented is what we're responding to there,  
14 which is that all of the state's arguments,  
15 including their alternatives, which are undue  
16 burden without viability, would be the  
17 equivalent of overruling Casey and Roe because  
18 the viability line is the central holding of  
19 those cases. Casey mentioned it no fewer than  
20 19 times. And the Court in June Medical just a  
21 year ago affirmed that the viability line is the  
22 central holding of both Casey and Roe.

23 JUSTICE ALITO: Well, you -- you do  
24 emphasize that the Court drew the line at  
25 viability in Roe and reaffirmed that in Casey,



1 and that is certainly something that we have to  
2 take very seriously into consideration.

3 But suppose we were considering that  
4 question now for the first time. I'm sure you  
5 know the arguments about the viability line as  
6 well as I do, probably better than I do. What  
7 would you say in defense of that line? What  
8 would you say to the argument that has been made  
9 many times by people who are pro-choice and  
10 pro-life that the line really doesn't make any  
11 sense, that it is, as Justice Blackmun himself  
12 described it, arbitrary?

13 The -- the woman's -- if a woman wants  
14 to be free of the burdens of pregnancy, that  
15 interest does not disappear the moment the  
16 viability line is crossed. Isn't that right?

17 MS. RIKELMAN: No, Your Honor, and if  
18 I may make a few points to answer your question.

19 First, I think the state views  
20 viability as arbitrary because it completely  
21 discounts the woman's interests. But  
22 viability --

23 JUSTICE ALITO: No, no. But does a  
24 woman have -- does -- upon reaching the point of  
25 viability, does not the woman have the same

1 interests that she had before viability in being  
2 free of this pregnancy that she no longer wants  
3 to continue?

4 MS. RIKELMAN: Viability is a  
5 principled line, Your Honor, because, in  
6 ordering the interests --

7 JUSTICE ALITO: Well, I'm trying to  
8 see whether it is a principled line.

9 MS. RIKELMAN: Yeah. The --

10 JUSTICE ALITO: Will you agree with me  
11 at least on that point, that a woman still has  
12 the same interest in terminating her pregnancy  
13 after the viability line has been crossed?

14 MS. RIKELMAN: Yes, Your Honor, but  
15 the Court balanced the interests --

16 JUSTICE ALITO: Okay. And then --

17 MS. RIKELMAN: -- and in ordering the  
18 interests at stake --

19 JUSTICE ALITO: -- look at the  
20 interests on -- on the other side. The -- the  
21 fetus has an interest in having a life, and that  
22 doesn't change, does it, from the point before  
23 viability to the point after viability?

24 MS. RIKELMAN: In -- in some people's  
25 view, it doesn't, Your Honor, but what the Court

1 said is that those philosophical differences  
2 couldn't be resolved --

3 JUSTICE ALITO: Well, what is the --

4 MS. RIKELMAN: -- in the way --

5 JUSTICE ALITO: That -- that's what  
6 I'm getting at. What is the philosophical  
7 argument, the secular philosophical argument for  
8 saying this is the appropriate line?

9 There are those who say that the  
10 rights of personhood should be considered to  
11 have taken hold at a point when the fetus  
12 acquires certain independent characteristics.  
13 But viability is dependent on medical technology  
14 and medical practice. It has changed. It may  
15 continue to change.

16 MS. RIKELMAN: No, Your Honor, it is  
17 principled because, in ordering the interests at  
18 stake, the Court had to set a line between  
19 conception and birth, and it logically looked at  
20 the fetus's ability to survive separately as a  
21 legal line because it's objectively verifiable  
22 and doesn't require the Court to resolve the  
23 philosophical issues at stake.

24 CHIEF JUSTICE ROBERTS: I just want to  
25 focus on stare decisis for a little bit. I

1 found my colleague, Justice Breyer's, comments  
2 quite compelling. I'm not quite sure how  
3 they're -- they play out in -- in Casey.

4 It is certainly true that we cannot  
5 base our decisions on whether they're popular or  
6 not with the people. Casey seemed to say we  
7 shouldn't base our decisions not only on that  
8 but whether they're going to -- whether they're  
9 going to seem popular, and it seemed to me to  
10 have a paradoxical conclusion that the more  
11 unpopular the decisions are, the firmer the  
12 Court should be in not departing from prior  
13 precedent, sort of a super stare decisis, but  
14 it's super stare decisis for what are regarded  
15 as -- by many, as the most erroneous decisions.

16 Do you think there is that category?  
17 Is there -- or is it just normal stare decisis?

18 MS. RIKELMAN: I think it is precedent  
19 on precedent, Your Honor, because Casey did the  
20 stare decisis analysis for Roe, so the question  
21 before this Court is whether that stare decisis  
22 analysis was egregiously wrong.

23 And if I may answer your earlier  
24 question about whether viability was squarely at  
25 issue in Casey, it clearly was, Your Honor. At

1 pages 869 to 871, the Court squarely discussed  
2 viability because the government had made the  
3 argument that viability was arbitrary --

4 CHIEF JUSTICE ROBERTS: Well, no, I  
5 appreciate that Casey addressed it, but that's  
6 different than saying it was at issue. It said  
7 it was the central principle of Roe because it  
8 was pretty much all that was left after they  
9 were done dealing with the rest of it.

10 And the regulations in Casey had --  
11 had no applicability or not depending upon where  
12 viability was. They applied throughout the  
13 whole range, period. So, if they didn't say  
14 anything about viability, it's like what Justice  
15 Blackmun said in -- when discussing among his  
16 colleagues, which is a good reason not to have  
17 papers out that -- that early, is that they  
18 don't have to address the line-drawing at all in  
19 Roe, and they didn't have to address the  
20 line-drawing at all in Casey.

21 MS. RIKELMAN: I disagree with that,  
22 Your Honor, because the undue burden test  
23 incorporates the viability line. That was what  
24 the Court was assessing the regulations against,  
25 whether they imposed a substantial obstacle in

1 the path of a woman before viability.

2 And if a prohibition like this law  
3 isn't a substantial obstacle, then nothing would  
4 be, so the issue was squarely before the Court,  
5 and, in fact, the Court said at page 879 that in  
6 adopting the undue burden test, it was not  
7 disturbing the viability line.

8 JUSTICE BREYER: It's a very  
9 interesting question that I think Justice  
10 Barrett raised too. It's usually just  
11 philosophical, but I think it has bite here.

12 When I read Casey, it's not just one  
13 on one, you know, two is greater than one.  
14 Casey plus Roe is greater than -- it -- it's --  
15 they're making a point that -- that -- that  
16 we're an institution, perhaps more, than a court  
17 of appeals or a district court. It's Hamilton's  
18 point, no purse, no sword, and yet we have to  
19 have public support, and that comes primarily,  
20 says Casey -- I wonder if it was O'Connor who  
21 wrote that? I don't know.

22 But it comes primarily from people  
23 believing that we do our job. We use reason.  
24 We don't look to just what's popular. And  
25 that's where you're seeing the paradox. But the

1 problem with the super case of which we've heard  
2 three mentioned, the problem with a super case  
3 like this, the rare case, the watershed case,  
4 where people are really opposed on both sides  
5 and they really fight each other, is they're  
6 going to be ready to say, no, you're just  
7 political, you're just politicians.

8           And that's what kills us as an  
9 American institution. That's what they're  
10 saying. So we're looking at it for that. But  
11 we are looking to, and that they say is a reason  
12 why -- a reason why, when you get a case like  
13 that, you better be damn sure that the normal  
14 stare considerations, stare decisis overrulings  
15 are really there in spades, double, triple,  
16 quadruple, and then they go through and show  
17 they're not. Okay?

18           What's the paradox? Now maybe you  
19 think I've just made an argument that there  
20 isn't one, but, really, in my head, I'm thinking  
21 I'm not sure. There may be one. And I don't  
22 know if you've ever thought about this. I don't  
23 know if you've ever -- if -- when -- when --  
24 when that occurred to you, I don't want to  
25 overrule the stare -- I wouldn't want the Court

1 to overrule the stare decisis section of Casey,  
2 you see. And that -- that's -- that's what I  
3 think is being brought up, and maybe I haven't  
4 made it clearer, but I've tried to.

5 MS. RIKELMAN: Yes, Your Honor. I  
6 think the point that the Court was making was  
7 that the fact that some states may continue to  
8 enact laws in the teeth of the Court's precedent  
9 has never been enough of a reason to overrule.  
10 And that's true for a number of decisions that  
11 the Court has issued. The fact that some people  
12 continue to disagree with them is not a basis to  
13 discard that precedent.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Thomas, anything further?

16 JUSTICE THOMAS: Back to my original  
17 question. If I were -- I know your interest  
18 here is in abortion, I understand that, but, if  
19 I were to ask you what constitutional right  
20 protects the right to abortion, is it privacy?  
21 Is it autonomy? What would it be?

22 MS. RIKELMAN: It's liberty, Your  
23 Honor. It's the textual protection in the  
24 Fourteenth Amendment that a state can't deprive  
25 a person of liberty without due process of law,



1 and the Court has interpreted liberty to include  
2 the right to make family decisions and the right  
3 to physical autonomy, including the right to end  
4 a pre-viability pregnancy.

5 JUSTICE THOMAS: So it's all of the  
6 above?

7 MS. RIKELMAN: Well, the Court --  
8 that's how the Court has interpreted the liberty  
9 clause for over a hundred years in cases going  
10 back to Meyer, Griswold, Carey, Loving,  
11 Lawrence.

12 JUSTICE THOMAS: Yeah, but I -- I  
13 mean, all of those sort of just come out of  
14 Lochner, the -- so it's that we've -- we've  
15 dropped part of it. So I understand what you're  
16 saying, but what I'm trying to focus on is, if  
17 we -- is to lower the level of generality or at  
18 least be a little bit more specific.

19 In the old days, we used to say it was  
20 a right to privacy that the Court found in the  
21 due process, substantive due process clause,  
22 okay? So -- or in substantive due process, and  
23 I'm trying to get you to tell me, what are we  
24 relying on now? Is it privacy? Is it autonomy?  
25 What is it?

1           MS. RIKELMAN: I think it continues to  
2 be liberty, and the right exists whatever level  
3 of generality the Court applies. There was a  
4 tradition under the common law for centuries of  
5 women being able to end their pregnancies.

6           But, in addition, when it comes to  
7 decisions related to family, marriage, and  
8 childbearing, the Court has done the analysis at  
9 a higher level of generality, and that makes  
10 sense because, otherwise, the Constitution would  
11 reinforce the historical discrimination against  
12 women.

13           JUSTICE THOMAS: Thank you.

14           CHIEF JUSTICE ROBERTS: Justice  
15 Breyer?

16           Justice Alito?

17           JUSTICE ALITO: Well, you just  
18 mentioned the common law, so let me ask you a  
19 couple questions about history.

20           Did any state constitutional provision  
21 recognize that abortion was a right, liberty, or  
22 immunity in 1868, when the Fourteenth Amendment  
23 was adopted?

24           MS. RIKELMAN: No, Your Honor, but it  
25 had been allowed under the common law for many

1 years.

2 JUSTICE ALITO: Does any judicial  
3 decision at that time or shortly or immediately  
4 after 1868 recognize that abortion was a right,  
5 liberty, or immunity?

6 MS. RIKELMAN: There were state high  
7 court decisions shortly before then, Your Honor,  
8 talking about the ability of women to end a  
9 pregnancy before quickening.

10 JUSTICE ALITO: What's your best case?

11 MS. RIKELMAN: For the right to end a  
12 pregnancy, Your Honor?

13 JUSTICE ALITO: Uh-huh.

14 MS. RIKELMAN: Allowing a state to  
15 take control of a woman's body and force her to  
16 undergo the physical demands, risks, and  
17 life-altering consequences of pregnancy is a  
18 fundamental deprivation of her liberty. And,  
19 once the Court recognizes that that liberty  
20 interest deserves heightened protection, it does  
21 need to draw a workable line, and viability is a  
22 line that logically balances the interests at  
23 stake.

24 JUSTICE ALITO: The brief for the  
25 American Historical Association says that

1 abortion was not legal before quickening in 26  
2 out of 37 states at the time when the Fourteenth  
3 Amendment was adopted. Is that correct?

4 MS. RIKELMAN: That is correct because  
5 some of the states had started to discard the  
6 common law at that point because of a  
7 discriminatory view that a woman's proper role  
8 was as a wife and mother, a view that the  
9 Constitution now rejects, and that's why it's  
10 appropriate to do the historical analysis at a  
11 higher level of generality.

12 JUSTICE ALITO: In the face of that,  
13 can it said that the right to -- to abortion is  
14 deeply rooted in the history and traditions of  
15 the American people?

16 MS. RIKELMAN: Yes, it can, Your  
17 Honor. Again, at the founding, women were able  
18 to end their pregnancy under the common law.  
19 And, in fact, this Court in Glucksberg  
20 specifically decided -- discussed Casey as a  
21 decision based on history and tradition and, at  
22 Note 19, specifically called out and relied on  
23 Roe's conclusion that at the time of the  
24 founding and well into the 1800s, women had the  
25 ability to end a pregnancy.

1 JUSTICE ALITO: What was the -- the  
2 principal source that the Court relied on in Roe  
3 for its historical analysis? Who was the author  
4 of that -- of that article?

5 MS. RIKELMAN: I apologize, Your  
6 Honor, I don't remember the author. I know that  
7 the Court spent many pages of the opinion doing  
8 a historical analysis. There's also a brief on  
9 behalf of several key American historian  
10 associations that go through that history in  
11 detail because there's even more information now  
12 that supports Roe's legal conclusions.

13 JUSTICE ALITO: All right. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor?

16 Justice Kagan?

17 Justice Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: I think the other  
20 side would say that the core problem here is  
21 that the Court has been forced by the position  
22 you're taking and by the -- the cases to pick  
23 sides on the most contentious social debate in  
24 American life and to do so in a situation where  
25 they say that the Constitution is neutral on the

1 question of abortion, the text and history, that  
2 the Constitution's neither pro-life nor  
3 pro-choice on the question of abortion, and they  
4 would say, therefore, it should be left to the  
5 people, to the states, or to Congress.

6           And I think they also then continue,  
7 because the Constitution is neutral, that this  
8 Court should be scrupulously neutral on the  
9 question of abortion, neither pro-choice nor  
10 pro-life, but, because, they say, the  
11 Constitution doesn't give us the authority, we  
12 should leave it to the states and we should be  
13 scrupulously neutral on the question and that  
14 they are saying here, I think, that we should  
15 return to a position of neutrality on that  
16 contentious social issue rather than continuing  
17 to pick sides on that issue. So I think that's,  
18 at a big-picture level, their argument. I want  
19 to give you a chance to respond to that.

20           MS. RIKELMAN: Yes. A few points if I  
21 may, Your Honor.

22           First, of course, those very same  
23 arguments were made in Casey, and the Court  
24 rejected them, saying that this philosophical  
25 disagreement can't be resolved in a way that a

1 woman has no choice in the matter.

2           And, second, I don't think it would be  
3 a neutral position. The Constitution provides a  
4 guarantee of liberty. The Court has interpreted  
5 that liberty to include the ability to make  
6 decisions related to child -- childbearing,  
7 marriage, and family. Women have an equal right  
8 to liberty under the Constitution, Your Honor,  
9 and if they're not able to make this decision,  
10 if states can take control of women's bodies and  
11 force them to endure months of pregnancy and  
12 childbirth, then they will never have equal  
13 status under the Constitution.

14           JUSTICE KAVANAUGH: And I want to ask  
15 a question about stare decisis and to think  
16 about how to approach that here because there  
17 have been lots of questions picking up on  
18 Justice Barrett's questions and others. And  
19 history helps think about stare decisis, as I've  
20 looked at it, and the history of how the Court's  
21 applied stare decisis, and when you really dig  
22 into it, the history tells a somewhat different  
23 story, I think, than is sometimes assumed.

24           If you think about some of the most  
25 important cases, the most consequential cases in

1 this Court's history, there's a string of them  
2 where the cases overruled precedent. Brown v.  
3 Board outlawed separate but equal. Baker versus  
4 Carr, which set the stage for one person/one  
5 vote. West Coast Hotel, which recognized the  
6 states' authority to regulate business. Miranda  
7 versus Arizona, which required police to give  
8 warnings when the right to -- about the right to  
9 remain silent and to have an attorney present to  
10 suspects in criminal custody. Lawrence v.  
11 Texas, which said that the state may not  
12 prohibit same-sex conduct. Mapp versus Ohio,  
13 which held that the exclusionary rule applies to  
14 state criminal prosecutions to exclude evidence  
15 obtained in violation of the Fourth Amendment.  
16 Gideon versus Wainwright, which guaranteed the  
17 right to counsel in criminal cases. Obergefell,  
18 which recognized a constitutional right to  
19 same-sex marriage.

20 In each of those cases -- and that's a  
21 list, and I could go on, and those are some of  
22 the most consequential and important in the  
23 Court's history -- the Court overruled  
24 precedent. And it turns out, if the Court in  
25 those cases had -- had listened, and they were



1 presented in -- with arguments in those cases,  
2 adhere to precedent in *Brown v. Board*, adhere to  
3 *Plessy*, on *West Coast Hotel*, adhere to *Atkins*  
4 and adhere to *Lochner*, and if the court had done  
5 that in those cases, you know, this -- the  
6 country would be a much different place.

7           So I assume you agree with most, if  
8 not all, the cases I listed there, where the  
9 Court overruled the precedent. So the question  
10 on *stare decisis* is why, if -- and I know you  
11 disagree with what about I'm about to say in the  
12 "if" -- if we think that the prior precedents  
13 are seriously wrong, if that, why then doesn't  
14 the history of this Court's practice with  
15 respect to those cases tell us that the right  
16 answer is actually a return to the position of  
17 neutrality and -- and not stick with those  
18 precedents in the same way that all those other  
19 cases didn't?

20           MS. RIKELMAN: Because the view that a  
21 previous precedent is wrong, Your Honor, has  
22 never been enough for this Court to overrule,  
23 and it certainly shouldn't be enough here when  
24 there's 50 years of precedent. Instead, the  
25 Court has required something else, a special

1 justification. And the state doesn't come  
2 forward with any special justification. It  
3 makes the same exact arguments the Court already  
4 considered and rejected in its stare decisis  
5 analysis in Casey.

6 And, in fact, there is nothing  
7 different. There is no less need today than 30  
8 years ago or 50 years ago for women to be able  
9 to make this fundamental decision for themselves  
10 about their bodies, lives, and health.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 JUSTICE BARRETT: I want to ask you a  
15 follow-up question. You know, the Chief was  
16 asking you about the viability line and if that  
17 was the right place, if that's the right line to  
18 draw. So let's take it out of the question of  
19 stare decisis and imagine that there is a state  
20 constitution that's identical to the Fourteenth  
21 Amendment's Due Process Clause, and a state  
22 supreme court has to decide as a matter of state  
23 constitutional law what the scope of an abortion  
24 right is. And the second trimester ends at 27  
25 weeks. And so that state supreme court says, we

1 think that the right exists, you know, in a --  
2 in a -- in an absolute sense, that the state  
3 cannot take away the right up to 27 weeks and  
4 then after that adopts an undue burden standard.

5 As a matter of first principles, is  
6 that line acceptable as a matter of  
7 constitutional law?

8 MS. RIKELMAN: Your Honor, it may be,  
9 but I think that the question in this case is  
10 whether a line is obviously more principled or  
11 obviously more workable than viability because  
12 of the stare decisis context.

13 JUSTICE BARRETT: Why -- I mean,  
14 that's the Roe framework basically, the  
15 trimester. Why wouldn't that be workable if you  
16 pick a line and say the end of the second  
17 trimester, 27 weeks; the third trimester,  
18 state's interests increase? I don't understand  
19 why 27 weeks is less workable than 24.

20 MS. RIKELMAN: I'm not trying to  
21 suggest it is, Your Honor. What I was trying to  
22 suggest is that the viability line is a  
23 principled and workable line, so to change it,  
24 there would have to be a new line that's  
25 obviously more principled and more workable.

1 And -- and the line that the Court has  
2 drawn actually --

3 JUSTICE BARRETT: But that's stare  
4 decisis. I'm asking as a matter of first  
5 principles.

6 MS. RIKELMAN: As a matter of first  
7 principle, the viability line makes sense  
8 because if the -- the state constitution was the  
9 same --

10 JUSTICE BARRETT: As a matter of  
11 prudential judgment. It's not constitutionally  
12 required as a matter of first principles  
13 because, in fact, we could decide to be more  
14 protective and say 27 weeks, end of the second  
15 trimester.

16 MS. RIKELMAN: You could, Your Honor,  
17 but the -- the viability line makes sense given  
18 the protection for liberty because it comes from  
19 the woman's liberty interests in resisting state  
20 control of her body. And, once the Court  
21 recognizes that interest, it does need to draw a  
22 line, as it does in many other constitutional  
23 contexts, like the Fourth and Fifth Amendment.

24 And the viability line, as I  
25 mentioned, makes sense because it focuses on the

1 fetus's ability to survive separately, which is  
2 an appropriate legal line because it's  
3 objectively verifiable and doesn't delve into  
4 philosophical questions about when life begins.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 General Prelogar?

8 ORAL ARGUMENT OF GENERAL ELIZABETH B. PRELOGAR  
9 FOR THE UNITED STATES, AS AMICUS CURIAE,  
10 SUPPORTING THE RESPONDENTS

11 GENERAL PRELOGAR: Mr. Chief Justice,  
12 and may it please the court:

13 For a half century, this Court has  
14 correctly recognized that the Constitution  
15 protects a woman's fundamental right to decide  
16 whether to end a pregnancy before viability.  
17 That guarantee that the state cannot force a  
18 woman to carry a pregnancy to term and give  
19 birth has engendered substantial individual and  
20 societal reliance.

21 The real-world effects of overruling  
22 Roe and Casey would be severe and swift. Nearly  
23 half of the states already have or are expected  
24 to enact bans on abortion at all stages of  
25 pregnancy, many without exceptions for rape or

1 incest.

2 Women who are unable to travel  
3 hundreds of miles to gain access to legal  
4 abortion will be required to continue with their  
5 pregnancies and give birth, with profound  
6 effects on their bodies, their health, and the  
7 course of their lives.

8 If this Court renounces the liberty  
9 interests recognized in Roe and reaffirmed in  
10 Casey, it would be an unprecedented contraction  
11 of individual rights and a stark departure from  
12 principles of stare decisis.

13 The Court has never revoked a right  
14 that is so fundamental to so many Americans and  
15 so central to their ability to participate fully  
16 and equally in society. The Court should not  
17 overrule this central component of women's  
18 liberty.

19 JUSTICE THOMAS: General, would you  
20 specifically tell me -- specifically state what  
21 the right is? Is it specifically abortion? Is  
22 it liberty? Is it autonomy? Is it privacy?

23 GENERAL PRELOGAR: The right is  
24 grounded in the liberty component of the  
25 Fourteenth Amendment, Justice Thomas, but I

1 think that it promotes interest in autonomy,  
2 bodily integrity, liberty, and equality. And I  
3 do think that it is specifically the right to  
4 abortion here, the right of a woman to be able  
5 to control, without the state forcing her to  
6 continue a pregnancy, whether to carry that baby  
7 to term.

8 JUSTICE THOMAS: I understand we're  
9 talking about abortion here, but what is  
10 confusing is that we -- if we were talking about  
11 the Second Amendment, I know exactly what we're  
12 talking about. If we're talking about the  
13 Fourth Amendment, I know what we're talking  
14 about because it's written. It's there.

15 What specifically is the right here  
16 that we're talking about?

17 GENERAL PRELOGAR: Well, Justice  
18 Thomas, I think that the Court in those other  
19 contexts with respect to those other amendments  
20 has had to articulate what the text means in the  
21 bounds of the constitutional guarantees, and  
22 it's done so through a variety of different  
23 tests that implement First Amendment rights,  
24 Second Amendment rights, Fourth Amendment  
25 rights.

1                   So I don't think that there is  
2 anything unprecedented or anomalous about the  
3 right that the Court articulated in Roe and  
4 Casey and the way that it implemented that right  
5 by defining the scope of the liberty interest by  
6 reference to viability and providing that that  
7 is the moment when the balance of interests tips  
8 and when the state can act to prohibit a woman  
9 from -- from getting an abortion based on its  
10 interests in protecting the fetal life at that  
11 point.

12                   JUSTICE THOMAS: So the right  
13 specifically is abortion?

14                   GENERAL PRELOGAR: It's the right of a  
15 woman prior to viability to control whether to  
16 continue with the pregnancy, yes.

17                   JUSTICE THOMAS: Thank you.

18                   JUSTICE SOTOMAYOR: General, I am  
19 interested in Justice Kavanaugh's long litany of  
20 cases in which we've overruled precedent, and we  
21 have. Yet, you did call this unprecedented. As  
22 I see the structure of the Constitution, the  
23 body of it is the relationship of the three  
24 branches of government, and then there is the  
25 relationship of the federal government to the



1 state, and, through our incorporation of the  
2 Fourteenth Amendment, of the state vis-à-vis the  
3 individual, it's the federal government and the  
4 states' relationship to individuals.

5 And I see the Bill of Rights,  
6 including the Fourteenth Amendment, as basically  
7 setting the limits, giving individual freedom to  
8 do certain things and stopping the government  
9 from intruding in those liberties, in those Bill  
10 of Rights, correct?

11 Of all of the decisions that Justice  
12 Kavanaugh listed, all of them invite --  
13 virtually, except for maybe one, involved us  
14 recognizing and overturning state control over  
15 issues that we said belong to individuals, the  
16 right in Miranda to be warned was an individual  
17 right, correct?

18 GENERAL PRELOGAR: That's right,  
19 Justice Sotomayor, and I think that that is a  
20 key distinction with the list of precedents that  
21 Justice Kavanaugh was relying on.

22 I think that there are really two key  
23 distinctions, and the first is that in the vast  
24 majority of those cases, the Court was actually  
25 taking the issue away from the people and saying

1 that it had been wrong before not to recognize a  
2 right. And I think that matters because it goes  
3 straight to reliance interests.

4 Here, the Court would be doing the  
5 opposite. It would be telling the women of  
6 America that it was wrong, that, actually, the  
7 ability to control their bodies and perhaps the  
8 most important decision they can make about  
9 whether to bring a child into this world is not  
10 part of their protected liberty, and I think  
11 that that would come at tremendous cost to the  
12 reliance that women have placed on this right  
13 and on societal reliance and what this right has  
14 meant for further ensuring equality.

15 JUSTICE BREYER: The reliance point is  
16 a -- is a good point, and this may be my fault.  
17 I'm talking about pages 854 to 863 in the Casey  
18 case. And I've already used up too much time.  
19 I can't read those pages out loud. But they do  
20 not include the list that Justice Kavanaugh had.  
21 They do include two. One is Brown, and the  
22 second one is West Coast Hotel versus Parrish.  
23 And you could add the gay rights cases as a  
24 third which would fit the criteria.

25 But there are complex criteria that

1 she's talking about that link to the position in  
2 the rule of law of this Court, so all I would  
3 say is you have to read them before beginning to  
4 say whether they are overruling or not  
5 overruling in the sense meant there calling for  
6 special concern.

7           Now they say in those, maybe I'd  
8 mention two, wait a minute, of course, Plessy  
9 was wrong when decided, but, just a minute, also  
10 remember Plessy said that separate but equal was  
11 a badge of inferiority. No, they said, it  
12 isn't. Well, all you have to do is open your  
13 eyes and look at the south, my friend, and you  
14 will see whether it was or it wasn't in 1954.

15           And they made a similar point. They  
16 said, are you going to sit here in the middle of  
17 the Depression and tell me that -- that Lochner,  
18 with its other cases, and pure, just about pure  
19 laissez faire, we can run the country that way.

20           I mention that because I want people  
21 to read those 15 pages with care, and that's why  
22 I said that. If you have anything to add to my  
23 plea to read it, please do.

24           GENERAL PRELOGAR: Well, Justice  
25 Breyer, I agree completely. I have read those

1 pages and re-read them many times, and I think  
2 that this is actually another key distinction  
3 from the cases that Justice Kavanaugh was  
4 referring to, and that is, as I understand those  
5 passages in Casey, the Court carefully walked  
6 through each and every stare decisis factor that  
7 this court focuses on. It looked at workability  
8 of the viability rule, doctrinal underpinnings,  
9 legal and factual developments, and critically  
10 reliance interests.

11           And down the line, it found that the  
12 case for reaffirming Roe was overwhelming. And  
13 in that situation, when every factor that the  
14 Court consults to determine whether to retain  
15 precedent counsels in favor of retaining it, I  
16 think Casey properly perceived that a decision  
17 to overrule nevertheless, perhaps based on a  
18 conclusion that the justices thought the case  
19 was wrongly decided in the first instance, would  
20 run counter to the ability of stare decisis to  
21 function as a cornerstone of the rule of law in  
22 this context.

23           JUSTICE ALITO: Is it your argument  
24 that a case can never be overruled simply  
25 because it was egregiously wrong?

1                   GENERAL PRELOGAR: I think that at the  
2 very least, the state would have to come forward  
3 with some kind of materially changed  
4 circumstance or some kind of materially new  
5 argument, and Mississippi hasn't done so in this  
6 case. It is --

7                   JUSTICE ALITO: Really? So suppose  
8 Plessy versus Ferguson was re-argued in 1897, so  
9 nothing had changed. Would it not be sufficient  
10 to say that was an egregiously wrong decision on  
11 the day it was handed down and now it should be  
12 overruled?

13                   GENERAL PRELOGAR: It certainly  
14 was egregiously wrong on the day that it was  
15 handed down, Plessy, but what the Court said in  
16 analyzing Plessy to Brown and Casey was that  
17 what had become clear is that the factual  
18 premise that underlay the decision, this idea  
19 that segregation didn't create a badge of  
20 inferiority, had been entirely mistaken.

21                   JUSTICE ALITO: So is your -- is it  
22 really --

23                   GENERAL PRELOGAR: And, here, the  
24 state is not --

25                   JUSTICE ALITO: -- is it your answer

1 that we needed all the experience from 1896 to  
2 1954 to realize that Plessy was -- was wrongly  
3 decided? Would you answer my question? Had it  
4 come before the Court in 1897, should it have  
5 been overruled or not?

6 GENERAL PRELOGAR: I think it should  
7 have been overruled, but I think that the  
8 factual premise was wrong in the moment it was  
9 decided, and the Court realized that and  
10 clarified that when it overruled in Brown.

11 JUSTICE ALITO: So there are --

12 GENERAL PRELOGAR: And, here --

13 JUSTICE ALITO: -- circumstances in  
14 which a decision may be overruled, properly  
15 overruled, when it must be overruled simply  
16 because it was egregiously wrong at the moment  
17 it was decided?

18 GENERAL PRELOGAR: Well, I think --

19 JUSTICE ALITO: Correct?

20 GENERAL PRELOGAR: -- every other --

21 JUSTICE ALITO: Is that correct?

22 GENERAL ALITO: -- stare decisis  
23 factor likewise would have justified overruling  
24 in that interest, that actually it would run  
25 counter to any notion of reasonable reliance,

1 that it was not a workable rule, that it had  
2 become an outlier in our understanding of  
3 fundamental freedoms.

4 JUSTICE ALITO: Well, there was a lot  
5 of reliance on --

6 GENERAL PRELOGAR: And so I think,  
7 looking at all of the facts --

8 JUSTICE ALITO: -- there was a lot of  
9 reliance on Plessy. The -- the south built up a  
10 whole society based on the idea of white  
11 supremacy. So there was a lot of reliance. It  
12 was -- it was improper reliance. It was  
13 reliance on an egregiously wrong understanding  
14 of what equal protection means.

15 But your answer is -- I don't -- I  
16 still don't understand -- I still don't have  
17 your answer clearly. Can a decision be  
18 overruled simply because it was erroneously  
19 wrong, even if nothing has changed between the  
20 time of that decision and the time when the  
21 Court is called upon to consider whether it  
22 should be overruled? Yes or no? Can you give  
23 me a yes or no answer on that?

24 GENERAL PRELOGAR: This Court, no, has  
25 never overruled in that situation just based on

1 a conclusion that the decision was wrong. It  
2 has always applied the stare decisis factors and  
3 likewise found that they warrant overruling in  
4 that instance. And -- and Casey did that. It  
5 applied the stare decisis factors.

6 If stare decisis is to mean anything,  
7 it has to mean that that kind of extensive  
8 consideration of all of the same arguments for  
9 whether to retain or discard a precedent itself  
10 is an additional layer of precedent that needs  
11 to be relied on and can form a stable foundation  
12 of the rule of law.

13 JUSTICE KAGAN: General, you've talked  
14 a number of times about the reliance interests  
15 here, and I think I'd like you to say a little  
16 bit more about that because, you know,  
17 sometimes, when we talk about reliance  
18 interests, it's like there's a rule of law and  
19 you look at it and you say, oh, somebody will  
20 enforce my contract because of this rule, and it  
21 has a very kind of grounded quality to it.

22 And, as Casey talked about the  
23 reliance interests here, they're a little bit  
24 more airy. And I just wanted to get your sense  
25 of what are the reliance interests here and how



1 does -- how do they cash out on the ground?

2           GENERAL PRELOGAR: Well, there are  
3 multiple reliance interests here, as I think  
4 Casey correctly recognized. Casey pointed to  
5 the individual reliance of women and their  
6 partners who had been able to organize their  
7 lives and make important life decisions against  
8 the backdrop of having control over this  
9 incredibly consequential decision whether to  
10 have a child. And people make decisions in  
11 reliance on having that kind of reproductive  
12 control, decisions about where to live, what  
13 relationships to enter into, what investments to  
14 make in their jobs and careers.

15           And so I think, on a very individual  
16 level, there has been profound reliance. And  
17 it's certainly the case that not every woman in  
18 America has needed to exercise this right or has  
19 wanted to, but one in four American women have  
20 had an abortion, and for those women, the right  
21 secured by Roe and Casey has been critical in  
22 ensuring that they can control their bodies and  
23 control their lives.

24           And then I think there's a second  
25 dimension to it that Casey also properly

1 recognized, and that's the societal dimension.  
2 That's the -- the understanding of our society,  
3 even though this has been a controversial  
4 decision, that this is a liberty interest of  
5 women. It's the case that not everyone agrees  
6 with *Roe versus Wade*, but just about every  
7 person in America knows what this Court held,  
8 they know how the Court has defined this concept  
9 of liberty for women and what control they will  
10 have in the situation of an unplanned pregnancy.

11 And for the Court to reverse course  
12 now, I think, would run counter to that societal  
13 reliance and the very concept we have of what  
14 equality is guaranteed to women in this country.

15 JUSTICE SOTOMAYOR: It is certainly  
16 true that there can be some planning by some  
17 people about pregnancy. People who are raped  
18 don't have a choice, whether it's by an outsider  
19 or their own husband. And not everybody can  
20 afford contraceptives, contrary to the -- the --  
21 your adversary's brief. In fact, 19 percent of  
22 the women in Mississippi are uninsured, so they  
23 don't have money to pay for contraceptives.

24 So -- but why -- their point in their  
25 brief was, you know, contraceptives, if you use

1       them, the failure rate is very small, et cetera,  
2       et cetera, how can there be real reliance. So  
3       could you address that issue?

4               GENERAL PRELOGAR: Of course. So,  
5       first, this is not a new circumstance since Roe  
6       and Casey. Contraceptives existed in 1973 and  
7       in 1992, and still the Court recognized that  
8       unplanned pregnancies would persist and deeply  
9       implicate the liberty interests of women.

10              But I think even on the facts, the  
11       state is mistaken here. Contraceptive failure  
12       rate in this country is at about 10 percent,  
13       using the most common methods. That means that  
14       women using contraceptives, approximately one in  
15       10 will experience an unplanned pregnancy in the  
16       first year of use alone. About half the women  
17       who have unplanned pregnancies were on  
18       contraceptives in the month that that occurred.  
19       And so I think the idea that contraceptives  
20       could make the need for abortion dissipate is  
21       just contrary to the factual reality.

22              JUSTICE SOTOMAYOR: You also  
23       mentioned, or maybe it was your co-counsel, that  
24       life changes for women after 15 weeks.

25              GENERAL PRELOGAR: That's exactly

1 right, Justice Sotomayor, and I think that this  
2 is responsive as well to the questions that the  
3 Chief Justice was asking about, in particular,  
4 the impact of enforcing a 15-week bar in this  
5 case. The Court has always looked at that issue  
6 by looking at the people for whom the law is a  
7 restriction, not those for whom it's irrelevant.

8           So the question is, why would women  
9 need access to abortion after 15 weeks, and what  
10 is the effect on them? And there are any number  
11 of women who cannot get an abortion earlier.  
12 They don't realize that they're pregnant.  
13 That's especially true of women who are young or  
14 don't have -- haven't experienced a pregnancy  
15 before, or their life circumstances change, as  
16 you referred to, Justice Sotomayor. They lose  
17 their job or their relationship breaks apart or  
18 they have medical complications. Or, for many  
19 women, they don't have the resources to pay for  
20 it earlier. It takes time for them to raise the  
21 money or make the appropriate logistical  
22 arrangements to be able to take time off work  
23 and travel and have childcare. And for all  
24 those women in this category who need access  
25 to abortion after 15 weeks, the fact that other

1 women were able to exercise their constitutional  
2 rights does nothing to diminish the impact on  
3 their liberty interests in forcing them to  
4 continue with that pregnancy.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: General,  
7 following up on that, would that argument be  
8 true in terms of viability as well? In other  
9 words, what -- your discussion of the reliance  
10 interests and the ability of women and men to  
11 control their lives in reliance on the right to  
12 -- to an abortion, the argument would not be as  
13 strong, I think you'll have to concede, given  
14 what we're talking about, which is not a  
15 prohibition; it's a 15-week line. Is that  
16 right?

17 GENERAL PRELOGAR: Yes. So this --

18 CHIEF JUSTICE ROBERTS: There -- you  
19 have to hypothesize people who have planned  
20 their lives according to a 24 or whatever week  
21 limit it is but not a 15-week limit on abortion,  
22 right?

23 GENERAL PRELOGAR: Well, I don't think  
24 the Court has ever analyzed reliance with that  
25 kind of parsing. I think, here, the -- I -- the

1 -- the force of the viability line is that it's  
2 clearly demarcated to the scope of a  
3 woman's protected liberty interests in this  
4 context. And the state is not actually asking  
5 this Court to replace it with a clear 15-week  
6 line that would provide some measure of  
7 continued protection for this right. They're  
8 asking the Court to reverse the liberty interest  
9 altogether or leave it up in the air.

10           And if that were to happen, then  
11 immediately states with six-week bans,  
12 eight-week bans, ten-week bans, and so on, would  
13 seek to enforce those with no continued guidance  
14 of what the scope of the liberty interest is  
15 going forward.

16           CHIEF JUSTICE ROBERTS: Well, that may  
17 be what they're asking for, but the thing that  
18 is at issue before us today is 15 weeks. And I  
19 just wonder what the strength of your reliance  
20 arguments, which sounded to me like being based  
21 on a total prohibition, would be if there isn't  
22 a total prohibition, and as far as viability  
23 goes, I don't see what that has to do with the  
24 question of choice at all.

25           GENERAL PRELOGAR: Well, I think, as

1 Casey emphasized in reaffirming the viability  
2 line, the Court justified that as having both a  
3 logical and a biological justification that it  
4 marks the point in pregnancy when the fetus is  
5 capable of meaningful life --

6 CHIEF JUSTICE ROBERTS: No, that's  
7 what John Hart Ely explained was a complete  
8 syllogism. That's the definition of viability.  
9 It's not a reason that viability is a good line.

10 GENERAL PRELOGAR: Well, it's focused  
11 on the idea of fetal separateness, and I think  
12 that that is a line that also accords with the  
13 history and tradition in this country of  
14 abortion regulation. Contrary to the state's  
15 arguments here, at the time of the founding and  
16 for most of early American history, women had an  
17 -- an ability to access abortion in the early  
18 stages of pregnancy, and it was only when the  
19 fetus was deemed sufficiently separate that  
20 states could act to bar that.

21 So I think that the viability line  
22 also aligns with history and tradition in that  
23 respect.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Thomas?

1 JUSTICE THOMAS: You heard my question  
2 to counsel earlier about the woman who was  
3 convicted of criminal child neglect. What would  
4 be your reaction to that as far as her liberty  
5 and whether or not the liberty interest that  
6 we're talking about extends to her?

7 GENERAL PRELOGAR: Well, Justice  
8 Thomas, I have to confess that I haven't read  
9 the specific case you're referring to, but, if I  
10 understand the question you were posing, it  
11 sounds as though the state is seeking to  
12 regulate for a child that's been born that was  
13 injured while it was inside the womb.

14 And I think that we are not denying  
15 that a state has an interest there. We're not  
16 denying that a state has an interest here  
17 either. Roe recognized that states have  
18 interests that exist from the outset of  
19 pregnancy.

20 But, with respect to this specific  
21 right to abortion, there are also profound  
22 liberty interests of the woman on the other side  
23 of the scale in not being forced to continue  
24 with a pregnancy, not being forced to endure  
25 childbirth and to have a child out in the world.



1           And the state's arguments here seem to  
2 ask this Court to look only at its interests and  
3 to ignore entirely those incredibly weighty  
4 interests of the women on the other side.

5           JUSTICE THOMAS: Thank you.

6           CHIEF JUSTICE ROBERTS: Justice  
7 Breyer?

8           Justice Alito? No?

9           Justice Gorsuch, anything further?

10          JUSTICE GORSUCH: I just want to make  
11 sure I understand your response to the Chief  
12 Justice. If this Court will reject the  
13 viability line, do you see any other  
14 intelligible principle that the Court could  
15 choose?

16          GENERAL PRELOGAR: Well, I think that  
17 it would be critically important, even if this  
18 Court were to reject the viability line, to  
19 reinforce and reaffirm the fundamental and  
20 profound liberty interests --

21          JUSTICE GORSUCH: That -- that --

22          GENERAL PRELOGAR: -- at stake here,  
23 and I --

24          JUSTICE GORSUCH: Counsel, I'm sorry  
25 for interrupting, but that wasn't my question.

1 I understand -- I understand you -- I understand  
2 that point fully by the end of this argument.  
3 That is deeply clear to me. I understand your  
4 position.

5 I -- I'm just asking a question about  
6 whether you think there would be another  
7 alternative line that the government would  
8 propose or not. You emphasized that if -- if 15  
9 weeks were approved, then we'd have cases about  
10 12 and 10 and 8 and 6, and so my question is, is  
11 there a line in there that the government  
12 believes would be principled or not.

13 GENERAL PRELOGAR: I don't think  
14 there's any line that could be more principled  
15 than viability. You know, I think the factors  
16 the Court would have to think about are what is  
17 most consistent with precedent, what would be  
18 clear and workable and what would preserve  
19 the -- the essential components of the liberty  
20 interests, and viability checks all of those  
21 boxes and has the advantage as well as being a  
22 rule of law for 50 years.

23 JUSTICE GORSUCH: Thank you. That's  
24 helpful, counsel. Appreciate it.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: You -- you make a  
3 very forceful argument and identify critically  
4 important interests that are at stake in this  
5 issue, no doubt about that.

6 The other side says, though, that  
7 there are two interests at stake, that there's  
8 also the interest in -- in fetal life at stake  
9 as well. And in your brief, you say that the  
10 existing framework accommodates -- that's your  
11 word -- both the interests of the pregnant woman  
12 and the interests of the fetus.

13 And the -- and the problem, I think  
14 the other side would say and the reason this  
15 issue is hard, is that you can't accommodate  
16 both interests. You have to pick. That's the  
17 fundamental problem. And one interest has to  
18 prevail over the other at any given point in  
19 time, and that's why this is so challenging, I  
20 think.

21 And the question then becomes, what  
22 does the Constitution say about that? And I  
23 just want to get your reaction to what the other  
24 side's theme is, and I've mentioned it in my  
25 prior questions.

1           When you have those two interests at  
2 stake and both are important, as you  
3 acknowledge, why not -- why should this Court be  
4 the arbiter rather than Congress, the state  
5 legislatures, state supreme courts, the people  
6 being able to resolve this? And there will be  
7 different answers in Mississippi and New York,  
8 different answers in Alabama than California  
9 because they're two different interests at stake  
10 and the people in those states might value those  
11 interests somewhat differently.

12           Why is that not the right answer?

13           GENERAL PRELOGAR: Justice Kavanaugh,  
14 it's not the right answer because the Court  
15 correctly recognized that this is a fundamental  
16 right of women, and the nature of fundamental  
17 rights is that it's not left up to state  
18 legislatures to decide whether to honor them or  
19 not.

20           And it's true, different rules would  
21 prevail throughout the country if this Court  
22 were to overrule Roe and Wade -- Roe and Casey,  
23 but what that would mean is that women in those  
24 states who are refusing to honor their rights  
25 and who are forcing them to continue to use

1 their bodies to sustain a pregnancy and then to  
2 bring a child into the world will have no  
3 recourse other than to travel if they're able to  
4 afford it or to attempt abortion outside the  
5 confines of the medical system or to have a  
6 child even though that was not the best choice  
7 for them and their family.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Barrett.

11 JUSTICE BARRETT: I have a follow-up  
12 to Justice Kagan's question about reliance. I'm  
13 just trying to nail down, and I -- and I asked  
14 Ms. Rikelman this question too, but I'm not sure  
15 that I fully understand the government's  
16 position or Ms. Rikelman's position.

17 So, on pages 18 and 19 of your brief,  
18 you talk about reliance interests and you quote  
19 some of the language from Casey about a woman's  
20 ability to participate in the social and  
21 economic life of the nation.

22 And I mentioned the safe haven laws to  
23 Ms. Rikelman, and it -- it seems to me I fully  
24 understand the reliance interests. There are  
25 the airy ones Justice Kagan was referring to and

1 then there are the more specific ones about a  
2 woman's access to abortion as a backup form of  
3 birth control in the event that contraception  
4 fails so that she need not bear the burdens of  
5 pregnancy.

6 But what do you have to say to  
7 Petitioners' argument that those reliance  
8 interests do not include the reliance interests  
9 of parenting and bringing a child into the world  
10 when maybe that's not the best thing for her  
11 family or her career?

12 GENERAL PRELOGAR: I think the state  
13 is wrong about that. And I -- I think where the  
14 analysis goes wrong in reliance on those safe  
15 haven laws is overlooking the consequences of  
16 forcing a woman upon her the choice of having to  
17 decide whether to give a child up for adoption.  
18 That itself is its own monumental decision for  
19 her.

20 And so I think that there's nothing  
21 new about the safe haven laws, the -- or -- or  
22 at least nothing new about the availability of  
23 adoption as an alternative. Roe and Casey  
24 already took account of that fact. And I think  
25 that there are certainly, of course, all of

1 the -- the bodily integrity interests that we've  
2 referred to, but, also, the autonomy interests  
3 retain in force as well.

4 JUSTICE BARRETT: Okay. So it's  
5 the -- the reliance interests and the right to  
6 be able to choose to terminate the pregnancy  
7 rather than having to terminate the parental  
8 rights?

9 GENERAL PRELOGAR: I think that that  
10 is part of it, yes. And I think, for many  
11 women, that is an incredibly difficult choice,  
12 but it's one that this Court for 50 years has  
13 recognized must be left up to them based on  
14 their beliefs and their conscience and their  
15 determination about what is best for the course  
16 of their lives.

17 JUSTICE BARRETT: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 General.

20 Rebuttal, General Stewart.

21 REBUTTAL ARGUMENT OF SCOTT G. STEWART.  
22 ON BEHALF OF THE PETITIONERS

23 MR. STEWART: Thank you, Mr. Chief  
24 Justice. I'd like to do my best to make three  
25 points.

1           First, picking up where -- where you  
2 just left off, Justice Barrett, on safe haven  
3 laws, the Respondents in this case, I -- I  
4 believe, as Your Honor pointed out, have  
5 emphasized parenting burdens being a lead or the  
6 lead reason that women seek abortions.

7           I would emphasize safe haven laws, as  
8 best I've been able to find, first came into  
9 existence in 1999 in Texas. They're now  
10 ubiquitous, and you're correct, Justice Barrett,  
11 that they relieve that huge burden.

12           I would also add that as to -- as to  
13 burdens during pregnancy, I would emphasize that  
14 contraception is more accessible and affordable  
15 and available than it was at the time of Roe or  
16 Casey. It serves the same goal of allowing  
17 women to decide if, when, and how many children  
18 to have.

19           And I would also note, just frankly,  
20 the lowest cost abortion at Jackson Women's  
21 Health is \$600 for the abortion, additional  
22 costs and further fees. According to -- to my  
23 friends, the Respondents, and their amici, there  
24 are also additional costs related to travel,  
25 taking off time -- time off of work,



1 accommodations, all of those sorts of things.  
2 Whether somebody is uninsured or not, the costs  
3 of contraception are consistently significantly  
4 less than those.

5           Number two, I -- I think you --  
6 Justice Kavanaugh, you had it exactly right when  
7 you -- when you used the term scrupulously  
8 neutral. I think that's a very good description  
9 of what we're asking for here. I think it's the  
10 problem and the value that has evaded the Court  
11 and will continue to evade this Court under Roe  
12 and Casey, but that is exact -- exactly right.

13           This is a hard issue. It involves --  
14 and -- and I would emphasize, Your Honor, that,  
15 as you said, there are interests here on -- on  
16 both sides. There are interests for everyone  
17 involved. This is unique for the woman. It's  
18 unique for the unborn child too whose life is at  
19 stake in all of these decisions. It's unique  
20 for us as a society in how we decide if the  
21 states get to -- get -- get to legislate on this  
22 issue, how to decide and how to weigh these  
23 tremendously momentous issues.

24           In closing, I would say that in its  
25 dissent in Plessy versus Ferguson, Justice

1 Harlan emphasized that there is no caste system  
2 here. The humblest in our country is the pure,  
3 the most powerful. Our Constitution neither  
4 knows nor tolerates distinctions on the basis of  
5 race.

6 It took 58 years for this Court to  
7 recognize the truth of those realities in a  
8 decision, and that was the greatest decision  
9 that this Court ever reached. We're -- we're  
10 running on 50 years of Roe. It is an  
11 egregiously wrong decision that has inflicted  
12 tremendous damage on our country and will  
13 continue to do so and take enumerable human  
14 lives unless and until this Court overrules it.

15 We ask the Court to do so in this case  
16 and uphold the state's law. Thank you, Your  
17 Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 General, counsel. The case is submitted.

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

22

23

24

25

## Official - Subject to Final Review

<b>\$</b>	<b>58</b> <sup>[1]</sup> 113:6	10	<b>Alabama</b> <sup>[1]</sup> 107:8	<b>applies</b> <sup>[5]</sup> 5:3 8:8 60:7 73:3 79:13
<b>\$600</b> <sup>[1]</sup> 111:21	<b>6</b>	<b>accommodations</b> <sup>[1]</sup> 112:1	<b>alarmingly</b> <sup>[1]</sup> 57:25	<b>apply</b> <sup>[5]</sup> 5:2 26:2 42:10 61:12 62:1
<b>1</b>	<b>6</b> <sup>[1]</sup> 105:10	<b>according</b> <sup>[5]</sup> 5:10 27:13 41:12 100:20 111:22	<b>aligns</b> <sup>[1]</sup> 102:22	<b>applying</b> <sup>[1]</sup> 62:6
<b>1</b> <sup>[1]</sup> 1:14	<b>7</b>	<b>accords</b> <sup>[1]</sup> 102:12	<b>ALITO</b> <sup>[33]</sup> 17:8 32:5 41:4 63:4,23 64:23 65:7,10,16,19 66:3,5 73:16,17 74:2,10,13,24 75:12 76:1,13 91:23 92:7,21,25 93:11,13,19,21,22 94:4,8 104:8	<b>appreciate</b> <sup>[3]</sup> 63:2 68:5 105:24
<b>10</b> <sup>[4]</sup> 9:22 98:12,15 105:10	<b>75</b> <sup>[2]</sup> 31:4 57:25	<b>account</b> <sup>[8]</sup> 12:11 16:25 17:4 18:14 32:1 38:2 45:12 109:24	<b>allow</b> <sup>[3]</sup> 44:3 47:15 55:2	<b>approach</b> <sup>[3]</sup> 11:2 46:4 78:16
<b>10:00</b> <sup>[2]</sup> 1:18 4:2	<b>8</b>	<b>accurate</b> <sup>[1]</sup> 43:22	<b>allowed</b> <sup>[1]</sup> 73:25	<b>appropriate</b> <sup>[6]</sup> 36:6 46:25 66:8 75:10 84:2 99:21
<b>11:54</b> <sup>[1]</sup> 113:20	<b>8</b> <sup>[1]</sup> 105:10	<b>acknowledge</b> <sup>[1]</sup> 107:3	<b>Allowing</b> <sup>[2]</sup> 74:14 111:16	<b>approved</b> <sup>[1]</sup> 105:9
<b>110</b> <sup>[1]</sup> 3:14	<b>84</b> <sup>[1]</sup> 3:11	<b>acknowledged</b> <sup>[1]</sup> 33:10	<b>allows</b> <sup>[2]</sup> 44:9 55:6	<b>approximately</b> <sup>[1]</sup> 98:14
<b>12</b> <sup>[3]</sup> 41:18 55:12 105:10	<b>854</b> <sup>[2]</sup> 11:3 89:17	<b>acquires</b> <sup>[1]</sup> 66:12	<b>alluding</b> <sup>[2]</sup> 8:7 42:7	<b>arbiter</b> <sup>[1]</sup> 107:4
<b>14</b> <sup>[1]</sup> 31:9	<b>863</b> <sup>[1]</sup> 89:17	<b>across</b> <sup>[1]</sup> 41:19	<b>alone</b> <sup>[3]</sup> 4:19 12:12 98:16	<b>arbitrary</b> <sup>[4]</sup> 19:24 64:12,20 68:3
<b>15</b> <sup>[18]</sup> 4:23 14:17 41:18 51:23 52:4,14 53:13,17,22 55:20 57:5 60:11 90:21 98:24 99:9,25 101:18 105:8	<b>869</b> <sup>[2]</sup> 11:3 68:1	<b>Act</b> <sup>[3]</sup> 60:10 87:8 102:20	<b>already</b> <sup>[5]</sup> 57:15 81:3 84:23 89:18 109:24	<b>areas</b> <sup>[6]</sup> 7:14,15,18 40:13,16,16
<b>15-week</b> <sup>[7]</sup> 51:21 54:9,12	<b>871</b> <sup>[1]</sup> 68:1	<b>acts</b> <sup>[2]</sup> 15:4 21:5	<b>alternative</b> <sup>[2]</sup> 105:7 109:23	<b>aren't</b> <sup>[3]</sup> 28:11 50:20 55:16
<b>99:4 100:15,21 101:5</b>	<b>879</b> <sup>[1]</sup> 69:5	<b>actually</b> <sup>[13]</sup> 15:20 19:19 39:16 53:2 58:6 61:7 80:16 83:2 88:24 89:6 91:2 93:24 101:4	<b>alternatives</b> <sup>[1]</sup> 63:15	<b>argue</b> <sup>[3]</sup> 28:3 59:9,11
<b>150</b> <sup>[1]</sup> 25:24	<b>9</b>	<b>add</b> <sup>[6]</sup> 19:22 24:7 25:12 89:23 90:22 111:12	<b>altogether</b> <sup>[1]</sup> 101:9	<b>argued</b> <sup>[1]</sup> 18:24
<b>16</b> <sup>[1]</sup> 57:5	<b>9</b> <sup>[2]</sup> 41:18 55:20	<b>added</b> <sup>[2]</sup> 16:13 38:1	<b>Amendment</b> <sup>[16]</sup> 15:17 23:20 51:4 71:24 73:22 75:3 79:15 83:23 85:25 86:11,13,23,24,24 88:2,6	<b>arguing</b> <sup>[6]</sup> 39:10 43:5,5,8,15 45:14
<b>18</b> <sup>[2]</sup> 55:12 108:17	<b>A</b>	<b>addition</b> <sup>[3]</sup> 38:5 57:17 73:6	<b>Amendment's</b> <sup>[1]</sup> 81:21	<b>argument</b> <sup>[30]</sup> 1:17 3:2,5,8,12 4:4,7 38:2,7,9 47:7 50:13 59:22 60:23 62:6 64:8 66:7,7 68:3 70:19 77:18 84:8 91:23 92:5 100:7,12 105:2 106:3 109:7 110:21
<b>1800s</b> <sup>[1]</sup> 75:24	<b>a.m</b> <sup>[3]</sup> 1:18 4:2 113:20	<b>additional</b> <sup>[3]</sup> 95:10 111:21,24	<b>amendments</b> <sup>[1]</sup> 86:19	<b>arguments</b> <sup>[15]</sup> 34:23 38:17,25 39:11 54:8 63:12,14 64:5 77:23 80:1 81:3 95:8 101:20 102:15 104:1
<b>1868</b> <sup>[2]</sup> 73:22 74:4	<b>ability</b> <sup>[22]</sup> 10:21 22:21 29:24 49:9 52:13,21 53:6,7 57:3,22,23 66:20 74:8 75:25 78:5 84:1 85:15 89:7 91:20 100:10 102:17 108:20	<b>address</b> <sup>[4]</sup> 57:7 68:18,19 98:3	<b>America</b> <sup>[3]</sup> 89:6 96:18 97:7	<b>Arizona</b> <sup>[1]</sup> 79:7
<b>1896</b> <sup>[1]</sup> 93:1	<b>able</b> <sup>[18]</sup> 15:13 18:15 36:13 41:22 44:4 53:21 73:5 75:17 78:9 81:8 86:4 96:6 99:22 100:1 107:6 108:3 110:6 111:8	<b>addressed</b> <sup>[2]</sup> 38:23 68:5	<b>American</b> <sup>[8]</sup> 16:23 70:9 74:25 75:15 76:9,24 96:19 102:16	<b>around</b> <sup>[2]</sup> 39:21 55:23
<b>1897</b> <sup>[2]</sup> 92:8 93:4	<b>abortion</b> <sup>[67]</sup> 5:1,5,18 6:5,9,13,25 7:23 12:21 23:22 24:4 31:10 35:15 43:9,11,17,19 44:4 47:11 48:16 50:9,14 51:6 52:4,18 53:3,22 54:5 55:2,6,13,24 56:7 57:4 58:3 60:11 71:18,20 73:21 74:4 75:1,13 77:1,3,9 81:23 84:24 85:4,21 86:4,9 87:9,13 96:20 98:20 99:9,11,25 100:12,21 102:14,17 103:21 108:4 109:2 111:20,21	<b>adds</b> <sup>[1]</sup> 18:1	<b>74:25 75:15 76:9,24 96:19 102:16</b>	<b>arrangements</b> <sup>[1]</sup> 99:22
<b>19</b> <sup>[4]</sup> 63:20 75:22 97:21 108:17	<b>abortions</b> <sup>[6]</sup> 4:23 5:7 31:6 37:7 44:10 111:6	<b>adhere</b> <sup>[5]</sup> 48:3 80:2,2,3,4	<b>American</b> <sup>[8]</sup> 16:23 70:9 74:25 75:15 76:9,24 96:19 102:16	<b>array</b> <sup>[1]</sup> 32:11
<b>19-1392</b> <sup>[1]</sup> 4:4	<b>above</b> <sup>[1]</sup> 72:6	<b>adhered</b> <sup>[1]</sup> 57:16	<b>102:16</b>	<b>article</b> <sup>[1]</sup> 76:4
<b>1954</b> <sup>[2]</sup> 90:14 93:2	<b>above-entitled</b> <sup>[1]</sup> 1:16	<b>administer</b> <sup>[1]</sup> 60:1	<b>102:16</b>	<b>articulate</b> <sup>[1]</sup> 86:20
<b>1973</b> <sup>[1]</sup> 98:6	<b>absence</b> <sup>[1]</sup> 10:13	<b>administrable</b> <sup>[1]</sup> 8:9	<b>Americans</b> <sup>[1]</sup> 85:14	<b>articulated</b> <sup>[1]</sup> 87:3
<b>1992</b> <sup>[1]</sup> 98:7	<b>absolute</b> <sup>[1]</sup> 82:2	<b>adopt</b> <sup>[2]</sup> 14:13 35:7	<b>amici</b> <sup>[2]</sup> 56:13 111:23	<b>aside</b> <sup>[4]</sup> 30:7,9 53:9 59:23
<b>1999</b> <sup>[1]</sup> 111:9	<b>absolutely</b> <sup>[1]</sup> 15:25	<b>adopted</b> <sup>[4]</sup> 12:22 16:21 73:23 75:3	<b>amicus</b> <sup>[3]</sup> 2:8 3:10 84:9	<b>asks</b> <sup>[1]</sup> 47:14
<b>2</b>	<b>abstract</b> <sup>[1]</sup> 7:1	<b>adopting</b> <sup>[1]</sup> 69:6	<b>among</b> <sup>[1]</sup> 68:15	<b>aspects</b> <sup>[1]</sup> 6:16
<b>20</b> <sup>[1]</sup> 9:22	<b>accept</b> <sup>[4]</sup> 13:3,7 45:13 62:13	<b>adoption</b> <sup>[4]</sup> 57:13 58:7 109:17,23	<b>analysis</b> <sup>[12]</sup> 6:22 7:7 39:22 60:2 67:20,22 73:8 75:10 76:3,8 81:5 109:14	<b>assessing</b> <sup>[1]</sup> 68:24
<b>200</b> <sup>[1]</sup> 25:24	<b>acceptable</b> <sup>[1]</sup> 82:6	<b>adopts</b> <sup>[1]</sup> 82:4	<b>analyzed</b> <sup>[1]</sup> 100:24	<b>assisted</b> <sup>[1]</sup> 7:14
<b>2021</b> <sup>[1]</sup> 1:14	<b>access</b> <sup>[11]</sup> 52:12 55:2,2,6,13 56:15 85:3 99:9,24 102:17 109:2	<b>adults</b> <sup>[1]</sup> 25:5	<b>analyzes</b> <sup>[1]</sup> 27:17	<b>associated</b> <sup>[1]</sup> 59:17
<b>23</b> <sup>[2]</sup> 21:15 57:4	<b>accessible</b> <sup>[1]</sup> 111:14	<b>advancement</b> <sup>[1]</sup> 17:12	<b>analyzing</b> <sup>[1]</sup> 92:16	<b>Association</b> <sup>[1]</sup> 74:25
<b>24</b> <sup>[4]</sup> 17:23 21:15 82:19 100:20	<b>accessing</b> <sup>[1]</sup> 48:24	<b>advancements</b> <sup>[2]</sup> 17:5,9	<b>anomalous</b> <sup>[1]</sup> 87:2	<b>associations</b> <sup>[1]</sup> 76:10
<b>25</b> <sup>[1]</sup> 17:23	<b>accommodate</b> <sup>[1]</sup> 106:15	<b>advantage</b> <sup>[1]</sup> 105:21	<b>another</b> <sup>[5]</sup> 27:1 42:17 61:6 91:2 105:6	<b>assume</b> <sup>[3]</sup> 8:21 49:6 80:7
<b>26</b> <sup>[1]</sup> 75:1	<b>accommodates</b> <sup>[1]</sup> 106:6	<b>adversary's</b> <sup>[1]</sup> 97:21	<b>answer</b> <sup>[16]</sup> 13:3 27:9 31:18 35:22 42:3 58:10 64:18 67:23 80:16 92:25 93:3 94:15,17,23 107:12,14	<b>assumed</b> <sup>[1]</sup> 78:23
<b>27</b> <sup>[5]</sup> 81:24 82:3,17,19 83:14		<b>affects</b> <sup>[1]</sup> 5:21	<b>answers</b> <sup>[2]</sup> 107:7,8	<b>assumes</b> <sup>[1]</sup> 30:4
<b>3</b>		<b>affirm</b> <sup>[1]</sup> 49:4	<b>anybody</b> <sup>[1]</sup> 44:11	<b>Atkins</b> <sup>[1]</sup> 80:3
<b>3-0</b> <sup>[1]</sup> 60:18		<b>affirmed</b> <sup>[1]</sup> 63:21	<b>anyway</b> <sup>[1]</sup> 42:25	<b>attempt</b> <sup>[1]</sup> 108:4
<b>30</b> <sup>[10]</sup> 11:11 12:9 13:23 14:6,15 16:25 17:5 35:10,12 81:7		<b>afford</b> <sup>[2]</sup> 97:20 108:4	<b>apart</b> <sup>[1]</sup> 99:17	<b>attend</b> <sup>[1]</sup> 61:5
<b>37</b> <sup>[1]</sup> 75:2		<b>affordable</b> <sup>[1]</sup> 111:14	<b>apologize</b> <sup>[2]</sup> 36:23 76:5	<b>attorney</b> <sup>[1]</sup> 79:9
<b>4</b>		<b>ago</b> <sup>[6]</sup> 34:22 35:10,11 63:21 81:8,8	<b>appeals</b> <sup>[2]</sup> 38:4 69:17	<b>author</b> <sup>[2]</sup> 76:3,6
<b>4</b> <sup>[1]</sup> 3:4		<b>agree</b> <sup>[6]</sup> 26:24 59:13 61:13 65:10 80:7 90:25	<b>APPEARANCES</b> <sup>[1]</sup> 2:1	<b>authority</b> <sup>[5]</sup> 10:9 43:9,10 77:11 79:6
<b>40</b> <sup>[1]</sup> 21:3		<b>agrees</b> <sup>[1]</sup> 97:5	<b>appearing</b> <sup>[1]</sup> 15:24	<b>autonomy</b> <sup>[18]</sup> 6:7,9,17,19 7:16 23:21 33:24 49:7 50:
<b>47</b> <sup>[1]</sup> 3:7		<b>ahead</b> <sup>[4]</sup> 11:19 24:16,16,17	<b>applicability</b> <sup>[1]</sup> 68:11	
<b>48</b> <sup>[1]</sup> 56:8		<b>air</b> <sup>[1]</sup> 101:9	<b>applicable</b> <sup>[1]</sup> 45:19	
<b>5</b>		<b>airy</b> <sup>[2]</sup> 95:24 108:25	<b>applied</b> <sup>[6]</sup> 60:15 62:10 68:12 78:21 95:2,5	
<b>50</b> <sup>[16]</sup> 4:16,19 14:14 34:16,17,22 35:11 51:8 52:18 56:5 60:16 80:24 81:8 105:22 110:12 113:10		<b>AL</b> <sup>[2]</sup> 1:5,9		
<b>505</b> <sup>[1]</sup> 11:3				

## Official - Subject to Final Review

15,16 56:23 58:23 71:21 72:3,24 85:22 86:1 110:2 <b>availability</b> [1] 109:22 <b>available</b> [1] 111:15 <b>avoid</b> [1] 49:2 <b>away</b> [4] 29:24 51:10 82:3 88:25	<b>belief</b> [1] 16:10 <b>beliefs</b> [1] 110:14 <b>believe</b> [15] 15:14,18,20 17: 23 18:5 31:16 32:10 37:20 49:13 52:3 58:17 61:19,22, 23 111:4 <b>believes</b> [1] 105:12 <b>believing</b> [1] 69:23 <b>belong</b> [2] 22:17 88:15 <b>belongs</b> [2] 5:22 13:17 <b>below</b> [3] 5:1 21:14 60:17 <b>benefits</b> [6] 28:21 44:23 53:4,5 59:17,20 <b>best</b> [11] 5:19 12:3 30:13 32:2 39:10 74:10 108:6 109:10 110:15,24 111:8 <b>better</b> [3] 9:10 64:6 70:13 <b>between</b> [6] 18:6 25:5 51: 23 57:3 66:18 94:19 <b>beyond</b> [4] 10:16 23:11,15 33:15 <b>big-picture</b> [1] 77:18 <b>bill</b> [4] 14:19,20 88:5,9 <b>bioethicists</b> [1] 32:6 <b>biological</b> [1] 102:3 <b>birth</b> [7] 31:9 47:16 58:1 66: 19 84:19 85:5 109:3 <b>bit</b> [7] 26:7 44:19 55:21 66: 25 72:18 95:16,23 <b>bite</b> [1] 69:11 <b>Blackmun</b> [4] 19:18,22 64: 11 68:15 <b>Board</b> [3] 15:9 79:3 80:2 <b>bodies</b> [6] 78:10 81:10 85: 6 89:7 96:22 108:1 <b>bodily</b> [9] 6:20 34:1 49:8 50:15,16 56:22 58:20 86:2 110:1 <b>body</b> [5] 14:10 48:6 74:15 83:20 87:23 <b>boil</b> [1] 60:23 <b>born</b> [1] 103:12 <b>both</b> [19] 21:13 36:14 40:6 49:8 50:2,4,22 53:25 56: 11 58:17 59:2,17 63:22 70: 4 102:2 106:11,16 107:2 112:16 <b>bounds</b> [1] 86:21 <b>Bowers</b> [1] 45:4 <b>boxes</b> [1] 105:21 <b>brain</b> [3] 20:25 21:2,6 <b>branch</b> [1] 46:5 <b>branches</b> [1] 87:24 <b>break</b> [2] 7:23 46:16 <b>breaks</b> [1] 99:17 <b>BREYER</b> [27] 8:18,21,24 11:6,13,18 12:17 13:2,9,11, 23 25:18,23 26:10,14,17, 21 27:7 32:21 41:3 44:20 45:9 69:8 73:15 89:15 90: 25 104:7 <b>Breyer's</b> [1] 67:1	<b>bridge</b> [1] 34:17 <b>brief</b> [13] 11:10 17:2 37:9 49:6 52:25 63:5,10 74:24 76:8 97:21,25 106:9 108: 17 <b>briefed</b> [1] 18:24 <b>briefs</b> [2] 59:15 63:5 <b>bright-line</b> [1] 8:16 <b>bring</b> [2] 89:9 108:2 <b>bringing</b> [1] 109:9 <b>brings</b> [1] 48:9 <b>Britain</b> [1] 55:5 <b>broad</b> [1] 55:14 <b>broader</b> [1] 38:17 <b>brought</b> [1] 71:3 <b>Brown</b> [9] 15:9 36:8 45:4, 16 79:2 80:2 89:21 92:16 93:10 <b>brutal</b> [1] 5:5 <b>built</b> [1] 94:9 <b>bulk</b> [1] 12:15 <b>burden</b> [29] 8:4,15 12:12 14:9 16:22 29:11,16 41:11 42:9,14,16,20 56:21 57:1 59:8,9,11 60:5 61:12,12,23 62:6,8,15 63:16 68:22 69: 6 82:4 111:11 <b>burdens</b> [9] 56:11 57:18 58:15 59:17,21 64:14 109: 4 111:5,13 <b>business</b> [1] 79:6	<b>60:6,13 61:11 70:1,2,3,3, 12 74:10 82:9 89:18 91:12, 18,24 92:6 96:17 97:5 99: 5 103:9 111:3 113:15,19, 20</b> <b>cases</b> [40] 7:24 17:19 23: 25 24:21,25 25:3,25 27:10 28:4,12 33:23 34:4 36:9 39:21 40:2 57:16 58:19,20, 21,23 63:19 72:9 76:22 78: 25,25 79:2,17,20,25 80:1,5, 8,15,19 87:20 88:24 89:23 90:18 91:3 105:9 <b>Casey</b> [104] 4:12 5:14,24 6: 1,7 8:1,14,19,22 11:8,11, 12 12:6,14,15,17 13:13 14: 7,11,15 15:7 16:5,8,10,17, 17,20 17:2 18:11,13 20:4,4, 9 22:14 23:7,7,22 25:21 26:15 31:25 32:23 33:10, 18 35:13,14 37:11 39:1 40: 20 42:12,19,24 45:9,16 46: 1 47:21 48:3,5 49:12 56: 11 57:12,19 58:6,18 59:7 62:9 63:7,17,19,22,25 67:3, 6,19,25 68:5,10,20 69:12, 14,20 71:1 75:20 77:23 81: 5 84:22 85:10 87:4 89:17 91:5,16 92:16 95:4,22 96: 4,4,21,25 98:6 102:1 107: 22 108:19 109:23 111:16 112:12 <b>Casey's</b> [2] 5:9 35:5 <b>cash</b> [1] 96:1 <b>caste</b> [1] 113:1 <b>category</b> [6] 60:24 61:1 62: 22,24 67:16 99:24 <b>causal</b> [1] 53:2 <b>caused</b> [1] 11:13 <b>causing</b> [1] 50:17 <b>center</b> [1] 4:17 <b>central</b> [9] 20:5,14 33:11 48:4 63:18,22 68:7 85:15, 17 <b>centuries</b> [1] 73:4 <b>century</b> [1] 84:13 <b>cert</b> [3] 37:4,18 38:13 <b>certain</b> [9] 6:16,16 22:16 42:15,15 44:10 62:22 66: 12 88:8 <b>certainly</b> [13] 19:1 20:18 49:24 50:21 51:20 63:12 64:1 67:4 80:23 92:13 96: 17 97:15 109:25 <b>cetera</b> [2] 98:1,2 <b>Carr</b> [1] 79:4 <b>carry</b> [2] 84:18 86:6 <b>carrying</b> [2] 42:21 58:12 <b>Case</b> [51] 4:4,22 9:4,12,18, 19,20 10:1 13:6 18:23 32: 22 33:5,14,16,17 35:14 42: 11 45:7 49:12,16,17 50:16, 20 51:2,5,6 52:25 59:24	<b>7 65:22 66:15 82:23 99:15</b> <b>changed</b> [9] 17:3 21:11 33: 18 35:5,9 66:14 92:3,9 94: 19 <b>changes</b> [4] 17:1 33:4 53: 4 98:24 <b>characteristics</b> [1] 66:12 <b>characterization</b> [1] 26: 25 <b>checks</b> [1] 105:20 <b>CHIEF</b> [53] 4:3,9 18:21 19: 6,10,15 20:1,3,19 36:23,25 38:16 39:12,13 40:5,24 41: 2 43:1 44:16 47:2,4,6,9 51: 17 52:22 53:8 54:11 55:9 56:2 60:21 62:3 66:24 68: 4 71:14 73:14 76:14 81:12, 15 84:5,11 99:3 100:6,18 101:16 102:6,24 104:6,11 105:25 108:9 110:18,23 113:18 <b>child</b> [21] 5:3 17:14 31:10 49:14,20 50:12 51:15 56:7 57:12 58:12 78:6 89:9 96: 10 103:3,12,25 108:2,6 109:9,17 112:18 <b>childbearing</b> [4] 49:10 58: 25 73:8 78:6 <b>childbirth</b> [3] 48:8 78:12 103:25 <b>childcare</b> [1] 99:23 <b>children</b> [3] 22:20 57:23 111:17 <b>China</b> [1] 54:18 <b>choice</b> [16] 8:15 9:13 31:15 53:10,10,13,13,16,17 57:2 78:1 97:18 101:24 108:6 109:16 110:11 <b>choices</b> [1] 22:23 <b>choked</b> [1] 4:16 <b>choose</b> [6] 14:9 22:21,25 31:13 104:15 110:6 <b>Circuit</b> [1] 60:17 <b>circumstance</b> [3] 30:25 92:4 98:5 <b>circumstances</b> [4] 45:2 52:5 93:13 99:15 <b>cited</b> [1] 58:21 <b>claim</b> [1] 62:22 <b>clarification</b> [1] 63:3 <b>clarified</b> [2] 8:4 93:10 <b>clarify</b> [1] 61:23 <b>clause</b> [3] 72:9,21 81:21 <b>clear</b> [14] 24:11 25:3,6 40: 17 43:4,7 50:8 51:8 52:18 53:5 92:17 101:5 105:3,18 <b>clearer</b> [1] 71:4 <b>clearly</b> [5] 14:10 30:16 67: 25 94:17 101:2 <b>closely</b> [2] 11:7 23:12 <b>closing</b> [1] 112:24 <b>co-counsel</b> [1] 98:23
	<b>B</b>			
<b>baby</b> [1] 86:6 <b>back</b> [11] 8:11,19 21:10 25: 24,24 32:25 33:3 37:3 42: 2 71:16 72:10 <b>backdrop</b> [1] 96:8 <b>backgrounds</b> [1] 14:18 <b>backup</b> [1] 109:2 <b>backwards</b> [3] 48:16 55: 20,22 <b>bad</b> [3] 11:14 26:8 35:10 <b>badge</b> [2] 90:11 92:19 <b>Baker</b> [1] 79:3 <b>balance</b> [5] 34:10,13,14 36: 18 87:7 <b>balanced</b> [1] 65:15 <b>balances</b> [1] 74:22 <b>balancing</b> [1] 48:13 <b>ban</b> [14] 14:21,23 25:3,4,6 47:11 48:20 51:6 52:14 54: 5,7,9,12 61:3 <b>bans</b> [5] 54:10 84:24 101: 11,12,12 <b>bar</b> [5] 47:21 53:23 62:22 99:4 102:20 <b>barely</b> [1] 5:12 <b>BARRETT</b> [22] 24:15,18,19 26:18 40:11 44:17,18 46: 18 56:3 58:5 69:10 81:13, 14 82:13 83:3,10 108:10, 11 110:4,17 111:2,10 <b>Barrett's</b> [1] 78:18 <b>barriers</b> [3] 55:8,17,25 <b>base</b> [2] 67:5,7 <b>based</b> [11] 33:19 39:2,18 53:2 75:21 87:9 91:17 94: 10,25 101:20 110:13 <b>basic</b> [1] 14:16 <b>basically</b> [3] 41:10 82:14 88:6 <b>basis</b> [6] 4:13 8:8 27:4 35: 6 71:12 113:4 <b>battle</b> [1] 4:18 <b>bear</b> [1] 109:4 <b>bearing</b> [1] 58:12 <b>became</b> [1] 41:11 <b>become</b> [3] 6:14 92:17 94: 2 <b>becomes</b> [1] 106:21 <b>begin</b> [2] 30:6 32:8 <b>beginning</b> [2] 29:21 90:3 <b>begins</b> [2] 29:20 84:4 <b>behalf</b> [9] 2:3,4 3:4,7,14 4: 8 47:8 76:9 110:22 <b>behind</b> [1] 33:23	<b>calculus</b> [1] 31:3 <b>California</b> [1] 107:8 <b>call</b> [4] 9:8 24:20 26:1 87: 21 <b>called</b> [3] 11:23 75:22 94: 21 <b>calling</b> [1] 90:5 <b>calm</b> [1] 14:4 <b>calming</b> [1] 13:24 <b>came</b> [2] 1:16 111:8 <b>Canada</b> [1] 55:5 <b>cannot</b> [7] 21:13 24:3 51:9 67:4 82:3 84:17 99:11 <b>capable</b> [1] 102:5 <b>care</b> [6] 48:24 50:3 52:13 56:20 57:22 90:21 <b>career</b> [1] 109:11 <b>careers</b> [1] 96:14 <b>carefully</b> [3] 16:3 47:22 91: 5 <b>Carey</b> [1] 72:10 <b>Carolina</b> [1] 49:13 <b>Carr</b> [1] 79:4 <b>carry</b> [2] 84:18 86:6 <b>carrying</b> [2] 42:21 58:12 <b>Case</b> [51] 4:4,22 9:4,12,18, 19,20 10:1 13:6 18:23 32: 22 33:5,14,16,17 35:14 42: 11 45:7 49:12,16,17 50:16, 20 51:2,5,6 52:25 59:24	<b>C</b>		

## Official - Subject to Final Review

<p><b>Coast</b> <sup>[4]</sup> 45:17 79:5 80:3 89:22</p> <p><b>cocaine</b> <sup>[2]</sup> 49:15,18</p> <p><b>colleague</b> <sup>[1]</sup> 67:1</p> <p><b>colleagues</b> <sup>[2]</sup> 59:6 68:16</p> <p><b>colloquy</b> <sup>[3]</sup> 40:10,10 44:22</p> <p><b>color</b> <sup>[1]</sup> 58:4</p> <p><b>come</b> <sup>[8]</sup> 33:6 34:22 62:21 72:13 81:1 89:11 92:2 93:4</p> <p><b>comes</b> <sup>[4]</sup> 69:19,22 73:6 83:18</p> <p><b>comfortable</b> <sup>[1]</sup> 27:16</p> <p><b>coming</b> <sup>[1]</sup> 41:21</p> <p><b>command</b> <sup>[1]</sup> 45:2</p> <p><b>comments</b> <sup>[1]</sup> 67:1</p> <p><b>common</b> <sup>[7]</sup> 5:5 73:4,18, 25 75:6,18 98:13</p> <p><b>comparable</b> <sup>[1]</sup> 55:16</p> <p><b>compelling</b> <sup>[2]</sup> 10:14 67:2</p> <p><b>compiles</b> <sup>[1]</sup> 53:1</p> <p><b>complete</b> <sup>[1]</sup> 102:7</p> <p><b>completely</b> <sup>[5]</sup> 21:2 51:10 53:24 64:20 90:25</p> <p><b>complex</b> <sup>[1]</sup> 89:25</p> <p><b>complicate</b> <sup>[1]</sup> 31:14</p> <p><b>complicated</b> <sup>[1]</sup> 39:3</p> <p><b>complications</b> <sup>[2]</sup> 31:8 99:18</p> <p><b>component</b> <sup>[3]</sup> 47:25 85:17,24</p> <p><b>components</b> <sup>[1]</sup> 105:19</p> <p><b>comprehensively</b> <sup>[1]</sup> 24:3</p> <p><b>compromise</b> <sup>[2]</sup> 4:16 36:3</p> <p><b>concede</b> <sup>[1]</sup> 100:13</p> <p><b>conceded</b> <sup>[2]</sup> 53:21 60:8</p> <p><b>concedes</b> <sup>[1]</sup> 51:7</p> <p><b>conceive</b> <sup>[1]</sup> 58:11</p> <p><b>concept</b> <sup>[2]</sup> 97:8,13</p> <p><b>conception</b> <sup>[3]</sup> 32:8 45:11 66:19</p> <p><b>concepts</b> <sup>[2]</sup> 6:19 7:1</p> <p><b>concern</b> <sup>[3]</sup> 15:24 17:12 90:6</p> <p><b>concerned</b> <sup>[3]</sup> 18:16 31:22 54:21</p> <p><b>conclusion</b> <sup>[6]</sup> 13:19 57:7 67:10 75:23 91:18 95:1</p> <p><b>conclusions</b> <sup>[2]</sup> 13:22 76:12</p> <p><b>condemnation</b> <sup>[1]</sup> 10:20</p> <p><b>conduct</b> <sup>[1]</sup> 79:12</p> <p><b>confess</b> <sup>[1]</sup> 103:8</p> <p><b>confidence</b> <sup>[1]</sup> 10:21</p> <p><b>confines</b> <sup>[1]</sup> 108:5</p> <p><b>confirms</b> <sup>[1]</sup> 6:23</p> <p><b>conflict</b> <sup>[2]</sup> 27:6 46:3</p> <p><b>confusing</b> <sup>[1]</sup> 86:10</p> <p><b>Congress</b> <sup>[3]</sup> 43:21 77:5 107:4</p> <p><b>conscience</b> <sup>[2]</sup> 7:17 110:</p>	<p>14</p> <p><b>consciousness</b> <sup>[1]</sup> 21:9</p> <p><b>consenting</b> <sup>[1]</sup> 25:5</p> <p><b>consequences</b> <sup>[10]</sup> 25:9 46:13 48:9 49:20 51:14 52:15 56:17 58:14 74:17 109:15</p> <p><b>consequential</b> <sup>[3]</sup> 78:25 79:22 96:9</p> <p><b>Consider</b> <sup>[3]</sup> 4:22 59:16 94:21</p> <p><b>consideration</b> <sup>[3]</sup> 57:14 64:2 95:8</p> <p><b>considerations</b> <sup>[6]</sup> 25:10 40:15,18 45:19,23 70:14</p> <p><b>considered</b> <sup>[3]</sup> 59:21 66:10 81:4</p> <p><b>considering</b> <sup>[1]</sup> 64:3</p> <p><b>consistent</b> <sup>[3]</sup> 8:10 44:7 105:17</p> <p><b>consistently</b> <sup>[2]</sup> 60:16 112:3</p> <p><b>Constitution</b> <sup>[39]</sup> 4:13 5:15,16,21 6:15,15 15:3 16:2 21:22 22:5,8,10,12 23:3,5, 12,16,19 27:13 35:6,21 39:2 43:16,18 46:5 73:10 75:9 76:25 77:7,11 78:3,8,13 81:20 83:8 84:14 87:22 106:22 113:3</p> <p><b>Constitution's</b> <sup>[1]</sup> 77:2</p> <p><b>constitutional</b> <sup>[18]</sup> 7:5 9:12 27:5 38:9 46:23 51:1 54:20 60:25 61:2 63:1 71:19 73:20 79:18 81:23 82:7 83:22 86:21 100:1</p> <p><b>constitutionally</b> <sup>[1]</sup> 83:11</p> <p><b>consults</b> <sup>[1]</sup> 91:14</p> <p><b>contentious</b> <sup>[2]</sup> 76:23 77:16</p> <p><b>context</b> <sup>[3]</sup> 82:12 91:22 101:4</p> <p><b>contexts</b> <sup>[4]</sup> 7:2 56:24 83:23 86:19</p> <p><b>continue</b> <sup>[15]</sup> 36:21 44:3 65:3 66:15 71:7,12 77:6 85:4 86:6 87:16 100:4 103:23 107:25 112:11 113:13</p> <p><b>continued</b> <sup>[3]</sup> 36:20 101:7, 13</p> <p><b>continues</b> <sup>[1]</sup> 73:1</p> <p><b>continuing</b> <sup>[1]</sup> 77:16</p> <p><b>contraception</b> <sup>[7]</sup> 22:24 25:4 48:25 52:9 109:3 111:14 112:3</p> <p><b>Contraceptive</b> <sup>[1]</sup> 98:11</p> <p><b>contraceptives</b> <sup>[7]</sup> 97:20, 23,25 98:6,14,18,19</p> <p><b>contract</b> <sup>[1]</sup> 95:20</p> <p><b>contraction</b> <sup>[1]</sup> 85:10</p> <p><b>contrary</b> <sup>[3]</sup> 97:20 98:21 102:14</p>	<p><b>control</b> <sup>[16]</sup> 14:10 48:6 74:15 78:10 83:20 86:5 87:15 88:14 89:7 96:8,12,22,23 97:9 100:11 109:3</p> <p><b>controversial</b> <sup>[4]</sup> 14:1 40:15,16 97:3</p> <p><b>controversy</b> <sup>[1]</sup> 11:24</p> <p><b>convicted</b> <sup>[2]</sup> 49:14 103:3</p> <p><b>convincing</b> <sup>[1]</sup> 10:3</p> <p><b>core</b> <sup>[6]</sup> 5:9 20:4,8,8 45:7 76:20</p> <p><b>cornerstone</b> <sup>[1]</sup> 91:21</p> <p><b>correct</b> <sup>[15]</sup> 38:15 43:12,13 44:6 48:5 54:25 62:5 63:10 75:3,4 88:10,17 93:19, 21 111:10</p> <p><b>correctly</b> <sup>[5]</sup> 19:16 56:9 84:14 96:4 107:15</p> <p><b>cortex</b> <sup>[1]</sup> 18:6</p> <p><b>cost</b> <sup>[2]</sup> 89:11 111:20</p> <p><b>costs</b> <sup>[3]</sup> 111:22,24 112:2 66:2</p> <p><b>couldn't</b> <sup>[3]</sup> 13:20 42:14</p> <p><b>Counsel</b> <sup>[14]</sup> 14:3 22:4 41:23 47:3 49:5 59:5 61:10 62:13 79:17 84:6 103:2 104:24 105:24 113:19</p> <p><b>counseled</b> <sup>[1]</sup> 42:4</p> <p><b>counsels</b> <sup>[1]</sup> 91:15</p> <p><b>counter</b> <sup>[3]</sup> 91:20 93:25 97:12</p> <p><b>counterproductive</b> <sup>[1]</sup> 50:4</p> <p><b>countries</b> <sup>[3]</sup> 54:15 55:1, 11</p> <p><b>country</b> <sup>[13]</sup> 4:12 5:18 9:8, 10 34:20 80:6 90:19 97:14 98:12 102:13 107:21 113:2,12</p> <p><b>couple</b> <sup>[6]</sup> 11:6 24:24 35:3 37:15 57:10 73:19</p> <p><b>course</b> <sup>[17]</sup> 9:24 17:4 20:22 34:3 35:1 37:16 44:24 48:22 50:19 57:13 77:22 85:7 90:8 97:11 98:4 109:25 110:15</p> <p><b>COURT</b> <sup>[182]</sup> 1:1,17 4:10, 17,20 6:1,18,21 7:2,19 8:13 9:2,2,11,16 10:8,12,22, 23,25 11:8,24 13:19 14:17, 25 15:12,18,22,25 19:3 20:12,17 22:8,9,11,15 23:12, 23 24:1 25:17 27:24,25 28:12 30:15,24 32:24 33:3 35:13,21 36:6,19,21 37:17,19, 21,23 38:4,6,13 39:5 40:11, 20 41:13,21,24 42:11,12, 19 43:8,10 45:19,25 46:8, 16,17,19 47:10,14,18,21 49:4 50:8,25 51:8 52:16, 24 55:18 57:14 59:13,15, 16,19 61:10,17 62:2,9,14</p>	<p>63:20,24 65:15,25 66:18, 22 67:12,21 68:1,24 69:4,5, 16,17 70:25 71:6,11 72:1,7, 8,20 73:3,8 74:7,19 75:19 76:2,7,21 77:8,23 78:4 79:23,24 80:4,9,22,25 81:3,22, 25 83:1,20 84:12,13 85:8, 13,16 86:18 87:3 88:24 89:4 90:2 91:5,7,14 92:15 93:4,9 94:21,24 97:7,8,11 98:7 99:5 100:24 101:5,8 102:2 104:2,12,14,18 105:16 107:3,14,21 110:12 112:10, 11 113:6,9,14,15</p> <p><b>Court's</b> <sup>[16]</sup> 6:3 7:23 10:15, 20 12:20,25 14:1 32:17 33:4 40:23 46:4 71:8 78:20 79:1,23 80:14</p> <p><b>courts</b> <sup>[10]</sup> 5:1,6,10 17:19 21:14 35:16 38:3 53:25 60:15 107:5</p> <p><b>create</b> <sup>[1]</sup> 92:19</p> <p><b>creates</b> <sup>[1]</sup> 15:2</p> <p><b>criminal</b> <sup>[6]</sup> 49:14 50:12 79:10,14,17 103:3</p> <p><b>criteria</b> <sup>[2]</sup> 89:24,25</p> <p><b>critical</b> <sup>[3]</sup> 52:19,20 96:21</p> <p><b>critically</b> <sup>[3]</sup> 91:9 104:17 106:3</p> <p><b>crossed</b> <sup>[2]</sup> 64:16 65:13</p> <p><b>curiae</b> <sup>[3]</sup> 2:8 3:11 84:9</p> <p><b>Curzan</b> <sup>[1]</sup> 58:21</p> <p><b>custody</b> <sup>[1]</sup> 79:10</p> <p><b>cutting</b> <sup>[1]</sup> 55:23</p>	<p>3,9,17</p> <p><b>deciding</b> <sup>[1]</sup> 13:5</p> <p><b>decision</b> <sup>[28]</sup> 10:4,15 16:1 24:19 39:15 48:11,19 51:10,12 52:14 74:3 75:21 78:9 81:9 89:8 91:16 92:10, 18 93:14 94:17,20 95:1 96:9 97:4 109:18 113:8,8,11</p> <p><b>decisional</b> <sup>[1]</sup> 58:23</p> <p><b>decisions</b> <sup>[28]</sup> 12:21 14:2 15:8 22:16 24:8 29:4 34:2, 12,17 40:21 45:17 49:9 58:24 59:1 67:5,7,11,15 71:10 72:2 73:7 74:7 78:6 88:11 96:7,10,12 112:19</p> <p><b>decisis</b> <sup>[48]</sup> 9:3 11:1,9,10 12:8 13:1,5 16:4 24:12 25:10,15 32:21 39:8,14 40:14 44:21,23 45:1,6,11,18 46:24 47:20 59:5 60:2 66:25 67:13,14,17,20,21 70:14 71:1 78:15,19,21 80:10 81:4,19 82:12 83:4 85:12 91:6,20 93:22 95:2,5,6</p> <p><b>decisively</b> <sup>[1]</sup> 24:2</p> <p><b>dedicated</b> <sup>[1]</sup> 10:24</p> <p><b>deduce</b> <sup>[1]</sup> 23:18</p> <p><b>deemed</b> <sup>[1]</sup> 102:19</p> <p><b>deeply</b> <sup>[3]</sup> 75:14 98:8 105:3</p> <p><b>defend</b> <sup>[1]</sup> 54:9</p> <p><b>defending</b> <sup>[1]</sup> 54:7</p> <p><b>defense</b> <sup>[1]</sup> 64:7</p> <p><b>defined</b> <sup>[1]</sup> 97:8</p> <p><b>defines</b> <sup>[1]</sup> 20:25</p> <p><b>defining</b> <sup>[1]</sup> 87:5</p> <p><b>definition</b> <sup>[1]</sup> 102:8</p> <p><b>delayed</b> <sup>[2]</sup> 48:23 52:10</p> <p><b>delve</b> <sup>[1]</sup> 84:3</p> <p><b>demand</b> <sup>[1]</sup> 48:7</p> <p><b>demands</b> <sup>[4]</sup> 5:19 51:13 57:20 74:16</p> <p><b>demarcated</b> <sup>[1]</sup> 101:2</p> <p><b>democratic</b> <sup>[2]</sup> 4:15 43:21</p> <p><b>denied</b> <sup>[1]</sup> 52:13</p> <p><b>denying</b> <sup>[2]</sup> 103:14,16</p> <p><b>departing</b> <sup>[1]</sup> 67:12</p> <p><b>DEPARTMENT</b> <sup>[2]</sup> 1:5 2:7</p> <p><b>departure</b> <sup>[2]</sup> 54:13 85:11</p> <p><b>dependent</b> <sup>[1]</sup> 66:13</p> <p><b>depending</b> <sup>[3]</sup> 33:1,4 68:11</p> <p><b>Depression</b> <sup>[1]</sup> 90:17</p> <p><b>deprivation</b> <sup>[2]</sup> 48:10 74:18</p> <p><b>deprive</b> <sup>[1]</sup> 71:24</p> <p><b>derives</b> <sup>[1]</sup> 46:20</p> <p><b>described</b> <sup>[1]</sup> 64:12</p> <p><b>describing</b> <sup>[1]</sup> 12:15</p> <p><b>description</b> <sup>[1]</sup> 112:8</p> <p><b>deserves</b> <sup>[1]</sup> 74:20</p> <p><b>detail</b> <sup>[1]</sup> 76:11</p>
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## Official - Subject to Final Review

<p><b>deter</b> <sup>[1]</sup> 50:2  <b>determination</b> <sup>[1]</sup> 110:15  <b>determine</b> <sup>[1]</sup> 91:14  <b>developments</b> <sup>[4]</sup> 12:10, 10 40:8 91:9  <b>devote</b> <sup>[1]</sup> 39:6  <b>devoted</b> <sup>[1]</sup> 11:10  <b>dicta</b> <sup>[2]</sup> 19:5,19  <b>difference</b> <sup>[6]</sup> 6:8 7:6 14:8 18:10 26:7 51:23  <b>differences</b> <sup>[3]</sup> 7:10 9:11 66:1  <b>different</b> <sup>[18]</sup> 8:19 13:25 14:13 32:12 34:21 36:3 41:16 45:10,15 68:6 78:22 80:6 81:7 86:22 107:7,8,9,20  <b>differently</b> <sup>[1]</sup> 107:11  <b>difficult</b> <sup>[6]</sup> 13:16 34:9 59:13,24,25 110:11  <b>difficulty</b> <sup>[1]</sup> 60:17  <b>dig</b> <sup>[1]</sup> 78:21  <b>dignity</b> <sup>[2]</sup> 7:16 33:25  <b>dimension</b> <sup>[2]</sup> 96:25 97:1  <b>dimensions</b> <sup>[1]</sup> 41:20  <b>diminish</b> <sup>[1]</sup> 100:2  <b>direction</b> <sup>[1]</sup> 44:13  <b>directly</b> <sup>[1]</sup> 6:18  <b>disagree</b> <sup>[4]</sup> 16:17 68:21 71:12 80:11  <b>disagreement</b> <sup>[1]</sup> 77:25  <b>disappear</b> <sup>[1]</sup> 64:15  <b>discard</b> <sup>[5]</sup> 33:7,9 71:13 75:5 95:9  <b>discarded</b> <sup>[1]</sup> 41:10  <b>discerned</b> <sup>[1]</sup> 23:4  <b>discipline</b> <sup>[1]</sup> 27:19  <b>discounts</b> <sup>[2]</sup> 29:14 64:21  <b>discrimination</b> <sup>[1]</sup> 73:11  <b>discriminatory</b> <sup>[1]</sup> 75:7  <b>discussed</b> <sup>[2]</sup> 68:1 75:20  <b>discussing</b> <sup>[1]</sup> 68:15  <b>discussion</b> <sup>[3]</sup> 16:16 18:2 100:9  <b>dismantle</b> <sup>[1]</sup> 47:14  <b>disproportionately</b> <sup>[1]</sup> 58:3  <b>dispute</b> <sup>[1]</sup> 44:25  <b>disputes</b> <sup>[1]</sup> 44:24  <b>disregards</b> <sup>[1]</sup> 29:15  <b>dissent</b> <sup>[2]</sup> 36:10 112:25  <b>dissimilating</b> <sup>[1]</sup> 28:4  <b>dissipate</b> <sup>[1]</sup> 98:20  <b>distinct</b> <sup>[2]</sup> 45:18,22  <b>distinction</b> <sup>[3]</sup> 45:20 88:20 91:2  <b>distinctions</b> <sup>[2]</sup> 88:23 113:4  <b>district</b> <sup>[1]</sup> 69:17  <b>disturbing</b> <sup>[1]</sup> 69:7  <b>diversity</b> <sup>[2]</sup> 28:14 29:1  <b>divided</b> <sup>[1]</sup> 9:9  <b>divides</b> <sup>[1]</sup> 35:14</p>	<p><b>DOBBS</b> <sup>[2]</sup> 1:3 4:4  <b>doctors</b> <sup>[2]</sup> 17:22 18:5  <b>doctrinal</b> <sup>[1]</sup> 91:8  <b>doctrine</b> <sup>[2]</sup> 39:18 45:1  <b>doing</b> <sup>[9]</sup> 14:20,23 17:14 29:7,11,12 53:23 76:7 89:4  <b>done</b> <sup>[8]</sup> 11:12,12 39:12 68:9 73:8 80:4 86:22 92:5  <b>double</b> <sup>[1]</sup> 70:15  <b>doubt</b> <sup>[1]</sup> 106:5  <b>down</b> <sup>[11]</sup> 5:2 9:12 40:20 41:24 60:18,23 62:21 91:11 92:11,15 108:13  <b>dramatic</b> <sup>[1]</sup> 54:13  <b>draw</b> <sup>[9]</sup> 22:1,3 24:9,9,11 25:3 74:21 81:18 83:21  <b>drawing</b> <sup>[1]</sup> 30:5  <b>drawn</b> <sup>[2]</sup> 36:18 83:2  <b>drew</b> <sup>[3]</sup> 13:20 14:7 63:24  <b>dropped</b> <sup>[1]</sup> 72:15  <b>due</b> <sup>[9]</sup> 6:22 27:11,12,17 71:25 72:21,21,22 81:21  <b>during</b> <sup>[3]</sup> 48:22 49:15 111:13</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> <sup>[5]</sup> 6:13 42:11 70:5 79:20 91:6  <b>earlier</b> <sup>[7]</sup> 5:13 55:4,10 67:23 99:11,20 103:2  <b>early</b> <sup>[4]</sup> 17:15 68:17 102:16,17  <b>economic</b> <sup>[2]</sup> 58:15 108:21  <b>economists</b> <sup>[1]</sup> 52:25  <b>educate</b> <sup>[2]</sup> 22:21,22  <b>Education</b> <sup>[2]</sup> 15:9 53:6  <b>effect</b> <sup>[2]</sup> 28:6 99:10  <b>effects</b> <sup>[2]</sup> 84:21 85:6  <b>efforts</b> <sup>[1]</sup> 9:23  <b>egregiously</b> <sup>[8]</sup> 48:3 67:22 91:25 92:10,14 93:16 94:13 113:11  <b>eight-week</b> <sup>[1]</sup> 101:12  <b>either</b> <sup>[1]</sup> 103:17  <b>elect</b> <sup>[1]</sup> 31:6  <b>elective</b> <sup>[1]</sup> 37:7  <b>eliminating</b> <sup>[1]</sup> 48:15  <b>ELIZABETH</b> <sup>[3]</sup> 2:6 3:9 84:8  <b>elsewhere</b> <sup>[1]</sup> 22:3  <b>Ely</b> <sup>[1]</sup> 102:7  <b>emphasize</b> <sup>[16]</sup> 8:6 11:21 12:7,16 13:12 23:10 27:3 35:2 38:11,24 45:24 56:11 63:24 111:7,13 112:14  <b>emphasized</b> <sup>[10]</sup> 20:13 29:17 35:19 37:17,20 59:7 102:1 105:8 111:5 113:1  <b>enact</b> <sup>[2]</sup> 71:8 84:24  <b>end</b> <sup>[16]</sup> 4:20 11:24 34:14 42:2 47:24 48:19 72:3 73:</p>	<p>5 74:8,11 75:18,25 82:16 83:14 84:16 105:2  <b>ending</b> <sup>[1]</sup> 31:8  <b>ends</b> <sup>[1]</sup> 81:24  <b>endure</b> <sup>[2]</sup> 78:11 103:24  <b>enduringly</b> <sup>[1]</sup> 60:14  <b>enforce</b> <sup>[2]</sup> 95:20 101:13  <b>enforcing</b> <sup>[2]</sup> 49:21 99:4  <b>engendered</b> <sup>[2]</sup> 25:7 84:19  <b>enough</b> <sup>[7]</sup> 13:21 36:7,9 53:18 71:9 80:22,23  <b>ensuring</b> <sup>[2]</sup> 89:14 96:22  <b>enter</b> <sup>[3]</sup> 31:2,22 96:13  <b>entire</b> <sup>[3]</sup> 31:23,24 33:8  <b>entirely</b> <sup>[3]</sup> 34:21 92:20 104:3  <b>entirety</b> <sup>[1]</sup> 63:8  <b>entrenched</b> <sup>[1]</sup> 15:10  <b>enumerable</b> <sup>[1]</sup> 113:13  <b>episodes</b> <sup>[1]</sup> 21:1  <b>equal</b> <sup>[8]</sup> 36:12 52:19 56:15 78:7,12 79:3 90:10 94:14  <b>equality</b> <sup>[4]</sup> 49:3 86:2 89:14 97:14  <b>equally</b> <sup>[1]</sup> 85:16  <b>equivalent</b> <sup>[1]</sup> 63:17  <b>erred</b> <sup>[1]</sup> 15:18  <b>erroneous</b> <sup>[2]</sup> 39:24 67:15  <b>erroneously</b> <sup>[1]</sup> 94:18  <b>errors</b> <sup>[1]</sup> 16:16  <b>especially</b> <sup>[3]</sup> 32:23 47:21 99:13  <b>ESQ</b> <sup>[4]</sup> 3:3,6,9,13  <b>ESQUIRE</b> <sup>[1]</sup> 2:4  <b>essential</b> <sup>[1]</sup> 105:19  <b>ET</b> <sup>[4]</sup> 1:5,9 98:1,2  <b>Europe</b> <sup>[1]</sup> 55:6  <b>evade</b> <sup>[1]</sup> 112:11  <b>evaded</b> <sup>[1]</sup> 112:10  <b>evaluate</b> <sup>[1]</sup> 39:17  <b>even</b> <sup>[13]</sup> 33:8 35:15 44:5 46:16 55:3,10 57:11 76:11 94:19 97:3 98:10 104:17 108:6  <b>evening</b> <sup>[1]</sup> 61:4  <b>event</b> <sup>[1]</sup> 109:3  <b>everybody</b> <sup>[2]</sup> 11:2 97:19  <b>everyone</b> <sup>[4]</sup> 5:21 13:17 97:5 112:16  <b>everything</b> <sup>[1]</sup> 15:14  <b>evidence</b> <sup>[1]</sup> 79:14  <b>evolved</b> <sup>[1]</sup> 59:12  <b>exact</b> <sup>[3]</sup> 34:15 81:3 112:12  <b>Exactly</b> <sup>[7]</sup> 29:3 39:23 58:17 86:11 98:25 112:6,12  <b>examined</b> <sup>[1]</sup> 47:22  <b>example</b> <sup>[7]</sup> 12:18 13:21 18:13 50:12 55:5 59:14 61:5  <b>exceedingly</b> <sup>[1]</sup> 60:19</p>	<p><b>except</b> <sup>[3]</sup> 34:15 50:9 88:13  <b>exceptions</b> <sup>[2]</sup> 4:24 84:25  <b>exclude</b> <sup>[1]</sup> 79:14  <b>exclusionary</b> <sup>[1]</sup> 79:13  <b>exercise</b> <sup>[4]</sup> 10:22 32:19 96:18 100:1  <b>exercising</b> <sup>[2]</sup> 60:24 62:23  <b>exist</b> <sup>[1]</sup> 103:18  <b>existed</b> <sup>[1]</sup> 98:6  <b>existence</b> <sup>[3]</sup> 31:14 34:19 111:9  <b>existing</b> <sup>[1]</sup> 106:10  <b>exists</b> <sup>[3]</sup> 17:23 73:2 82:1  <b>expanded</b> <sup>[1]</sup> 31:20  <b>expectations</b> <sup>[1]</sup> 15:11  <b>expected</b> <sup>[1]</sup> 84:23  <b>experience</b> <sup>[2]</sup> 93:1 98:15  <b>experienced</b> <sup>[2]</sup> 18:6 99:14  <b>expert</b> <sup>[1]</sup> 21:14  <b>explain</b> <sup>[1]</sup> 37:13  <b>explained</b> <sup>[1]</sup> 102:7  <b>explicitly</b> <sup>[1]</sup> 45:12  <b>extend</b> <sup>[1]</sup> 62:15  <b>extends</b> <sup>[1]</sup> 103:6  <b>extensive</b> <sup>[1]</sup> 95:7  <b>extent</b> <sup>[2]</sup> 11:22 19:3  <b>eyes</b> <sup>[3]</sup> 11:14,15 90:13</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>fabric</b> <sup>[1]</sup> 34:19  <b>face</b> <sup>[3]</sup> 20:18 46:22 75:12  <b>facing</b> <sup>[1]</sup> 28:1  <b>fact</b> <sup>[18]</sup> 18:16 19:15 22:6 33:15 35:3 52:17 55:1 57:21 60:9 69:5 71:7,11 75:19 81:6 83:13 97:21 99:25 109:24  <b>factor</b> <sup>[5]</sup> 45:13,14 91:6,13 93:23  <b>factors</b> <sup>[9]</sup> 11:8 13:1 16:4 24:13 40:23 46:24 95:2,5 105:15  <b>facts</b> <sup>[3]</sup> 49:17 94:7 98:10  <b>factual</b> <sup>[6]</sup> 12:10 17:2 91:9 92:17 93:8 98:21  <b>failed</b> <sup>[2]</sup> 5:24 12:25  <b>fails</b> <sup>[2]</sup> 12:16 109:4  <b>failure</b> <sup>[2]</sup> 98:1,11  <b>fair</b> <sup>[3]</sup> 37:8 53:12 61:16  <b>faire</b> <sup>[1]</sup> 90:19  <b>fairly</b> <sup>[2]</sup> 38:14,17  <b>faith</b> <sup>[1]</sup> 32:13  <b>family</b> <sup>[8]</sup> 49:10 52:7 57:23 72:2 73:7 78:7 108:7 109:11  <b>far</b> <sup>[4]</sup> 9:18 31:22 101:22 103:4  <b>fared</b> <sup>[1]</sup> 38:3  <b>fault</b> <sup>[1]</sup> 89:16  <b>favor</b> <sup>[4]</sup> 24:20 35:6 54:19 91:15</p>	<p><b>fear</b> <sup>[1]</sup> 23:2  <b>features</b> <sup>[2]</sup> 25:14 42:21  <b>federal</b> <sup>[3]</sup> 60:15 87:25 88:3  <b>feelings</b> <sup>[2]</sup> 9:9,24  <b>fees</b> <sup>[1]</sup> 111:22  <b>feet</b> <sup>[1]</sup> 21:4  <b>Ferguson</b> <sup>[3]</sup> 51:2 92:8 112:25  <b>fetal</b> <sup>[7]</sup> 17:13,23 49:25 50:23 87:10 102:11 106:8  <b>fetus</b> <sup>[8]</sup> 21:7,12 50:18 65:21 66:11 102:4,19 106:12  <b>fetus's</b> <sup>[3]</sup> 30:4 66:20 84:1  <b>few</b> <sup>[5]</sup> 5:20 37:1 53:19 64:18 77:20  <b>fewer</b> <sup>[1]</sup> 63:19  <b>Fifteen</b> <sup>[1]</sup> 14:14  <b>Fifth</b> <sup>[2]</sup> 60:17 83:23  <b>fight</b> <sup>[1]</sup> 70:5  <b>fighting</b> <sup>[2]</sup> 12:4 62:12  <b>filled</b> <sup>[1]</sup> 21:1  <b>find</b> <sup>[1]</sup> 111:8  <b>finish</b> <sup>[1]</sup> 20:20  <b>fire</b> <sup>[1]</sup> 10:13  <b>firm</b> <sup>[1]</sup> 46:21  <b>firmer</b> <sup>[1]</sup> 67:11  <b>First</b> <sup>[25]</sup> 24:24 37:2,5 38:6 39:14 47:20 52:10 53:20 54:24 57:11 60:5 64:4,19 77:22 82:5 83:4,6,12 86:23 88:23 91:19 98:5,16 111:1,8  <b>fit</b> <sup>[2]</sup> 49:17 89:24  <b>fits</b> <sup>[1]</sup> 17:20  <b>five</b> <sup>[1]</sup> 37:20  <b>flatly</b> <sup>[1]</sup> 47:12  <b>flow</b> <sup>[1]</sup> 56:18  <b>focus</b> <sup>[8]</sup> 6:5,6,8 54:12 56:13 57:17 66:25 72:16  <b>focused</b> <sup>[3]</sup> 56:16 57:3 102:10  <b>focuses</b> <sup>[3]</sup> 56:21 83:25 91:7  <b>focusing</b> <sup>[3]</sup> 6:11,12 39:9  <b>follow</b> <sup>[4]</sup> 15:13 46:23 56:25 63:4  <b>follow-up</b> <sup>[3]</sup> 44:19 81:15 108:11  <b>following</b> <sup>[1]</sup> 100:7  <b>follows</b> <sup>[2]</sup> 9:15,16  <b>foot</b> <sup>[1]</sup> 21:4  <b>force</b> <sup>[6]</sup> 47:15 74:15 78:11 84:17 101:1 110:3  <b>forced</b> <sup>[5]</sup> 56:13,14 76:21 103:23,24  <b>forceful</b> <sup>[1]</sup> 106:3  <b>forcing</b> <sup>[5]</sup> 31:3 86:5 100:3 107:25 109:16  <b>form</b> <sup>[2]</sup> 95:11 109:2  <b>formed</b> <sup>[1]</sup> 18:6  <b>formula</b> <sup>[1]</sup> 20:7</p>
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## Official - Subject to Final Review

<p><b>forth</b> [2] 33:1,3  <b>forward</b> [6] 41:14 42:21 58:13 81:2 92:2 101:15  <b>found</b> [5] 59:13 67:1 72:20 91:11 95:3  <b>foundation</b> [1] 95:11  <b>founded</b> [1] 17:24  <b>founding</b> [3] 75:17,24 102:15  <b>Four</b> [3] 14:16 48:18 96:19  <b>Fourteenth</b> [8] 23:20 71:24 73:22 75:2 81:20 85:25 88:2,6  <b>Fourth</b> [5] 51:3 79:15 83:23 86:13,24  <b>framework</b> [4] 12:22 59:8 82:14 106:10  <b>frankly</b> [1] 111:19  <b>free</b> [2] 64:14 65:2  <b>freedom</b> [3] 7:16 33:24 88:7  <b>freedoms</b> [1] 94:3  <b>freely</b> [1] 44:3  <b>friend</b> [1] 90:13  <b>friends</b> [1] 111:23  <b>fringe</b> [1] 18:5  <b>full</b> [3] 31:10 42:5 44:9  <b>full-blown</b> [1] 38:9  <b>fully</b> [5] 17:14 85:15 105:2 108:15,23  <b>function</b> [2] 10:23 91:21  <b>fundamental</b> [14] 21:19 34:2 35:18 38:10 48:10 74:18 81:9 84:15 85:14 94:3 104:19 106:17 107:15,16  <b>further</b> [4] 71:15 89:14 104:9 111:22</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>gain</b> [1] 85:3  <b>gave</b> [3] 16:20,23 17:2  <b>gay</b> [1] 89:23  <b>gears</b> [1] 37:10  <b>GEN</b> [2] 2:6 3:9  <b>General</b> [53] 2:2,6 4:6 6:4,19 18:21 24:14,15 32:4,5,20 41:7 44:18 84:7,8,11 85:19,23 86:17 87:14,18 88:18 90:24 92:1,13,23 93:6,12,18,20,22 94:6,24 95:13 96:2 98:4,25 100:6,17,23 101:25 102:10 103:7 104:16,22 105:13 107:13 109:12 110:9,17,19,20 113:19  <b>generality</b> [4] 72:17 73:3,9 75:11  <b>generations</b> [1] 48:17  <b>gets</b> [1] 37:3  <b>getting</b> [2] 66:6 87:9  <b>Giddeon</b> [1] 79:16  <b>girl's</b> [1] 5:11  <b>give</b> [14] 9:22 31:9 35:22</p>	<p>37:12 47:16 58:1 60:3 77:11,19 79:7 84:18 85:5 94:22 109:17  <b>given</b> [6] 5:25 12:5 51:12 83:17 100:13 106:18  <b>giving</b> [1] 88:7  <b>Glucksberg</b> [3] 6:18 27:17 75:19  <b>goal</b> [1] 111:16  <b>Gonzales</b> [1] 30:15  <b>Gorsuch</b> [14] 35:19 43:2 59:4 61:7,20,25 62:11 63:2 76:17 104:9,10,21,24 105:23  <b>got</b> [1] 37:9  <b>government</b> [7] 68:2 87:24,25 88:3,8 105:7,11  <b>government's</b> [1] 108:15  <b>granted</b> [3] 37:6 38:6,13  <b>great</b> [5] 12:18 24:8 36:8 41:16 55:5  <b>greater</b> [4] 31:8,9 69:13,14  <b>greatest</b> [2] 46:9 113:8  <b>Griswold</b> [4] 25:1 27:10 59:1 72:10  <b>gross</b> [1] 17:22  <b>ground</b> [1] 96:1  <b>groundable</b> [1] 40:22  <b>grounded</b> [7] 6:25 7:1 10:1 16:1 58:11 85:24 95:21  <b>guarantee</b> [2] 78:4 84:17  <b>guaranteed</b> [2] 79:16 97:14  <b>guarantees</b> [1] 86:21  <b>guess</b> [2] 33:16 34:24  <b>guidance</b> [1] 101:13</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>half</b> [5] 11:9 55:25 84:13,23 98:16  <b>half-measures</b> [1] 63:9  <b>hallmarks</b> [1] 12:24  <b>Hamilton's</b> [1] 69:17  <b>hand</b> [1] 38:19  <b>handed</b> [2] 92:11,15  <b>happen</b> [1] 101:10  <b>hard</b> [9] 5:17,17,19 20:12 30:20,24 42:9 106:15 112:13  <b>harder</b> [1] 39:4  <b>Hardwick</b> [1] 45:4  <b>Harlan</b> [2] 36:10 113:1  <b>harm</b> [1] 50:17  <b>Hart</b> [1] 102:7  <b>haunt</b> [1] 4:12  <b>haven</b> [8] 56:4,19 57:8 108:22 109:15,21 111:2,7  <b>head</b> [1] 70:20  <b>HEALTH</b> [15] 1:3,5,8 4:5,25 48:21 50:1,4,24 52:7,20 55:15 81:10 85:6 111:21  <b>hear</b> [3] 4:3 34:24 58:9  <b>heard</b> [2] 70:1 103:1</p>	<p><b>heart</b> [1] 33:11  <b>heightened</b> [2] 8:12 74:20  <b>held</b> [3] 5:6 79:13 97:7  <b>Hellerstedt</b> [1] 59:14  <b>help</b> [1] 5:13  <b>helpful</b> [2] 61:8 105:24  <b>helps</b> [1] 78:19  <b>high</b> [5] 9:9,24 47:21 57:25 74:6  <b>higher</b> [3] 31:5 73:9 75:11  <b>highlight</b> [1] 16:19  <b>himself</b> [1] 64:11  <b>hinder</b> [1] 56:14  <b>historian</b> [1] 76:9  <b>historical</b> [5] 73:11 74:25 75:10 76:3,8  <b>history</b> [24] 4:14 16:2 21:22 24:1,5,10 27:18,19,22 40:22 73:19 75:14,21 76:10 77:1 78:19,20,22 79:1,23 80:14 102:13,16,22  <b>hits</b> [1] 27:2  <b>hold</b> [1] 66:11  <b>holding</b> [6] 5:9 20:15 47:23 48:4 63:18,22  <b>home</b> [2] 4:13 22:21  <b>honestly</b> [1] 33:6  <b>Honor</b> [92] 6:11,24 7:8 8:3,6,20,23 11:17,21,21 12:8 13:15 16:7,14 18:13 19:2,11,22 20:11 23:17,25 24:6,8,23 25:11,16,22 26:6,20,25 27:15 28:14 29:9 30:7,19 31:17 32:14 35:3 37:14 38:12,23 40:23 42:25 43:6,13,24 44:8,15 45:23 47:1 49:10,24 50:7,19 52:2 53:1,20 54:24 55:12,21 57:10 58:16 60:4 61:18 62:20 63:11 64:17 65:5,14,25 66:16 67:19,25 68:22 71:5,23 73:24 74:7,12 75:17 76:6 77:21 78:8 80:21 82:8,21 83:16 107:18,24 111:4 112:14 113:17  <b>Honor's</b> [1] 42:7  <b>hope</b> [3] 11:2 37:2 42:22  <b>host</b> [1] 7:15  <b>hot</b> [1] 13:16  <b>Hotel</b> [4] 45:17 79:5 80:3 89:22  <b>hotly</b> [1] 29:20  <b>hours</b> [1] 56:8  <b>House</b> [1] 14:20  <b>however</b> [4] 32:1 38:1 50:25 56:24  <b>huge</b> [2] 17:24 111:11  <b>human</b> [8] 4:20 5:4 17:15 25:13,15 30:17 35:9 113:13  <b>humblest</b> [1] 113:2  <b>hundred</b> [1] 72:9</p>	<p><b>hundreds</b> [1] 85:3  <b>hurt</b> [1] 48:21  <b>husband</b> [1] 97:19  <b>hypothesize</b> [1] 100:19  <b>hypothetical</b> [2] 62:12,14  <b>hypothetically</b> [1] 62:14</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> [5] 57:12 92:18 94:10 98:19 102:11  <b>identical</b> [1] 81:20  <b>identified</b> [2] 37:16 45:16  <b>identify</b> [2] 24:13 106:3  <b>identifying</b> [2] 24:22 37:16  <b>ignore</b> [1] 104:3  <b>illegal</b> [1] 50:17  <b>illness</b> [1] 52:7  <b>imagine</b> [1] 81:19  <b>immediately</b> [2] 74:3 101:11  <b>immunity</b> [2] 73:22 74:5  <b>impact</b> [4] 51:18 57:21 99:4 100:2  <b>impacts</b> [1] 51:24  <b>imperative</b> [1] 15:25  <b>implement</b> [1] 86:23  <b>implemented</b> [1] 87:4  <b>implicate</b> [1] 98:9  <b>implicates</b> [1] 7:21  <b>important</b> [19] 7:15,16,17,19 9:25 12:21 30:22 32:21 34:6 37:19 39:7 56:1 78:25 79:22 89:8 96:7 104:17 106:4 107:2  <b>imposed</b> [1] 68:25  <b>imposes</b> [1] 57:20  <b>improper</b> [1] 94:12  <b>improperly</b> [2] 18:14 31:25  <b>inappropriate</b> [1] 53:14  <b>incest</b> [1] 85:1  <b>inclined</b> [1] 8:14  <b>include</b> [5] 72:1 78:5 89:20,21 109:8  <b>included</b> [1] 38:19  <b>includes</b> [4] 4:24 38:14,17 62:10  <b>including</b> [7] 15:15,16 22:6 23:24 63:15 72:3 88:6  <b>incorporates</b> [1] 68:23  <b>incorporation</b> [1] 88:1  <b>increase</b> [1] 82:18  <b>incredibly</b> [3] 96:9 104:3 110:11  <b>independent</b> [2] 46:5 66:12  <b>indicated</b> [1] 40:11  <b>individual</b> [7] 84:19 85:11 88:3,7,16 96:5,15  <b>individuals</b> [3] 22:17 88:4,15  <b>inevitable</b> [1] 9:23  <b>inexorable</b> [1] 45:1</p>	<p><b>inference</b> [1] 53:2  <b>inferiority</b> [2] 90:11 92:20  <b>inflicted</b> [1] 113:11  <b>information</b> [1] 76:11  <b>infringement</b> [1] 56:22  <b>ingested</b> [2] 49:15,18  <b>ingesting</b> [1] 50:17  <b>inherent</b> [1] 22:15  <b>injured</b> [1] 103:13  <b>inquiry</b> [2] 20:21 27:20  <b>inserted</b> [1] 19:13  <b>inside</b> [1] 103:13  <b>insight</b> [1] 19:20  <b>insofar</b> [2] 45:11 56:12  <b>instance</b> [3] 51:2 91:19 95:4  <b>Instead</b> [2] 57:19 80:24  <b>institution</b> [4] 15:1 32:25 69:16 70:9  <b>integrity</b> [6] 6:20 34:1 49:8 58:21 86:2 110:1  <b>intelligible</b> [1] 104:14  <b>intended</b> [1] 22:13  <b>interest</b> [20] 29:19 31:21 49:21 64:15 65:12,21 71:17 74:20 83:21 86:1 87:5 93:24 97:4 101:8,14 103:5,15,16 106:8,17  <b>interested</b> [1] 87:19  <b>interesting</b> [1] 69:9  <b>interests</b> [56] 25:8 29:15 31:24 32:1 34:6 44:9 48:13 49:25 50:2 64:21 65:1,6,15,18,20 66:17 74:22 82:18 83:19 85:9 87:7,10 89:3 91:10 95:14,18,23,25 96:3 98:9 100:3,10 101:3 103:18,22 104:2,4,20 105:20 106:4,7,11,12,16 107:1,9,11 108:18,24 109:8,8 110:1,2,5 112:15,16  <b>intermediate</b> [1] 41:9  <b>international</b> [2] 54:20,25  <b>interpreted</b> [3] 72:1,8 78:4  <b>interrupt</b> [1] 25:19  <b>interrupting</b> [1] 104:25  <b>intimate</b> [1] 25:4  <b>intrude</b> [1] 22:18  <b>intruding</b> [1] 88:9  <b>investments</b> [1] 96:13  <b>invite</b> [1] 88:12  <b>involve</b> [1] 25:13  <b>involved</b> [3] 49:13 88:13 112:17  <b>involves</b> [2] 7:5 112:13  <b>irrelevant</b> [1] 99:7  <b>isn't</b> [9] 28:19,20,23 30:1 64:16 69:3 70:20 90:12 101:21  <b>issue</b> [43] 5:17,17,19,21 7:19 13:16 14:6 18:23 19:1,1,2,7 20:9,11 29:20 31:21</p>
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## Official - Subject to Final Review

<p>32:18 35:25 36:22 37:3 38:5 39:7,14,15 43:20 50:14 53:9,17 60:6,12 67:25 68:6 69:4 77:16,17 88:25 98:3 99:5 101:18 106:5,15 112:13,22</p> <p><b>issued</b> [1] 71:11</p> <p><b>issues</b> [6] 30:24 50:20 51:1 66:23 88:15 112:23</p> <p><b>itself</b> [9] 11:8 12:22 42:13 43:9 54:7 57:19 59:25 95:9 109:18</p>	<p>8,9,10,12,21,24 105:23,25, 25 106:2 107:13 108:8,9,9, 11,12,25 110:4,17,18,24 111:2,10 112:6,25 113:18</p> <p><b>justices</b> [5] 14:14,17,21,24 91:18</p> <p><b>justification</b> [6] 10:4 33:14,14 81:1,2 102:3</p> <p><b>justified</b> [2] 93:23 102:2</p>	<p><b>leave</b> [3] 41:13 77:12 101:9</p> <p><b>leaves</b> [2] 4:25 43:20</p> <p><b>led</b> [4] 23:22 24:12 31:19 46:12</p> <p><b>left</b> [7] 35:16 43:24 68:8 77:4 107:17 110:13 111:2</p> <p><b>legal</b> [9] 39:18 55:2,13 66:21 75:1 76:12 84:2 85:3 91:9</p> <p><b>legalization</b> [1] 53:3</p> <p><b>legislate</b> [2] 24:3 112:21</p> <p><b>legislative</b> [1] 21:23</p> <p><b>legislature</b> [2] 21:25 22:3</p> <p><b>legislatures</b> [2] 107:5,18</p> <p><b>legitimacy</b> [4] 10:15 45:25 46:18,20</p> <p><b>lengthy</b> [1] 39:3</p> <p><b>less</b> [5] 54:1,1 81:7 82:19 112:4</p> <p><b>letting</b> [1] 12:18</p> <p><b>level</b> [8] 26:19,22 72:17 73:2,9 75:11 77:18 96:16</p> <p><b>liberties</b> [1] 88:9</p> <p><b>liberty</b> [37] 48:1,10,12 49:3 71:22,25 72:1,8 73:2,21 74:5,18,19 78:4,5,8 83:18, 19 85:8,18,22,24 86:2 87:5 89:10 97:4,9 98:9 100:3 101:3,8,14 103:4,5,22 104:20 105:19</p> <p><b>life</b> [34] 4:21,25 5:11 7:6,21 18:17 25:14,15 29:20,25 30:4,6,17 31:2,9 34:7,8 48:21 49:25 50:10,23 52:7 58:15 65:21 76:24 84:4 87:10 96:7 98:24 99:15 102:5 106:8 108:21 112:18</p> <p><b>life-altering</b> [3] 48:9 51:14 74:17</p> <p><b>light</b> [1] 56:10</p> <p><b>likely</b> [1] 48:23</p> <p><b>likewise</b> [2] 93:23 95:3</p> <p><b>limit</b> [2] 100:21,21</p> <p><b>limits</b> [1] 88:7</p> <p><b>line</b> [66] 14:6,12,16 19:18 21:12,12,24 22:2,3 29:12, 14 33:9 37:24,25 41:10 53:14 55:12,19 57:16 60:13, 14 62:10 63:18,21,24 64:5, 7,10,16 65:5,8,13 66:8,18, 21 68:23 69:7 74:21,22 81:16,17 82:6,10,16,22,23,24 83:1,7,17,22,24 84:2 91:11 100:15 101:1,6 102:2,9,12, 21 104:13,18 105:7,11,14</p> <p><b>line-drawing</b> [3] 19:25 68:18,20</p> <p><b>lines</b> [3] 24:11 55:3,10</p> <p><b>link</b> [1] 90:1</p> <p><b>list</b> [4] 40:2 79:21 88:20 89:20</p> <p><b>listed</b> [2] 80:8 88:12</p>	<p><b>listened</b> [1] 79:25</p> <p><b>litany</b> [1] 87:19</p> <p><b>literature</b> [1] 21:1</p> <p><b>little</b> [9] 5:13 20:12 37:1,2 44:19 66:25 72:18 95:15, 23</p> <p><b>live</b> [1] 96:12</p> <p><b>lives</b> [14] 33:25 34:3 35:9 52:21 57:22 58:4 81:10 85:7 96:7,23 100:11,20 110:16 113:14</p> <p><b>locally</b> [1] 12:2</p> <p><b>Lochner</b> [3] 72:14 80:4 90:17</p> <p><b>logical</b> [1] 102:3</p> <p><b>logically</b> [3] 48:13 66:19 74:22</p> <p><b>logistical</b> [1] 99:21</p> <p><b>long</b> [2] 40:1 87:19</p> <p><b>longer</b> [2] 48:25 65:2</p> <p><b>look</b> [19] 6:24 13:21 27:25 33:17 35:24 39:14,24,25 40:5,6 41:20 46:17,19 50:14 65:19 69:24 90:13 95:19 104:2</p> <p><b>looked</b> [7] 13:13,14 23:12 66:19 78:20 91:7 99:5</p> <p><b>looking</b> [11] 40:12 45:25 46:5,6,10 54:19 58:13 70:10,11 94:7 99:6</p> <p><b>looks</b> [5] 17:14 24:1 27:18, 18 42:11</p> <p><b>lose</b> [1] 99:16</p> <p><b>loss</b> [2] 10:20 52:8</p> <p><b>lost</b> [1] 38:4</p> <p><b>lot</b> [10] 9:21 37:11 39:6,20 40:15,21 44:21 94:4,8,11</p> <p><b>lots</b> [1] 78:17</p> <p><b>loud</b> [1] 89:19</p> <p><b>loudest</b> [1] 33:2</p> <p><b>Loving</b> [3] 28:1 59:1 72:10</p> <p><b>lower</b> [6] 5:6 35:16,21 38:3 60:15 72:17</p> <p><b>lowest</b> [1] 111:20</p>	<p><b>mark</b> [1] 7:12</p> <p><b>marks</b> [3] 7:18,21 102:4</p> <p><b>marriage</b> [7] 25:6 27:23 49:10 58:25 73:7 78:7 79:19</p> <p><b>marry</b> [1] 23:1</p> <p><b>materially</b> [2] 92:3,4</p> <p><b>matter</b> [16] 1:16 5:2,8 12:1 36:1 39:1 57:8,10 78:1 81:22 82:5,6 83:4,6,10,12</p> <p><b>matters</b> [3] 7:17 8:11 89:2</p> <p><b>mean</b> [19] 10:11 18:9 25:20 27:21 28:13 32:11,11 34:11 39:20 42:12 45:8 50:11 55:10 58:6 72:13 82:13 95:6,7 107:23</p> <p><b>Meaning</b> [1] 31:3</p> <p><b>meaningful</b> [1] 102:5</p> <p><b>means</b> [6] 22:10 35:15 58:8 86:20 94:14 98:13</p> <p><b>meant</b> [2] 89:14 90:5</p> <p><b>measure</b> [1] 101:6</p> <p><b>medical</b> [9] 31:8,14 35:20 59:18 63:20 66:13,14 99:18 108:5</p> <p><b>medicine</b> [2] 17:6,10</p> <p><b>members</b> [3] 10:7 14:17 57:23</p> <p><b>membership</b> [1] 33:4</p> <p><b>memory</b> [1] 16:24</p> <p><b>men</b> [1] 100:10</p> <p><b>mention</b> [3] 7:10 90:8,20</p> <p><b>mentioned</b> [14] 15:10 25:1 26:12 30:19 32:23 35:19 52:5 63:19 70:2 73:18 83:25 98:23 106:24 108:22</p> <p><b>merely</b> [1] 60:25</p> <p><b>merits</b> [4] 37:10 38:9,13,24</p> <p><b>met</b> [1] 13:7</p> <p><b>methods</b> [1] 98:13</p> <p><b>metrics</b> [1] 12:14</p> <p><b>Meyer</b> [1] 72:10</p> <p><b>middle</b> [1] 90:16</p> <p><b>might</b> [5] 25:19 30:12 45:20 56:8 107:10</p> <p><b>miles</b> [1] 85:3</p> <p><b>militia</b> [1] 15:20</p> <p><b>millions</b> [1] 35:8</p> <p><b>minimize</b> [1] 45:14</p> <p><b>minority</b> [3] 17:21,22,24</p> <p><b>minute</b> [2] 90:8,9</p> <p><b>Miranda</b> [2] 79:6 88:16</p> <p><b>MISSISSIPPI</b> [13] 1:4 2:3 4:22 14:20,22 31:6 47:14 54:6 57:24 58:1 92:5 97:22 107:7</p> <p><b>Mississippi's</b> [2] 47:11 48:20</p> <p><b>mistake</b> [1] 46:2</p> <p><b>mistaken</b> [4] 13:23 62:4 92:20 98:11</p> <p><b>moment</b> [4] 64:15 87:7 93:8,16</p>
<p style="text-align: center;"><b>J</b></p> <p><b>JACKSON</b> [4] 1:8 2:2 4:5 111:20</p> <p><b>jettisoned</b> [1] 12:21</p> <p><b>job</b> [3] 52:8 69:23 99:17</p> <p><b>jobs</b> [1] 96:14</p> <p><b>John</b> [1] 102:7</p> <p><b>judges</b> [2] 35:21,23</p> <p><b>judgment</b> [2] 5:20 83:11</p> <p><b>judicial</b> [2] 10:22 74:2</p> <p><b>judiciary</b> [1] 10:21</p> <p><b>JULIE</b> [3] 2:4 3:6 47:7</p> <p><b>June</b> [3] 35:20 59:18 63:20</p> <p><b>jurisprudence</b> [5] 6:6 7:24 8:10 32:17,19</p> <p><b>Justice</b> [264] 2:7 4:3,9 6:4 7:4,22,25 8:17,18,21,24 11:6,13,18 12:17 13:2,9,11,23 14:3,5 15:6,23 16:5,8,12, 15,18 17:7,8,9,16,18 18:4, 9,19,21 19:6,10,15,17,22 20:1,3,19,20,22,24 21:18 22:4 23:9,14 24:14,15,17, 17,19,21 25:18,23 26:10, 14,17,18,21 27:7,8,21 28:2, 9,16,19,23 29:3,6,10,18 30:3,9,13 31:1 32:4,5,20,20 35:1,18 36:10,20,23,25 38:16 39:12,13 40:5,10,24,25 41:1,2,2,4,5,6,7 42:3 43:1, 1,3,4,7,14,25 44:14,16,16, 18,20 45:9 46:18 47:2,5,6, 9 49:5,11 50:5,11 51:16,17 52:22 53:8 54:11 55:9 56:2,3 58:5 59:4 60:21 61:7, 20,25 62:4,11 63:2,4,23 64:11,23 65:7,10,16,19 66:3,5, 24 67:1 68:4,14 69:8,9 71:14,14,16 72:5,12 73:13,14, 14,16,17 74:2,10,13,24 75:12 76:1,13,14,14,16,17,18, 19 78:14,18 81:11,12,12, 14 82:13 83:3,10 84:5,11 85:19,25 86:8,17 87:12,17, 18,19 88:11,19,21 89:15, 20 90:24 91:3,23 92:7,21, 25 93:11,13,19,21 94:4,8 95:13 97:15 98:22 99:1,3, 16 100:5,6,18 101:16 102:6,24,24 103:1,7 104:5,6,6,</p>	<p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> [12] 24:14,17 32:4, 20 35:2 36:20 41:6,7 42:4 76:16 95:13 108:25</p> <p><b>Kagan's</b> [1] 108:12</p> <p><b>Kavanaugh</b> [19] 43:3,4,7, 14,25 44:14 76:18,19 78:14 81:11 88:12,21 89:20 91:3 106:1,2 107:13 108:8 112:6</p> <p><b>Kavanaugh's</b> [1] 87:19</p> <p><b>kept</b> [1] 4:17</p> <p><b>key</b> [4] 76:9 88:20,22 91:2</p> <p><b>kills</b> [1] 70:8</p> <p><b>kind</b> [16] 20:16 27:2 30:25 32:12 35:17 37:10 38:12 45:25 46:3 52:23 92:3,4 95:7,21 96:11 100:25</p> <p><b>knowing</b> [1] 35:16</p> <p><b>knowledge</b> [2] 17:12 40:8</p> <p><b>known</b> [1] 59:10</p> <p><b>knows</b> [2] 97:7 113:4</p> <p><b>Korea</b> [1] 54:18</p>	<p style="text-align: center;"><b>L</b></p> <p><b>laid</b> [2] 16:4 62:9</p> <p><b>laissez</b> [1] 90:19</p> <p><b>language</b> [1] 108:19</p> <p><b>last</b> [9] 10:17 12:9 13:23 14:6 16:25 17:5 22:6,9 52:18</p> <p><b>later</b> [1] 10:4</p> <p><b>law</b> [42] 4:15,23,24 5:1,2,3, 6 6:2 10:24 12:10,23 16:23 19:12 20:18 34:18 35:23 42:19 47:25 49:3,21 53:22 54:20,25 59:10 60:10, 18 69:2 71:25 73:4,18,25 75:6,18 81:23 82:7 90:2 91:21 95:12,18 99:6 105:22 113:16</p> <p><b>Lawrence</b> [5] 25:2 27:10 45:5 72:11 79:10</p> <p><b>laws</b> [13] 8:8 44:12 50:1 56:4,19 57:8,11 71:8 108:22 109:15,21 111:3,7</p> <p><b>layer</b> [1] 95:10</p> <p><b>laying</b> [1] 9:11</p> <p><b>lead</b> [4] 10:20 35:14 111:5, 6</p> <p><b>leads</b> [1] 35:8</p> <p><b>least</b> [8] 12:4 37:21,24 47:19 65:11 72:18 92:2 109:22</p>	<p style="text-align: center;"><b>M</b></p> <p><b>made</b> [14] 16:17 34:10,12, 14,22 51:18,20 52:6 64:8 68:2 70:19 71:4 77:23 90:15</p> <p><b>Madison</b> [2] 22:7 23:4</p> <p><b>magnitude</b> [1] 39:22</p> <p><b>major</b> [2] 48:21 52:7</p> <p><b>majority</b> [4] 44:1 54:14 55:1 88:24</p> <p><b>many</b> [24] 7:14 11:25,25 12:13 15:17 20:7 24:9,12 25:9 40:12 44:4,10 56:12 64:9 67:15 73:25 76:7 83:22 84:25 85:14 91:1 99:18 110:10 111:17</p> <p><b>Mapp</b> [1] 79:12</p> <p><b>Marbury</b> [2] 22:7 23:4</p>	<p style="text-align: center;"><b>M</b></p>



## Official - Subject to Final Review

<p><b>momentous</b> [2] 39:5 112:23</p> <p><b>money</b> [2] 97:23 99:21</p> <p><b>month</b> [1] 98:18</p> <p><b>months</b> [3] 4:25 47:12 78:11</p> <p><b>monumental</b> [1] 109:18</p> <p><b>morning</b> [1] 4:4</p> <p><b>most</b> [19] 10:3,13 12:20 16:22 34:2 52:4 55:6 61:5 67:15 76:23 78:24,25 79:22 80:7 89:8 98:13 102:16 105:17 113:3</p> <p><b>mother</b> [1] 75:8</p> <p><b>motherhood</b> [2] 56:14,18</p> <p><b>move</b> [1] 55:19</p> <p><b>moving</b> [1] 44:12</p> <p><b>Ms</b> [50] 47:6,9 49:8,23 50:7,19 52:2,24 53:19 54:23 55:11 56:3 57:9 58:16 60:4 61:18,22 62:8,19 63:11 64:17 65:4,9,14,17,24 66:4,16 67:18 68:21 71:5,22 72:7 73:1,24 74:6,11,14 75:4,16 76:5 77:20 80:20 82:8,20 83:6,16 108:14,16,23</p> <p><b>much</b> [19] 7:23 14:4 16:15 18:10 21:21 22:5 27:5 31:5 33:17 35:4 40:12 52:12 55:25 56:21 58:7,13 68:8 80:6 89:18</p> <p><b>multiple</b> [1] 96:3</p> <p><b>must</b> [3] 23:8 93:15 110:13</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>nail</b> [1] 108:13</p> <p><b>name</b> [1] 15:16</p> <p><b>narrowly</b> [1] 56:21</p> <p><b>nation</b> [2] 10:23 108:21</p> <p><b>nature</b> [2] 19:24 107:16</p> <p><b>navigating</b> [1] 52:12</p> <p><b>nearly</b> [2] 35:12 84:22</p> <p><b>necessarily</b> [3] 21:7 26:24 42:15</p> <p><b>need</b> [11] 37:21,22 52:3 55:22 74:21 81:7 83:21 98:20 99:9,24 109:4</p> <p><b>needed</b> [2] 93:1 96:18</p> <p><b>needs</b> [2] 5:13 95:10</p> <p><b>negative</b> [4] 24:12 25:8,9 49:19</p> <p><b>neglect</b> [3] 49:15 50:12 103:3</p> <p><b>neither</b> [6] 29:13 43:18 57:18 77:2,9 113:3</p> <p><b>neutral</b> [8] 35:23 43:16 76:25 77:7,8,13 78:3 112:8</p> <p><b>neutrality</b> [2] 77:15 80:17</p> <p><b>Nevada</b> [1] 58:22</p> <p><b>never</b> [12] 4:18 14:11 26:8 35:25 39:16 61:3 71:9 78:12 80:22 85:13 91:24 94:25</p>	<p><b>nevertheless</b> [1] 91:17</p> <p><b>New</b> [16] 2:4,4 10:7 12:23 14:21,24 15:15 40:7,8 57:11 82:24 92:4 98:5 107:7 109:21,22</p> <p><b>newest</b> [1] 14:21</p> <p><b>night</b> [1] 61:6</p> <p><b>nominal</b> [3] 55:3,10,12</p> <p><b>none</b> [2] 23:2 25:12</p> <p><b>nor</b> [4] 43:18 77:2,9 113:4</p> <p><b>normal</b> [2] 67:17 70:13</p> <p><b>North</b> [1] 54:18</p> <p><b>Note</b> [2] 75:22 111:19</p> <p><b>noted</b> [1] 13:16</p> <p><b>nothing</b> [9] 35:4,9 69:3 81:6 92:9 94:19 100:2 109:20,22</p> <p><b>notion</b> [1] 93:25</p> <p><b>novel</b> [1] 22:10</p> <p><b>Nowhere</b> [1] 4:19</p> <p><b>number</b> [9] 7:9 42:6,15 61:1 62:24 71:10 95:14 99:10 112:5</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O'Connor</b> [1] 69:20</p> <p><b>Obergefell</b> [4] 25:2 27:10,22 79:17</p> <p><b>objective</b> [1] 42:10</p> <p><b>objectively</b> [2] 66:21 84:3</p> <p><b>obligations</b> [2] 56:17 58:9</p> <p><b>obstacle</b> [2] 68:25 69:3</p> <p><b>obtain</b> [3] 4:25 53:22 55:24</p> <p><b>obtained</b> [1] 79:15</p> <p><b>Obviously</b> [6] 17:20 45:7 59:24 82:10,11,25</p> <p><b>occurred</b> [3] 17:1 70:24 98:18</p> <p><b>OFFICER</b> [1] 1:4</p> <p><b>often</b> [3] 24:11 52:4,11</p> <p><b>Ohio</b> [1] 79:12</p> <p><b>Okay</b> [8] 13:2 25:18 26:19 42:17 65:16 70:17 72:22 110:4</p> <p><b>old</b> [1] 72:19</p> <p><b>once</b> [4] 38:6 40:16 74:19 83:20</p> <p><b>one</b> [47] 6:10,24 7:10,12,18 8:25 15:10 16:9,20 17:24 18:18 28:18 29:13 30:12 34:8 36:15,16 37:5 38:14,21 41:13,18,18 42:16,23 44:8,25 46:7 48:18 49:6 51:9 53:10 58:20 69:12,13,13 70:20,21 79:4 88:13 89:21,22 96:19 98:14 106:17 110:12</p> <p><b>ones</b> [2] 108:25 109:1</p> <p><b>only</b> [15] 7:5 10:3 25:25 29:23 31:13 37:5,19 38:6 42:5 59:21 60:12 63:6 67:7 102:18 104:2</p> <p><b>open</b> [1] 90:12</p>	<p><b>opinion</b> [7] 9:1 10:25 14:8 26:17,22 35:20 76:7</p> <p><b>opportunities</b> [2] 56:16 58:14</p> <p><b>opportunity</b> [2] 53:13 60:3</p> <p><b>opposed</b> [2] 15:19 70:4</p> <p><b>opposite</b> [1] 89:5</p> <p><b>options</b> [1] 63:6</p> <p><b>oral</b> [7] 1:17 3:2,5,8 4:7 47:7 84:8</p> <p><b>order</b> [1] 43:10</p> <p><b>ordering</b> [3] 65:6,17 66:17</p> <p><b>ordinary</b> [1] 9:20</p> <p><b>organism</b> [1] 30:18</p> <p><b>ORGANIZATION</b> [2] 1:9 4:5</p> <p><b>organize</b> [1] 96:6</p> <p><b>original</b> [2] 39:1 71:16</p> <p><b>other</b> [51] 7:2,14,24 8:2,7 12:23 14:1 15:16 16:17 19:5 25:9 27:9 32:9 34:6,8 36:8 38:19 40:12,13,15 41:20 43:17 48:13 51:1 53:3 54:15 56:23 57:22,23 59:6,23 61:14 65:20 70:5 76:19 80:18 83:22 86:18,19 90:18 93:20 99:25 100:8 103:22 104:4,13 106:6,14,18,23 108:3</p> <p><b>others</b> [2] 14:1 78:18</p> <p><b>otherwise</b> [3] 28:10 32:17 73:10</p> <p><b>out</b> [27] 7:12,18 16:4 18:12 19:23 20:6 25:10,16 27:25 45:9 48:18 49:12 56:5 58:8 59:15 62:9 67:3 68:17 72:13 75:2,22 79:24 81:18 89:19 96:1 103:25 111:4</p> <p><b>outlawed</b> [1] 79:3</p> <p><b>outlier</b> [1] 94:2</p> <p><b>outset</b> [1] 103:18</p> <p><b>outside</b> [2] 5:12 108:4</p> <p><b>outsider</b> [1] 97:18</p> <p><b>outward</b> [2] 13:13 46:1</p> <p><b>outweighs</b> [2] 36:16,17</p> <p><b>over</b> [10] 14:14 19:3 35:14 36:24 52:18 59:12 72:9 88:14 96:8 106:18</p> <p><b>overall</b> [1] 41:11</p> <p><b>overlooking</b> [1] 109:15</p> <p><b>overrule</b> [19] 6:1 7:25 8:14 9:4,18 10:13 26:9 39:5 42:5,24 46:24 63:8 70:25 71:1,9 80:22 85:17 91:17 107:22</p> <p><b>overruled</b> [17] 12:20 37:12 79:2,23 80:9 87:20 91:24 92:12 93:5,7,10,14,15,15 94:18,22,25</p> <p><b>overrules</b> [2] 25:17 113:14</p> <p><b>overruling</b> [12] 10:5,19 26:2 40:19 45:3 47:23 63:17</p>	<p><b>84:21 90:4,5 93:23 95:3</b></p> <p><b>overrulings</b> [3] 36:8 46:9 70:14</p> <p><b>overturn</b> [3] 9:23 13:6 28:3</p> <p><b>overturned</b> [2] 23:8 48:2</p> <p><b>overturning</b> [2] 10:1 88:14</p> <p><b>overwhelming</b> [1] 91:12</p> <p><b>own</b> [3] 14:10 97:19 109:18</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>PAGE</b> [2] 3:2 69:5</p> <p><b>pages</b> [7] 68:1 76:7 89:17,19 90:21 91:1 108:17</p> <p><b>pain</b> [4] 17:13,23 18:5 21:8</p> <p><b>papers</b> [4] 16:16 19:17,23 68:17</p> <p><b>paradox</b> [2] 69:25 70:18</p> <p><b>paradoxical</b> [1] 67:10</p> <p><b>paragraph</b> [1] 16:20</p> <p><b>paragraphs</b> [1] 16:24</p> <p><b>parental</b> [3] 56:6 57:6 110:7</p> <p><b>Parenthood</b> [3] 4:11 57:1 58:9</p> <p><b>parenting</b> [6] 56:12,14,17 57:18 109:9 111:5</p> <p><b>parents</b> [1] 22:19</p> <p><b>Parrish</b> [1] 89:22</p> <p><b>parsing</b> [1] 100:25</p> <p><b>part</b> [13] 9:3 13:11 20:14 25:20 33:1 34:18,19 42:4 44:25 57:1 72:15 89:10 110:10</p> <p><b>participate</b> [2] 85:15 108:20</p> <p><b>participation</b> [1] 52:19</p> <p><b>particular</b> [5] 7:11 50:1 54:22 57:24 99:3</p> <p><b>particularly</b> [4] 6:12 9:25 13:13 48:20</p> <p><b>partners</b> [1] 96:6</p> <p><b>parts</b> [2] 8:25 12:23</p> <p><b>pass</b> [1] 41:17</p> <p><b>passages</b> [1] 91:5</p> <p><b>passed</b> [1] 35:4</p> <p><b>passing</b> [1] 58:8</p> <p><b>past</b> [2] 52:16 61:11</p> <p><b>path</b> [1] 69:1</p> <p><b>pay</b> [2] 97:23 99:19</p> <p><b>people</b> [64] 5:10,17,18,23,25 7:20 8:11 9:2 11:15,16,23,24,25 13:18 15:14,18,20 17:22 20:7 21:1,4,6 25:6 28:11 29:1 30:23,23 32:12,24 33:2,18 34:8,12,12,13 36:2,2 43:20,24 48:24 52:3,6,8,8 61:1,5 62:23,24 64:9 67:6 69:22 70:4 71:11 75:15 77:5 88:25 90:20 96:10 97:17,17 99:6 100:19 107:5,10</p> <p><b>people's</b> [3] 22:23 54:18 65:24</p>	<p><b>perceived</b> [1] 91:16</p> <p><b>percent</b> [4] 21:3 31:4 97:21 98:12</p> <p><b>percentage</b> [1] 31:5</p> <p><b>perception</b> [1] 15:3</p> <p><b>perhaps</b> [6] 16:22 43:21 52:6 69:16 89:7 91:17</p> <p><b>period</b> [5] 26:9 54:22 55:24 56:8 68:13</p> <p><b>permit</b> [2] 55:1,13</p> <p><b>persist</b> [1] 98:8</p> <p><b>person</b> [2] 71:25 97:7</p> <p><b>person/one</b> [1] 79:4</p> <p><b>personal</b> [2] 15:19 22:16</p> <p><b>personhood</b> [2] 32:8 66:10</p> <p><b>perspective</b> [1] 40:1</p> <p><b>petition</b> [2] 37:4,15</p> <p><b>Petitioner</b> [1] 56:5</p> <p><b>Petitioners</b> [6] 1:6 2:3 3:4,14 4:8 110:22</p> <p><b>Petitioners'</b> [1] 109:7</p> <p><b>philosophers</b> [2] 29:21 32:6</p> <p><b>philosophical</b> [8] 30:18 66:1,6,7,23 69:11 77:24 84:4</p> <p><b>physical</b> [5] 48:8 51:13 57:20 72:3 74:16</p> <p><b>physically</b> [1] 31:13</p> <p><b>pick</b> [4] 76:22 77:17 82:16 106:16</p> <p><b>picking</b> [2] 78:17 111:1</p> <p><b>place</b> [10] 14:22 22:1 34:15 42:16,17 51:19 55:8 57:12 80:6 81:17</p> <p><b>placed</b> [1] 89:12</p> <p><b>places</b> [2] 5:16 34:20</p> <p><b>Planned</b> [2] 4:11 100:19</p> <p><b>planning</b> [1] 97:16</p> <p><b>play</b> [1] 67:3</p> <p><b>plea</b> [1] 90:23</p> <p><b>please</b> [5] 4:10 47:10 62:4 84:12 90:23</p> <p><b>Plessy</b> [11] 36:11 45:4 80:3 90:8,10 92:8,15,16 93:2 94:9 112:25</p> <p><b>plunge</b> [1] 36:21</p> <p><b>plus</b> [1] 69:14</p> <p><b>point</b> [32] 10:18 28:16,24 31:23 32:8 35:5 36:6 51:11,18 53:12 54:4,6 55:14 59:15 60:5 64:24 65:11,22,23 66:11 69:15,18 71:6 75:6 87:11 89:15,16 90:15 97:24 102:4 105:2 106:18</p> <p><b>pointed</b> [8] 18:12 19:23 23:19 25:10 27:25 45:9 96:4 111:4</p> <p><b>points</b> [6] 37:15 39:9 56:5 64:18 77:20 110:25</p> <p><b>poisoned</b> [1] 4:15</p>
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## Official - Subject to Final Review

<p><b>poked</b> <sup>[1]</sup> 18:17  <b>police</b> <sup>[1]</sup> 79:7  <b>political</b> <sup>[11]</sup> 4:18 10:2,6  14:18 15:4,18,21,24 32:25  36:22 70:7  <b>politicians</b> <sup>[1]</sup> 70:7  <b>poor</b> <sup>[3]</sup> 31:4 48:22 52:11  <b>poorer</b> <sup>[1]</sup> 31:15  <b>popular</b> <sup>[3]</sup> 67:5,9 69:24  <b>population</b> <sup>[2]</sup> 28:11 31:5  <b>posed</b> <sup>[1]</sup> 50:20  <b>posing</b> <sup>[1]</sup> 103:10  <b>position</b> <sup>[9]</sup> 32:7 76:21 77:  15 78:3 80:16 90:1 105:4  108:16,16  <b>positions</b> <sup>[1]</sup> 41:9  <b>possibility</b> <sup>[2]</sup> 53:24 60:21  <b>possible</b> <sup>[3]</sup> 15:7 45:3 47:  22  <b>post-viability</b> <sup>[2]</sup> 49:16 50:  6  <b>potential</b> <sup>[1]</sup> 34:7  <b>Potter</b> <sup>[1]</sup> 10:18  <b>power</b> <sup>[1]</sup> 10:22  <b>powerful</b> <sup>[1]</sup> 113:3  <b>powerfully</b> <sup>[1]</sup> 46:19  <b>practicable</b> <sup>[1]</sup> 8:10  <b>practice</b> <sup>[2]</sup> 66:14 80:14  <b>pre-viability</b> <sup>[6]</sup> 37:6 49:19  50:5,18 58:2 72:4  <b>precedent</b> <sup>[19]</sup> 12:25 47:  13,15 67:13,18,19 71:8,13  79:2,24 80:2,9,21,24 87:20  91:15 95:9,10 105:17  <b>precedents</b> <sup>[5]</sup> 12:19 37:  23 80:12,18 88:20  <b>preclude</b> <sup>[1]</sup> 18:14  <b>pregnancies</b> <sup>[4]</sup> 73:5 85:5  98:8,17  <b>pregnancy</b> <sup>[44]</sup> 47:24 48:7,  19,22 49:1,16 50:22 51:13,  14 52:11 53:11 54:6 56:18,  25 57:19 58:13 64:14 65:2,  12 72:4 74:9,12,17 75:18,  25 78:11 84:16,18,25 86:6  87:16 97:10,17 98:15 99:  14 100:4 102:4,18 103:19,  24 108:1 109:5 110:6 111:  13  <b>pregnant</b> <sup>[4]</sup> 47:16 52:9 99:  12 106:11  <b>PRELOGAR</b> <sup>[33]</sup> 2:6 3:9  84:7,8,11 85:23 86:17 87:  14 88:18 90:24 92:1,13,23  93:6,12,18,20 94:6,24 96:2  98:4,25 100:17,23 101:25  102:10 103:7 104:16,22  105:13 107:13 109:12 110:  9  <b>premise</b> <sup>[2]</sup> 92:18 93:8  <b>prenatal</b> <sup>[1]</sup> 50:3  <b>present</b> <sup>[2]</sup> 38:8 79:9</p>	<p><b>presented</b> <sup>[4]</sup> 38:7 39:10  63:13 80:1  <b>presenting</b> <sup>[1]</sup> 39:10  <b>presents</b> <sup>[1]</sup> 47:20  <b>preserve</b> <sup>[4]</sup> 48:12 50:23,  24 105:18  <b>Preserving</b> <sup>[1]</sup> 48:11  <b>pressure</b> <sup>[5]</sup> 10:2,2,19 13:  14,15  <b>pressures</b> <sup>[1]</sup> 10:6  <b>presumably</b> <sup>[3]</sup> 19:19 38:  19 44:3  <b>pretty</b> <sup>[3]</sup> 8:22 30:16 68:8  <b>prevail</b> <sup>[5]</sup> 12:5 44:1,5 106:  18 107:21  <b>prevent</b> <sup>[2]</sup> 31:25 32:24  <b>preventing</b> <sup>[1]</sup> 33:2  <b>previous</b> <sup>[1]</sup> 80:21  <b>primarily</b> <sup>[3]</sup> 58:11 69:19,  22  <b>principal</b> <sup>[1]</sup> 76:2  <b>principle</b> <sup>[12]</sup> 9:12 10:1 13:  22 20:5,5,8 32:22 33:11  46:23 68:7 83:7 104:14  <b>principled</b> <sup>[9]</sup> 54:1 65:5,8  66:17 82:10,23,25 105:12,  14  <b>principles</b> <sup>[8]</sup> 9:4 10:8 13:  5 39:18 82:5 83:5,12 85:  12  <b>prior</b> <sup>[8]</sup> 9:18 61:13 62:7,16  67:12 80:12 87:15 106:25  <b>privacy</b> <sup>[10]</sup> 6:7,8,17,19 22:  23 23:21 71:20 72:20,24  85:22  <b>pro-choice</b> <sup>[4]</sup> 43:19 64:9  77:3,9  <b>pro-life</b> <sup>[4]</sup> 43:18 64:10 77:  2,10  <b>probably</b> <sup>[1]</sup> 64:6  <b>problem</b> <sup>[11]</sup> 21:19 27:3  35:18,20 56:20 70:1,2 76:  20 106:13,17 112:10  <b>problematic</b> <sup>[3]</sup> 7:22 8:12  40:14  <b>problems</b> <sup>[4]</sup> 12:13 19:25  29:17 42:6  <b>procedure</b> <sup>[1]</sup> 5:5  <b>process</b> <sup>[11]</sup> 4:15 6:22 27:  11,12,18 43:22 71:25 72:  21,21,22 81:21  <b>procreation</b> <sup>[1]</sup> 58:25  <b>produced</b> <sup>[1]</sup> 25:8  <b>profession</b> <sup>[1]</sup> 53:7  <b>professional</b> <sup>[1]</sup> 58:14  <b>profound</b> <sup>[6]</sup> 7:13 49:2 85:  5 96:16 103:21 104:20  <b>progress</b> <sup>[1]</sup> 25:20  <b>prohibit</b> <sup>[7]</sup> 43:9,11 50:9  60:10,24 79:12 87:8  <b>prohibition</b> <sup>[5]</sup> 60:9 69:2  100:15 101:21,22</p>	<p><b>prohibitions</b> <sup>[2]</sup> 37:7 60:8  <b>prohibits</b> <sup>[2]</sup> 4:23 5:7  <b>promises</b> <sup>[1]</sup> 5:16  <b>promote</b> <sup>[1]</sup> 8:9  <b>promotes</b> <sup>[1]</sup> 86:1  <b>propel</b> <sup>[1]</sup> 48:16  <b>proper</b> <sup>[1]</sup> 75:7  <b>properly</b> <sup>[3]</sup> 91:16 93:14  96:25  <b>propose</b> <sup>[2]</sup> 8:2 105:8  <b>proposed</b> <sup>[1]</sup> 59:18  <b>proposition</b> <sup>[1]</sup> 24:2  <b>prosecutions</b> <sup>[1]</sup> 79:14  <b>protect</b> <sup>[4]</sup> 5:11 6:16 29:25  34:1  <b>protected</b> <sup>[2]</sup> 89:10 101:3  <b>protecting</b> <sup>[3]</sup> 34:7,7 87:  10  <b>protection</b> <sup>[5]</sup> 71:23 74:20  83:18 94:14 101:7  <b>protective</b> <sup>[1]</sup> 83:14  <b>protects</b> <sup>[3]</sup> 48:12 71:20  84:15  <b>proved</b> <sup>[2]</sup> 59:23,25  <b>proves</b> <sup>[1]</sup> 21:7  <b>provide</b> <sup>[3]</sup> 6:16 13:20 101:  6  <b>provided</b> <sup>[1]</sup> 6:14  <b>provides</b> <sup>[1]</sup> 78:3  <b>providing</b> <sup>[1]</sup> 87:6  <b>provision</b> <sup>[1]</sup> 73:20  <b>prudential</b> <sup>[1]</sup> 83:11  <b>public</b> <sup>[4]</sup> 15:2 33:1 45:12  69:19  <b>pure</b> <sup>[3]</sup> 90:18,18 113:2  <b>purposeful</b> <sup>[1]</sup> 25:13  <b>purposefully</b> <sup>[1]</sup> 35:7  <b>purse</b> <sup>[1]</sup> 69:18  <b>pursue</b> <sup>[3]</sup> 33:25 52:21 53:  6  <b>push</b> <sup>[1]</sup> 42:2  <b>Put</b> <sup>[4]</sup> 8:25 14:22 31:7,14  <b>puts</b> <sup>[2]</sup> 8:10 25:16  <b>Putting</b> <sup>[4]</sup> 30:9 31:2 53:8  59:23</p> <p style="text-align: center;"><b>Q</b></p> <p><b>quadruple</b> <sup>[1]</sup> 70:16  <b>quality</b> <sup>[1]</sup> 95:21  <b>question</b> <sup>[53]</sup> 10:16 19:20  21:10 24:22 26:8 30:13 31:  19 34:9 37:5 38:7,10,14,14,  20 39:9 42:3,22 43:17,19  44:19 48:1 49:6 56:4,22  59:5,20 60:20 64:4,18 67:  20,24 69:9 71:17 77:1,3,9,  13 78:15 80:9 81:15,18 82:  9 93:3 99:8 101:24 103:1,  10 104:25 105:5,10 106:21  108:12,14  <b>questions</b> <sup>[15]</sup> 6:3 24:20  30:19 37:2,17 39:4 41:1  54:24 59:24 73:19 78:17,  18 84:4 99:2 106:25</p>	<p><b>quick</b> <sup>[1]</sup> 41:8  <b>quicken</b> <sup>[2]</sup> 74:9 75:1  <b>quintessentially</b> <sup>[1]</sup> 21:23  <b>quite</b> <sup>[9]</sup> 22:2 26:7 27:16  39:16 40:17,21 55:21 67:2,  2  <b>quote</b> <sup>[2]</sup> 10:18 108:18</p> <p style="text-align: center;"><b>R</b></p> <p><b>race</b> <sup>[1]</sup> 113:5  <b>radar</b> <sup>[1]</sup> 27:2  <b>raise</b> <sup>[1]</sup> 99:20  <b>raised</b> <sup>[3]</sup> 38:5,18 69:10  <b>ramifications</b> <sup>[1]</sup> 7:13  <b>ran</b> <sup>[1]</sup> 23:25  <b>range</b> <sup>[1]</sup> 68:13  <b>rape</b> <sup>[1]</sup> 84:25  <b>raped</b> <sup>[1]</sup> 97:17  <b>rare</b> <sup>[4]</sup> 9:7,13 13:4 70:3  <b>rate</b> <sup>[2]</sup> 98:1,12  <b>rather</b> <sup>[4]</sup> 46:6 77:16 107:4  110:7  <b>rational</b> <sup>[1]</sup> 8:8  <b>rationale</b> <sup>[1]</sup> 33:23  <b>re-argued</b> <sup>[1]</sup> 92:8  <b>re-read</b> <sup>[1]</sup> 91:1  <b>reach</b> <sup>[3]</sup> 16:1 25:16 36:3  <b>reached</b> <sup>[1]</sup> 113:9  <b>reaching</b> <sup>[1]</sup> 64:24  <b>react</b> <sup>[1]</sup> 34:25  <b>reaction</b> <sup>[4]</sup> 9:15 45:12  103:4 106:23  <b>read</b> <sup>[13]</sup> 8:21 10:11 19:4  25:21 58:6 63:5 69:12 89:  19 90:3,21,23,25 103:8  <b>readily</b> <sup>[1]</sup> 40:22  <b>reading</b> <sup>[1]</sup> 15:3  <b>reads</b> <sup>[1]</sup> 11:2  <b>ready</b> <sup>[1]</sup> 70:6  <b>reaffirm</b> <sup>[4]</sup> 8:25 19:4 63:7  104:19  <b>reaffirmed</b> <sup>[3]</sup> 14:15 63:25  85:9  <b>reaffirming</b> <sup>[3]</sup> 20:16 91:  12 102:1  <b>real</b> <sup>[4]</sup> 21:12 36:14 63:6 98:  2  <b>real-world</b> <sup>[1]</sup> 84:21  <b>realities</b> <sup>[1]</sup> 113:7  <b>reality</b> <sup>[2]</sup> 38:2 98:21  <b>realize</b> <sup>[2]</sup> 93:2 99:12  <b>realized</b> <sup>[1]</sup> 93:9  <b>really</b> <sup>[20]</sup> 7:12 10:11 11:25  18:1 21:20 25:19 40:19 46:  20 53:17 55:16 59:2 64:10  70:4,5,15,20 78:21 88:22  92:7,22  <b>reason</b> <sup>[12]</sup> 10:14 22:12 46:  7 47:23 68:16 69:23 70:11,  12 71:9 102:9 106:14 111:  6  <b>reasonable</b> <sup>[4]</sup> 22:2 53:23</p>	<p>60:21 93:25  <b>reasonably</b> <sup>[1]</sup> 32:14  <b>reasoned</b> <sup>[1]</sup> 23:20  <b>reasoning</b> <sup>[1]</sup> 12:20  <b>reasons</b> <sup>[12]</sup> 24:24 30:20,  22 32:23 42:23 47:19 53:  20 54:2 55:14,15,15 57:10  <b>REBUTTAL</b> <sup>[3]</sup> 3:12 110:  20,21  <b>recast</b> <sup>[1]</sup> 12:19  <b>recently</b> <sup>[1]</sup> 59:19  <b>recognize</b> <sup>[7]</sup> 4:20 36:14  48:25 73:21 74:4 89:1 113:  7  <b>recognized</b> <sup>[16]</sup> 22:18,20,  22,25 30:16 36:11 79:5,18  84:14 85:9 96:4 97:1 98:7  103:17 107:15 110:13  <b>recognizes</b> <sup>[2]</sup> 74:19 83:  21  <b>recognizing</b> <sup>[2]</sup> 52:10 88:  14  <b>recoil</b> <sup>[2]</sup> 18:18 21:5  <b>recoiling</b> <sup>[1]</sup> 18:17  <b>reconsider</b> <sup>[2]</sup> 37:22 55:  22  <b>record</b> <sup>[2]</sup> 42:11,13  <b>recourse</b> <sup>[1]</sup> 108:3  <b>reducing</b> <sup>[1]</sup> 48:15  <b>reevaluate</b> <sup>[1]</sup> 37:22  <b>reexamine</b> <sup>[1]</sup> 10:14  <b>refer</b> <sup>[1]</sup> 52:24  <b>reference</b> <sup>[2]</sup> 58:8 87:6  <b>referred</b> <sup>[2]</sup> 99:16 110:2  <b>referring</b> <sup>[3]</sup> 91:4 103:9  108:25  <b>refuse</b> <sup>[1]</sup> 47:18  <b>refusing</b> <sup>[1]</sup> 107:24  <b>regard</b> <sup>[1]</sup> 46:2  <b>regarded</b> <sup>[1]</sup> 67:14  <b>regimes</b> <sup>[1]</sup> 55:16  <b>regular</b> <sup>[1]</sup> 17:19  <b>regulate</b> <sup>[4]</sup> 49:24 50:22  79:6 103:12  <b>regulation</b> <sup>[1]</sup> 102:14  <b>regulations</b> <sup>[8]</sup> 41:17 55:  23 60:7 61:13,24 62:16 68:  10,24  <b>reinforce</b> <sup>[2]</sup> 73:11 104:19  <b>reject</b> <sup>[4]</sup> 14:12 24:2 104:  12,18  <b>rejected</b> <sup>[5]</sup> 7:2 47:22 59:7  77:24 81:4  <b>rejects</b> <sup>[1]</sup> 75:9  <b>related</b> <sup>[5]</sup> 49:9 58:24 73:7  78:6 111:24  <b>relationship</b> <sup>[4]</sup> 87:23,25  88:4 99:17  <b>relationships</b> <sup>[2]</sup> 25:5 96:  13  <b>relevant</b> <sup>[1]</sup> 60:1  <b>reliance</b> <sup>[35]</sup> 16:25 25:7 84:</p>
---	--	--	---	---

## Official - Subject to Final Review

<p>20 89:3,12,13,15 91:10 93:25 94:5,9,11,12,13 95:14,17,23,25 96:3,5,11,16 97:13 98:2 100:9,11,24 101:19 108:12,18,24 109:7,8,14 110:5</p> <p>relief [4] 48:17 75:22 76:2 95:11</p> <p>relieve [1] 111:11</p> <p>religion [2] 22:19 30:10</p> <p>religions [1] 29:22</p> <p>religious [6] 29:19,25 32:16,19 61:4,6</p> <p>relinquishing [1] 56:6</p> <p>rely [1] 27:11</p> <p>relying [4] 49:7 59:3 72:24 88:21</p> <p>remain [2] 47:16 79:9</p> <p>remember [3] 19:16 76:6 90:10</p> <p>remembering [1] 56:9</p> <p>removed [1] 6:14</p> <p>renounce [1] 48:1</p> <p>renounces [1] 85:8</p> <p>replace [1] 101:5</p> <p>replaced [1] 59:8</p> <p>reproductive [1] 96:11</p> <p>Republic [1] 54:18</p> <p>repudiation [1] 10:8</p> <p>require [1] 66:22</p> <p>required [4] 79:7 80:25 83:12 85:4</p> <p>requiring [1] 57:5</p> <p>resisting [1] 83:19</p> <p>resolve [6] 4:18 9:11 37:19 43:21 66:22 107:6</p> <p>resolved [2] 66:2 77:25</p> <p>resources [1] 99:19</p> <p>respect [7] 13:22 14:8 39:7 80:15 86:19 102:23 103:20</p> <p>respectfully [4] 16:7 28:7,8 30:2</p> <p>respects [1] 45:10</p> <p>respond [2] 60:3 77:19</p> <p>Respondents [9] 1:10 2:5,9 3:7,11 47:8 84:10 111:3,23</p> <p>responding [2] 21:2 63:13</p> <p>response [3] 21:6 62:3 104:11</p> <p>responsive [1] 99:2</p> <p>rest [1] 68:9</p> <p>restriction [2] 59:18 99:7</p> <p>restrictive [1] 44:13</p> <p>rests [1] 21:20</p> <p>result [1] 12:6</p> <p>retain [3] 91:14 95:9 110:3</p> <p>retaining [1] 91:15</p> <p>retrospect [1] 39:19</p> <p>return [4] 30:22 60:20 77:15 80:16</p>	<p>returned [2] 12:1 36:1</p> <p>reverse [2] 97:11 101:8</p> <p>review [2] 8:8 37:6</p> <p>revisit [1] 37:22</p> <p>revoked [1] 85:13</p> <p>rid [3] 37:24 42:6 46:14</p> <p>Riggins [1] 58:22</p> <p>rights [18] 15:16 32:7 51:4 56:6 57:6 61:2 66:10 85:11 86:23,24,25 88:5,10 89:23 100:2 107:17,24 110:8</p> <p>RIKELMAN [52] 2:4 3:6 47:6,7,9 49:8,23 50:7,19 52:2,24 53:19 54:23 55:11 56:3 57:9 58:16 60:4 61:18,22 62:8,19 63:11 64:17 65:4,9,14,17,24 66:4,16 67:18 68:21 71:5,22 72:7 73:1,24 74:6,11,14 75:4,16 76:5 77:20 80:20 82:8,20 83:6,16 108:14,23</p> <p>Rikelman's [1] 108:16</p> <p>rise [1] 26:22</p> <p>rising [1] 26:19</p> <p>risk [3] 31:2,8,15</p> <p>risks [6] 5:4 48:8 57:20,25 58:3 74:16</p> <p>road [2] 40:21 41:25</p> <p>ROBERTS [39] 4:3 18:21 19:6,10,15 20:1,3 36:25 38:16 39:13 40:24 41:2 43:1 44:16 47:2,6 51:17 52:22 53:8 54:11 55:9 56:2 66:24 68:4 71:14 73:14 76:14 81:12 84:5 100:6,18 101:16 102:6,24 104:6 105:25 108:9 110:18 113:18</p> <p>robust [1] 4:24</p> <p>Roe [70] 4:11 5:9,14,24 6:1,7 8:1,25 9:5,6 12:5,22 13:6 16:21 17:3 18:13,23 19:4,8,9 20:5,14 22:14 23:6,7,21 26:15 31:24 33:12,18 35:5 37:11 38:25 39:20,21 40:19 42:24 47:23 48:2,5 51:20 52:1 56:11 57:14,18 58:6 63:7,17,22,25 67:20 68:7,19 69:14 76:2 82:14 84:22 85:9 87:3 91:12 96:21 97:6 98:5 103:17 107:22,22 109:23 111:15 112:11 113:10</p> <p>Roe's [6] 12:19 20:15 48:4 59:7 75:23 76:12</p> <p>role [1] 75:7</p> <p>romantic [1] 25:4</p> <p>rooted [1] 75:14</p> <p>roughly [1] 55:24</p> <p>rule [17] 8:16 10:24 13:4,4 35:23 39:2 47:25 49:3 79:13 90:2 91:8,21 94:1 95:12,18,20 105:22</p> <p>rules [7] 25:3,7 26:2 40:17 45:15 55:22 107:20</p> <p>ruling [1] 28:5</p> <p>run [9] 9:9,24 23:25 24:25 32:18 90:19 91:20 93:24 97:12</p> <p>running [1] 113:10</p> <p>rush [1] 54:5</p>	<p style="text-align: center;"><b>S</b></p> <p>safe [8] 56:4,19 57:8 108:22 109:14,21 111:2,7</p> <p>safely [1] 25:16</p> <p>same [20] 10:18 25:6 31:21 34:15,22 39:22 49:19 51:24 55:8,17 57:1 59:20 64:25 65:12 77:22 80:18 81:3 83:9 95:8 111:16</p> <p>same-sex [3] 27:23 79:12,19</p> <p>save [1] 50:10</p> <p>saw [2] 13:14 34:8</p> <p>saying [19] 20:15 23:15 27:12 31:12 32:3 33:7 34:18 43:24 46:10 58:5,10 62:3 66:8 68:6 70:10 72:16 77:14,24 88:25</p> <p>says [6] 22:8 33:10 69:20 74:25 81:25 106:6</p> <p>scale [2] 42:5 103:23</p> <p>science [5] 17:6,19,25 21:11,20</p> <p>scope [4] 81:23 87:5 101:2,14</p> <p>SCOTT [5] 2:2 3:3,13 4:7 110:21</p> <p>scrupulously [3] 77:8,13 112:7</p> <p>second [13] 9:1,3 15:17 48:5 58:22 78:2 81:24 82:16 83:14 86:11,24 89:22 96:24</p> <p>section [1] 71:1</p> <p>secular [2] 32:6 66:7</p> <p>secured [1] 96:21</p> <p>see [13] 11:11 13:14 15:7 18:1 26:12 44:10 65:8 71:2 87:22 88:5 90:14 101:23 104:13</p> <p>seeing [2] 15:19 69:25</p> <p>seek [2] 101:13 111:6</p> <p>seeking [2] 50:3 103:11</p> <p>seem [4] 6:6 56:25 67:9 104:1</p> <p>seemed [3] 59:16 67:6,9</p> <p>seems [6] 6:6 53:15 56:10,20 57:2 108:23</p> <p>seen [3] 13:24 14:2 56:10</p> <p>segregation [1] 92:19</p> <p>Senate [1] 14:23</p> <p>sensation [1] 21:8</p> <p>sense [12] 22:1,23 27:9 41:12,18,20 105:22</p> <p>8 64:11 73:10 82:2 83:7,17,25 90:5 95:24</p> <p>sentence [2] 10:17 38:21</p> <p>sentences [1] 10:10</p> <p>separate [3] 79:3 90:10 102:19</p> <p>separately [2] 66:20 84:1</p> <p>separateness [1] 102:11</p> <p>separation [1] 52:8</p> <p>serious [1] 10:16</p> <p>seriously [2] 64:2 80:13</p> <p>serve [1] 49:25</p> <p>serves [2] 16:24 111:16</p> <p>services [2] 61:4,6</p> <p>set [10] 14:11 15:11,16 40:14 45:15,18,22 54:20 66:18 79:4</p> <p>setting [1] 88:7</p> <p>settled [1] 40:17</p> <p>setup [1] 33:8</p> <p>several [1] 76:9</p> <p>severe [1] 84:22</p> <p>sex [1] 25:6</p> <p>share [2] 54:17,22</p> <p>she's [1] 90:1</p> <p>shift [1] 38:12</p> <p>shifted [1] 37:10</p> <p>shortest [1] 56:7</p> <p>Shortly [3] 49:11 74:3,7</p> <p>shouldn't [2] 67:7 80:23</p> <p>show [4] 9:25 10:4 21:11 70:16</p> <p>showing [2] 53:1,2</p> <p>side [10] 9:1 34:6 59:6 61:14 65:20 76:20 103:22 104:4 106:6,14</p> <p>side's [1] 106:24</p> <p>sides [7] 5:22 13:15 36:15 70:4 76:23 77:17 112:16</p> <p>signaled [1] 38:8</p> <p>significantly [1] 112:3</p> <p>signs [1] 52:11</p> <p>silent [2] 43:16 79:9</p> <p>similar [3] 23:21 54:8 90:15</p> <p>similarly [1] 36:13</p> <p>simply [6] 12:18 61:5 62:23 91:24 93:15 94:18</p> <p>since [10] 14:11,15 17:1,3 18:10 29:21 33:18 57:11,13 98:5</p> <p>Sir [1] 18:19</p> <p>sit [1] 90:16</p> <p>situation [6] 34:21 35:12 76:24 91:13 94:25 97:10</p> <p>six-week [3] 14:22 54:7 101:11</p> <p>slightly [2] 36:16,17</p> <p>small [2] 18:4 98:1</p> <p>social [5] 10:2 55:14 76:23 77:16 108:20</p> <p>societal [4] 84:20 89:13 97:1,12</p>	<p>1,12</p> <p>society [9] 15:11 28:22 51:19 52:20 53:5 85:16 94:10 97:2 112:20</p> <p>socioeconomic [1] 55:15</p> <p>Solicitor [2] 2:2,6</p> <p>solutions [1] 36:4</p> <p>solve [1] 35:25</p> <p>somebody [2] 95:19 112:2</p> <p>somehow [2] 23:6 43:8</p> <p>sometimes [2] 78:23 95:17</p> <p>somewhat [2] 78:22 107:11</p> <p>sorry [9] 11:20 16:14 17:17 19:6,11 24:21 25:19 52:22 104:24</p> <p>sort [5] 36:5 41:15 51:24 67:13 72:13</p> <p>sorts [2] 39:23 112:1</p> <p>SOTOMAYOR [47] 14:3,5 15:6,23 16:5,8,12,15,18 17:7,9,16,18 18:4,19 20:20,23,24 21:18 22:4 23:10,14 24:21 27:8,21 28:2,9,16,19,23 29:3,6,10,18 30:3,9,14 31:1 41:5 76:15 87:18 88:19 97:15 98:22 99:1,16 100:5</p> <p>sounded [1] 101:20</p> <p>sounds [1] 103:11</p> <p>source [2] 19:17 76:2</p> <p>South [3] 49:13 90:13 94:9</p> <p>space [1] 39:6</p> <p>spades [1] 70:15</p> <p>special [7] 9:6,7 13:4 26:2 80:25 81:2 90:6</p> <p>specific [4] 72:18 103:9,20 109:1</p> <p>specifically [10] 6:9 58:24 75:20,22 85:20,20,21 86:3,15 87:13</p> <p>spent [1] 76:7</p> <p>splintered [1] 59:19</p> <p>sponsor [1] 14:23</p> <p>sponsors [1] 14:19</p> <p>spontaneous [1] 21:5</p> <p>squarely [4] 20:11 67:24 68:1 69:4</p> <p>stable [1] 95:11</p> <p>stage [4] 37:15,18 38:13 79:4</p> <p>stages [2] 84:24 102:18</p> <p>stake [13] 48:14 51:2 65:18 66:18,23 74:23 104:22 106:4,7,8 107:2,9 112:19</p> <p>stakes [1] 10:9</p> <p>stand [6] 4:19 12:19 46:21,21,22 63:7</p> <p>standard [36] 8:1,2,5,7,15 12:12,23 16:22,23 17:20,21 29:16 38:15 41:11,12 42:9,10,20 51:21 53:24 54:1,12</p>
--	--	--	--

## Official - Subject to Final Review

<p>14,17,17 59:9,10,12,25 60:19,22 61:15 62:7,9,15,25 63:1 82:4</p> <p><b>standards</b> [1] 54:21</p> <p><b>stands</b> [1] 20:17</p> <p><b>stare</b> [5] 9:3 11:1,9,10 12:8 13:1,5 16:4 24:12 25:10,14 26:9 32:21 39:7,13 40:14 44:21,23,25 45:6,11,18 46:24 47:20 59:5 60:2 66:25 67:13,14,17,20,21 70:14,14,25 71:1 78:15,19,21 80:10 81:4,19 82:12 83:3 85:12 91:6,20 93:22 95:2,5,6</p> <p><b>stark</b> [1] 85:11</p> <p><b>started</b> [2] 32:21 75:5</p> <p><b>starts</b> [1] 6:13</p> <p><b>STATE</b> [5] 1:3 20:25 28:10 29:15,24 31:12 36:13 38:13 48:6 49:21,23,24 51:7 53:20 57:4 60:8 61:3 63:12 64:19 71:24 73:20 74:6,14 79:11,14 81:1,19,21,22,25 82:2 83:8,19 84:17 85:20 86:5 87:8 88:1,2,14 92:2,24 98:11 101:4 103:11,15,16 107:4,5,17 109:12</p> <p><b>state's</b> [6] 6:2 63:14 82:18 102:14 104:1 113:16</p> <p><b>STATES</b> [42] 1:1,18 2:8 3:10 12:11 18:14 22:17 24:3 31:25 41:17 43:11,20 44:1,2,2,4,4,11 47:15 50:9,21 51:3,9 54:5,9 56:5 60:23 62:22 71:7 75:2,5 77:5,12 78:10 84:9,23 101:11 102:20 103:17 107:10,24 112:21</p> <p><b>states'</b> [2] 79:6 88:4</p> <p><b>status</b> [1] 78:13</p> <p><b>stench</b> [1] 15:2</p> <p><b>step</b> [3] 6:14 39:6 61:11</p> <p><b>STEWART</b> [78] 2:2 3:3,13 4:6,7,9 6:4,10 7:8 8:3,20,23 10:18 11:5,17,20 13:8,10 14:4 15:5,23 16:6,11,14,18 17:11,17 18:3,8,9,12,25 19:9,11,21 20:2,10,22 21:17 23:9,17 24:23 25:22 26:6,13,16,20,23 27:15,24 28:7,13,17,21,25 29:4,8,13 30:2,7,11 31:17 32:10 35:1 37:14 38:22 40:4 42:1 43:6,13,23 44:7,15 45:21 47:4 110:20,21,23</p> <p><b>stick</b> [1] 80:17</p> <p><b>still</b> [10] 29:7,22 31:20 44:2 46:17 51:3 65:11 94:16,16 98:7</p> <p><b>stimuli</b> [1] 21:3</p> <p><b>stopping</b> [2] 54:3 88:8</p>	<p><b>story</b> [1] 78:23</p> <p><b>straight</b> [1] 89:3</p> <p><b>strand</b> [2] 58:20,23</p> <p><b>strands</b> [2] 58:19 59:2</p> <p><b>strength</b> [1] 101:19</p> <p><b>strikes</b> [3] 33:5,16 34:11</p> <p><b>striking</b> [1] 60:18</p> <p><b>string</b> [1] 79:1</p> <p><b>strong</b> [5] 25:7 33:14 42:23 46:21 100:13</p> <p><b>struck</b> [1] 5:1</p> <p><b>structure</b> [7] 16:2 22:12,15 23:5,18 46:4 87:22</p> <p><b>studies</b> [1] 53:1</p> <p><b>submitted</b> [2] 113:19,21</p> <p><b>substance</b> [1] 50:17</p> <p><b>substantial</b> [4] 55:19 68:25 69:3 84:19</p> <p><b>substantially</b> [1] 55:19</p> <p><b>substantive</b> [6] 7:3 27:11,12,17 72:21,22</p> <p><b>subvert</b> [1] 10:15</p> <p><b>succeed</b> [1] 5:25</p> <p><b>suffer</b> [1] 52:15</p> <p><b>sufficient</b> [1] 92:9</p> <p><b>sufficiently</b> [1] 102:19</p> <p><b>suggest</b> [4] 30:5 59:16 82:21,22</p> <p><b>suggesting</b> [2] 38:18 51:22</p> <p><b>suggestion</b> [1] 37:25</p> <p><b>suicide</b> [1] 7:15</p> <p><b>Sullivan</b> [1] 15:15</p> <p><b>super</b> [4] 67:13,14 70:1,2</p> <p><b>supplying</b> [1] 7:3</p> <p><b>support</b> [1] 69:19</p> <p><b>supported</b> [1] 58:19</p> <p><b>supporting</b> [5] 2:8 3:11 58:20,23 84:10</p> <p><b>supports</b> [1] 76:12</p> <p><b>suppose</b> [2] 64:3 92:7</p> <p><b>supposes</b> [1] 53:11</p> <p><b>supremacy</b> [1] 94:11</p> <p><b>SUPREME</b> [8] 1:1,17 10:23 14:24 22:9 81:22,25 107:5</p> <p><b>surely</b> [1] 26:9</p> <p><b>surge</b> [1] 5:4</p> <p><b>surrender</b> [1] 10:6</p> <p><b>survive</b> [8] 5:12 15:1,14,21,22 21:13 66:20 84:1</p> <p><b>suspects</b> [1] 79:10</p> <p><b>sustain</b> [1] 108:1</p> <p><b>swift</b> [1] 84:22</p> <p><b>sword</b> [1] 69:18</p> <p><b>syllogism</b> [1] 102:8</p> <p><b>system</b> [2] 108:5 113:1</p>	<p><b>teach</b> [1] 22:19</p> <p><b>technology</b> [1] 66:13</p> <p><b>teeth</b> [1] 71:8</p> <p><b>tells</b> [1] 78:22</p> <p><b>ten-week</b> [1] 101:12</p> <p><b>tend</b> [1] 50:1</p> <p><b>term</b> [4] 31:10 84:18 86:7 112:7</p> <p><b>terminate</b> [5] 53:11 56:6 57:6 110:6,7</p> <p><b>terminating</b> [1] 65:12</p> <p><b>termination</b> [3] 25:13,15 35:8</p> <p><b>terms</b> [3] 22:18 26:11 100:8</p> <p><b>terrible</b> [1] 46:13</p> <p><b>test</b> [6] 60:6,7 61:12,23 68:22 69:6</p> <p><b>tests</b> [1] 86:23</p> <p><b>tethered</b> [1] 21:21</p> <p><b>Texas</b> [2] 79:11 111:9</p> <p><b>text</b> [8] 6:25 16:2 24:10,10 27:5,18 77:1 86:20</p> <p><b>textual</b> [1] 71:23</p> <p><b>theme</b> [1] 106:24</p> <p><b>themselves</b> [3] 29:5 35:24 81:9</p> <p><b>theory</b> [2] 27:14 49:7</p> <p><b>there's</b> [24] 18:10 21:3,7,8 22:4 26:7 27:12 28:25 29:1 32:11 34:16 35:22 36:17 52:14 54:23 76:8,11 79:1 80:24 95:18 96:24 105:14 106:7 109:20</p> <p><b>therefore</b> [2] 43:16 77:4</p> <p><b>They've</b> [6] 4:14,15,16,17 30:20 53:12</p> <p><b>thinking</b> [6] 32:24 33:3 41:15 45:6,8 70:20</p> <p><b>third</b> [5] 26:3,15 48:15 82:17 89:24</p> <p><b>THOMAS</b> [28] 1:3 6:4 7:4,22,25 8:17 40:25 41:1 49:5,11 50:5,11 51:16 71:15,16 72:5,12 73:13 85:19,25 86:8,18 87:12,17 102:25 103:1,8 104:5</p> <p><b>thoroughly</b> [1] 8:22</p> <p><b>though</b> [7] 27:1 46:18 51:21 97:3 103:11 106:6 108:6</p> <p><b>threatening</b> [1] 58:4</p> <p><b>three</b> [8] 9:2 10:12 16:24 37:17 47:19 70:2 87:23 110:24</p> <p><b>throughout</b> [4] 24:5 50:22 68:12 107:21</p> <p><b>tied</b> [1] 32:15</p> <p><b>tips</b> [1] 87:7</p> <p><b>title</b> [1] 60:10</p> <p><b>today</b> [5] 33:10 39:24 46:12 81:7 101:18</p>	<p><b>today's</b> [2] 39:25 40:1</p> <p><b>tolerates</b> [1] 113:4</p> <p><b>took</b> [3] 45:12 109:24 113:6</p> <p><b>topic</b> [1] 8:19</p> <p><b>tossing</b> [1] 20:6</p> <p><b>total</b> [2] 101:21,22</p> <p><b>totally</b> [1] 22:10</p> <p><b>touch</b> [1] 21:4</p> <p><b>tough</b> [1] 26:2</p> <p><b>tradition</b> [11] 16:3 21:23 24:1,6,10 27:19 40:22 73:4 75:21 102:13,22</p> <p><b>traditional</b> [2] 40:23 46:24</p> <p><b>traditionally</b> [4] 6:21,21 23:24 46:8</p> <p><b>traditions</b> [2] 4:14 75:14</p> <p><b>travel</b> [4] 85:2 99:23 108:3 111:24</p> <p><b>tremendous</b> [2] 89:11 113:12</p> <p><b>tremendously</b> [2] 31:7 112:23</p> <p><b>tried</b> [1] 71:4</p> <p><b>trimester</b> [8] 12:22 20:7 59:7 81:24 82:15,17,17 83:15</p> <p><b>triple</b> [1] 70:15</p> <p><b>trouble</b> [1] 52:12</p> <p><b>true</b> [8] 45:16 57:13 67:4 71:10 97:16 99:13 100:8 107:20</p> <p><b>trust</b> [1] 5:16</p> <p><b>truth</b> [1] 113:7</p> <p><b>try</b> [1] 30:11</p> <p><b>trying</b> [8] 28:3 50:14 65:7 72:16,23 82:20,21 108:13</p> <p><b>turns</b> [1] 79:24</p> <p><b>twice</b> [1] 48:23</p> <p><b>two</b> [23] 7:10 8:24 10:10 12:20 14:16 16:19 23:10 25:14,14,25 26:12 47:11 48:17 54:23 58:19 69:13 88:22 89:21 90:8 106:7 107:1,9 112:5</p> <p><b>type</b> [2] 39:22 55:17</p> <p><b>types</b> [1] 55:17</p>	<p>47:13 73:4,25 75:18 78:8,13 112:11</p> <p><b>undergo</b> [1] 74:16</p> <p><b>underlay</b> [1] 92:18</p> <p><b>undermine</b> [1] 50:1</p> <p><b>underpinnings</b> [1] 91:8</p> <p><b>understand</b> [19] 43:11,15 50:13 61:9 62:1 71:18 72:15 82:18 86:8 91:4 94:16 103:10 104:11 105:1,1,1,3 108:15,24</p> <p><b>understanding</b> [7] 19:12 34:5 61:16 63:10 94:2,13 97:2</p> <p><b>understandings</b> [1] 40:8</p> <p><b>understood</b> [1] 39:16</p> <p><b>undue</b> [26] 8:4,15 12:12 14:8 16:21 29:11,15 41:11 42:9,14,16,20 59:8,9,11 60:5 61:12,12,23 62:6,8,15 63:15 68:22 69:6 82:4</p> <p><b>unfortunate</b> [2] 19:16 46:16</p> <p><b>unfortunately</b> [2] 35:13,23</p> <p><b>uniformly</b> [1] 60:16</p> <p><b>uninsured</b> [2] 97:22 112:2</p> <p><b>unique</b> [7] 7:18 51:12 57:19,20 112:17,18,19</p> <p><b>uniquely</b> [1] 40:14</p> <p><b>UNITED</b> [5] 1:1,18 2:8 3:10 84:9</p> <p><b>unjustified</b> [1] 10:7</p> <p><b>unknown</b> [1] 12:23</p> <p><b>unless</b> [1] 113:14</p> <p><b>unmasked</b> [1] 40:7</p> <p><b>unnecessarily</b> [1] 10:19</p> <p><b>unplanned</b> [4] 97:10 98:8,15,17</p> <p><b>unpopular</b> [1] 67:11</p> <p><b>unprecedented</b> [3] 85:10 87:2,21</p> <p><b>untethered</b> [1] 8:16</p> <p><b>until</b> [6] 48:12 51:11,11 55:3,7 113:14</p> <p><b>unusual</b> [3] 7:22 23:7 46:1</p> <p><b>unwilling</b> [2] 9:17,18</p> <p><b>unworkable</b> [2] 16:23 53:25</p> <p><b>up</b> [15] 55:2,7 57:13 63:4 71:3 78:17 82:3 89:18 94:9 100:7 101:9 107:17 109:17 110:13 111:1</p> <p><b>uphold</b> [2] 6:1 113:16</p> <p><b>upholds</b> [1] 42:19</p> <p><b>using</b> [3] 54:8 98:13,14</p> <p><b>utterly</b> [1] 21:2</p>
<b>U</b>				
<p><b>U.S</b> [11] 11:3</p> <p><b>ubiquitous</b> [1] 111:10</p> <p><b>ultimately</b> [2] 60:23 62:21</p> <p><b>unable</b> [1] 85:2</p> <p><b>unanimously</b> [1] 60:18</p> <p><b>unbelievably</b> [1] 7:13</p> <p><b>unborn</b> [5] 5:3,11 18:17 30:17 112:18</p> <p><b>unclear</b> [1] 41:12</p> <p><b>unconstitutional</b> [3] 5:8 37:8 47:13</p> <p><b>undeniably</b> [1] 5:4</p> <p><b>under</b> [21] 5:14 10:13,19 12:5,6,25 17:21 19:5 29:11 34:17 42:13,19,20 44:5</p>				
<b>V</b>				
<p><b>vaccines</b> [1] 56:24</p> <p><b>validity</b> [1] 38:25</p> <p><b>value</b> [2] 107:10 112:10</p> <p><b>values</b> [3] 23:21 27:6 36:14</p>				

## Official - Subject to Final Review

<b>variation</b> <sup>[1]</sup> 41:19	<b>way</b> <sup>[15]</sup> 12:3 13:3 15:17 18:18 19:1,4 34:8,9 42:5,24 66:4 77:25 80:18 87:4 90:19	<b>33:25 47:15 48:16,18,21, 22 50:2 51:18 52:11 53:4, 10,21 57:21 58:4 60:24 73: 5,12 74:8 75:17,24 78:7 81:8 85:2 89:5,12 96:5,19, 20 97:5,9,14,22 98:9,14,16, 24 99:8,11,13,19,24 100:1, 10 102:16 104:4 107:16,23 110:11 111:6,17</b>
<b>variety</b> <sup>[3]</sup> 41:16,19 86:22	<b>ways</b> <sup>[2]</sup> 56:13 59:12	<b>81:8 85:2 89:5,12 96:5,19, 20 97:5,9,14,22 98:9,14,16, 24 99:8,11,13,19,24 100:1, 10 102:16 104:4 107:16,23 110:11 111:6,17</b>
<b>varying</b> <sup>[1]</sup> 14:18	<b>Wednesday</b> <sup>[2]</sup> 1:14 61:4	<b>WOMEN'S</b> <sup>[12]</sup> 1:8 4:5 9:13 34:19 49:2,25 51:3 52:19 56:15 78:10 85:17 111:20
<b>vast</b> <sup>[5]</sup> 12:15 23:24 24:25 54:14 88:23	<b>week</b> <sup>[2]</sup> 61:6 100:20	<b>wonder</b> <sup>[2]</sup> 69:20 101:19
<b>verifiable</b> <sup>[2]</sup> 66:21 84:3	<b>weeks</b> <sup>[31]</sup> 4:23 17:23 21:16 41:18,18,19 42:16 51:7, 23 52:4,15 53:14,18,22 55:12,13,20,20 57:4,5 60:11 81:25 82:3,17,19 83:14 98:24 99:9,25 101:18 105:9	<b>word</b> <sup>[4]</sup> 20:13 22:6,9 106:11
<b>version</b> <sup>[1]</sup> 8:4	<b>weigh</b> <sup>[1]</sup> 112:22	<b>words</b> <sup>[4]</sup> 9:22 43:17 51:19 100:9
<b>versus</b> <sup>[20]</sup> 4:5,11,12 15:9, 15 22:7 23:4,7 27:16 28:1 45:4 58:22 79:3,7,12,16 89:22 92:8 97:6 112:25	<b>weighing</b> <sup>[1]</sup> 32:1	<b>work</b> <sup>[8]</sup> 5:18 36:3 41:9 57:24 58:15 61:2 99:22 111:25
<b>viability</b> <sup>[103]</sup> 5:7 8:2,16 14:7,13,16 18:22,23 19:13,18 20:6,8,13,14 21:12,15,19, 21 22:1 24:4 29:12,14 30:16 31:7,11 32:9 33:9 37:3, 24,25 38:19 39:2 41:10 47:12,25 48:12 50:9,23 51:8, 11,23 53:15 54:2,3,13,16 55:3,7,21 57:16 60:13,14 61:11,13 62:7,10,16,19 63:16,18,21,25 64:5,16,20,22, 25 65:1,4,13,23,23 66:13 67:24 68:2,3,12,14,23 69:1, 7 74:21 81:16 82:11,22 83:7,17,24 84:16 87:6,15 91:8 100:8 101:1,22 102:1,8,9, 21 104:13,18 105:15,20	<b>weighty</b> <sup>[1]</sup> 104:3	<b>workability</b> <sup>[4]</sup> 12:9,12 16:21 91:7
<b>view</b> <sup>[13]</sup> 12:4 17:3 29:19, 25 32:14,16 44:5,8 62:18 65:25 75:7,8 80:20	<b>welcome</b> <sup>[1]</sup> 6:3	<b>workable</b> <sup>[21]</sup> 8:9 24:11 54:1 60:14,19,22 61:15,21,24 62:17,17,20,25 74:21 82:11,15,19,23,25 94:1 105:18
<b>views</b> <sup>[5]</sup> 28:14 29:1 32:13, 13 64:19	<b>West</b> <sup>[4]</sup> 45:17 79:5 80:3 89:22	<b>worked</b> <sup>[1]</sup> 29:14
<b>vigorously</b> <sup>[1]</sup> 29:2	<b>whatever</b> <sup>[3]</sup> 46:22 73:2 100:20	<b>workplace</b> <sup>[1]</sup> 56:15
<b>violate</b> <sup>[1]</sup> 51:3	<b>Whereupon</b> <sup>[1]</sup> 113:20	<b>world</b> <sup>[7]</sup> 5:14,15 42:18 89:9 103:25 108:2 109:9
<b>violation</b> <sup>[1]</sup> 79:15	<b>whether</b> <sup>[38]</sup> 9:19 13:6 17:19 19:7 22:24 34:8 37:6, 11 39:15 41:17 48:2,3 50:15 59:20 65:8 67:5,8,8,21, 24 68:25 82:10 84:16 86:6 87:15 89:9 90:4,14 91:14 94:21 95:9 96:9 97:18 103:5 105:6 107:18 109:17 112:2	<b>worse</b> <sup>[1]</sup> 9:10
<b>Virginia</b> <sup>[1]</sup> 28:1	<b>whichever</b> <sup>[2]</sup> 6:10,23	<b>written</b> <sup>[2]</sup> 23:3 86:14
<b>Virtually</b> <sup>[3]</sup> 20:24 54:6 88:13	<b>white</b> <sup>[1]</sup> 94:10	<b>wrongly</b> <sup>[5]</sup> 39:15,17 40:3 91:19 93:2
<b>vis-à-vis</b> <sup>[1]</sup> 88:2	<b>whole</b> <sup>[3]</sup> 7:15 68:13 94:10	<b>wrote</b> <sup>[1]</sup> 69:21
<b>vocally</b> <sup>[1]</sup> 11:25	<b>whom</b> <sup>[2]</sup> 99:6,7	<hr/> <b>Y</b> <hr/>
<b>voice</b> <sup>[1]</sup> 44:9	<b>wide</b> <sup>[2]</sup> 32:11 41:19	<b>year</b> <sup>[2]</sup> 63:21 98:16
<b>vote</b> <sup>[1]</sup> 79:5	<b>wife</b> <sup>[1]</sup> 75:8	<b>years</b> <sup>[29]</sup> 4:16,19 11:11 12:9 13:24 14:6,14 17:1,5 25:24 34:16,17,22 35:10,11, 13 49:11 51:9 52:18 60:16 72:9 74:1 80:24 81:8,8 105:22 110:12 113:6,10
<hr/> <b>W</b> <hr/>	<b>will</b> <sup>[35]</sup> 4:3 5:25 8:9 9:23, 24 15:1,12,21,22 21:5 22:19 32:25 33:3 36:21 42:3, 3 47:17 48:16 52:15 53:21, 23 54:3,5 65:10 78:12 85:4 90:14 95:19 97:9 98:15 104:12 107:6 108:2 112:11 113:12	<b>yells</b> <sup>[1]</sup> 33:1
<b>Wade</b> <sup>[3]</sup> 4:11 97:6 107:22	<b>willingness</b> <sup>[1]</sup> 46:21	<b>York</b> <sup>[4]</sup> 2:4,4 15:15 107:7
<b>Wainwright</b> <sup>[1]</sup> 79:16	<b>wish</b> <sup>[1]</sup> 34:1	<b>young</b> <sup>[3]</sup> 48:24 52:8 99:13
<b>wait</b> <sup>[1]</sup> 90:8	<b>within</b> <sup>[1]</sup> 35:24	
<b>wake</b> <sup>[1]</sup> 11:11	<b>without</b> <sup>[9]</sup> 46:6,10 54:3 56:22 62:19 63:16 71:25 84:25 86:5	
<b>walked</b> <sup>[2]</sup> 39:8 91:5	<b>woman</b> <sup>[22]</sup> 14:9 31:2 49:14 51:11 57:5,12 64:13,24, 25 65:11 69:1 78:1 84:18 86:4 87:8,15 96:17 103:2, 22 106:11 109:16 112:17	
<b>wanted</b> <sup>[8]</sup> 12:1 34:24 37:12 41:8 60:2 61:8 95:24 96:19	<b>woman's</b> <sup>[16]</sup> 4:24 31:21 47:24 48:6,11 50:10,24 64:13,21 74:15 75:7 83:19 84:15 101:3 108:19 109:2	
<b>wants</b> <sup>[2]</sup> 64:13 65:2	<b>womb</b> <sup>[2]</sup> 5:12 103:13	
<b>warned</b> <sup>[1]</sup> 88:16	<b>women</b> <sup>[54]</sup> 5:4 31:3,6,13	
<b>warnings</b> <sup>[1]</sup> 79:8		
<b>warrant</b> <sup>[1]</sup> 95:3		
<b>Washington</b> <sup>[3]</sup> 1:13 2:7 27:16		
<b>water</b> <sup>[1]</sup> 34:17		
<b>watershed</b> <sup>[9]</sup> 9:8 10:14 13:4 15:8 26:1,25 45:17, 20 70:3		