

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GEN. MARK BRNOVICH, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	BRIAN H. FLETCHER, ESQ.	
7	On behalf of the Federal Respondents	39
8	ORAL ARGUMENT OF:	
9	HELEN H. HONG, ESQ.	
10	On behalf of the State Respondents	86
11	REBUTTAL ARGUMENT OF:	
12	GEN. MARK BRNOVICH, ESQ.	
13	On behalf of the Petitioners	99
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
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8
9
10
11
12
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14
15
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19
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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 20-1775, Arizona versus San Francisco.

General Brnovich.

ORAL ARGUMENT OF GEN. MARK BRNOVICH

ON BEHALF OF THE PETITIONERS

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

The Ninth Circuit's refusal to let Arizona and other states intervene to defend the public charge rule capped an unprecedented effort by the United States to unlawfully disregard a prior administration's rule.

The Department of Justice had spent more than a year successfully fighting the rule's challengers in four different circuits. Every injunction against the rule had been stayed, and this very Court had granted certiorari. But the new Biden Administration suddenly abandoned its defense of the rule. It coordinated with the rule's challengers and dismissed the granted petition by this Court, all of the pending appeals in the lower courts

1 as well, and it left one final nationwide
2 injunction against the rule in place. Based
3 only on that, the Biden Administration rescinded
4 the rule without notice-and-comment rulemaking.

5 Days -- within days of these legal
6 maneuvers, Arizona and other states tried to
7 intervene in every district -- or every circuit
8 court to defend the rule. In the case below,
9 the Ninth Circuit denied intervention without
10 any reasoning.

11 That was error. The Petitioners had
12 satisfied all four requirements for intervention
13 as a matter of right and easily cleared the bar
14 for permissive intervention. Arizona has a
15 protectable interest because the rule saved the
16 states collectively more than a billion dollars
17 per year. This case could impair those
18 interests because a decision against the rule
19 would reimpose those costs on the states.

20 Fixing this error not just for Arizona
21 but also to ensure this case does not become a
22 blueprint for evading the APA in the future, the
23 public charge rule was enacted through
24 notice-and-comment rulemaking, so, therefore,
25 notice-and-rule comma -- comment -- comment

1 rulemaking is required to rescind or replace it.

2 Making clear the states can intervene
3 in these circumstances is not only the way to
4 ensure -- is the only way to ensure future
5 administrations follow the APA.

6 I look forward to your questions.

7 JUSTICE THOMAS: Would you explain why
8 you have standing to challenge the Ninth
9 Circuit's preliminary injunction in this case?

10 MR. BRNOVICH: Well, Your Honor, the
11 states -- even by -- the Department of Justice's
12 own brief acknowledges that the states are
13 impacted fiscally for -- by way of more than a
14 billion dollars.

15 But, furthermore, we know that in the
16 -- in future APA cases, the states have an
17 interest in being -- in ensuring that we have
18 the ability to comment on future rules and
19 proposed rules and not reward behavior in this
20 type of case. So our input really --

21 JUSTICE THOMAS: But did you comment
22 on the -- this rule or on the replacement rule?

23 MR. BRNOVICH: Your Honor, the
24 Department of Justice had just announced a new
25 proposed rule, and, ironically, even in that

1 proposal, they noted that the states would be
2 affected by more than a billion and a half
3 dollars.

4 We have commented on previous rules.
5 We do believe the -- the primary issue here goes
6 back to whether the states timely moved to
7 intervene, which we did, whether there is an
8 interest, which there is. Even the Respondent
9 states recognize that all of us have an
10 interest, and that interest is there.

11 JUSTICE THOMAS: But one final
12 question then. What makes this case different
13 from any other case? I mean, when
14 administrations change -- I think this is my
15 fifth administration change. And they got --
16 the -- the new administration often changes its
17 position in cases. So what's different from
18 this case in which the administration declines
19 to appeal an adverse ruling?

20 MR. BRNOVICH: Justice Thomas, this
21 was an unprecedented legal maneuver. What the
22 Department of Justice did here when the
23 administration changed is literally not only
24 dropped an appeal when this very Court had
25 granted certiorari but then simultaneously

1 dismissed four other appeals in the circuit
2 courts, that were pending before the circuit
3 courts, left in place one judgment in the
4 Northern District of Illinois, and then used
5 that district court decision to rescind a rule
6 without going through the proper notice and rule
7 comment -- commenting.

8 And so it is really unprecedented.
9 Frankly, I'm not aware of any other precedent
10 where you have this types of maneuvers.

11 JUSTICE SOTOMAYOR: Counsel --

12 MR. BRNOVICH: In fact, just last
13 year, if my recollection is correct -- correct,
14 there was a pending criminal case where the new
15 administration felt like they couldn't defend
16 that case in good faith before this Court, and
17 this Court allowed another party to represent
18 those interests. And if I recall, it was a 9-0
19 decision that ultimately the -- they prevailed.

20 So the key is -- is that the
21 administration not only changed, but it refused
22 and opposed the states intervening to protect
23 our interests.

24 JUSTICE SOTOMAYOR: Counsel --

25 CHIEF JUSTICE ROBERTS: How would you

1 --

2 JUSTICE SOTOMAYOR: -- I'm not sure
3 what your interest is.

4 First of all, the preliminary
5 injunction didn't run against you, correct? So,
6 as far as you were concerned, outside of the
7 Seventh Circuit's injunction, there was no
8 preliminary injunction against enforcement of
9 the rule in your jurisdiction, correct?

10 MR. BRNOVICH: Justice, we know that
11 the states -- during the 2019 rulemaking
12 process, there literally is an impact of
13 billions of dollars --

14 JUSTICE SOTOMAYOR: Counsel --

15 MR. BRNOVICH: -- to the states.

16 JUSTICE SOTOMAYOR: -- I agree. But
17 the injunction here was a plenary injunction,
18 not a decision on the merits, correct?

19 MR. BRNOVICH: That is correct.

20 JUSTICE SOTOMAYOR: So, if it's not a
21 decision on the merits, it's a preliminary
22 injunction that ran against other states. As
23 far as this injunction's jurisdictional scope,
24 it didn't bar the enforcement of the rule in
25 your state, correct?

1 MR. BRNOVICH: Justice, the
2 injunctions are --

3 JUSTICE SOTOMAYOR: Just answer that
4 yes or no. The injunction ran against other
5 states, correct?

6 MR. BRNOVICH: That is technically
7 correct, yes.

8 JUSTICE SOTOMAYOR: Technically --

9 MR. BRNOVICH: Yes.

10 JUSTICE SOTOMAYOR: -- and otherwise.
11 It didn't bar the administration from enforcing
12 the rule in your state? This preliminary
13 injunction in the Ninth Circuit was -- did not
14 run against you, correct, or in your favor?

15 MR. BRNOVICH: Well, Justice
16 Sotomayor, they're preliminary now, but the
17 point is they could become permanent at some
18 point in --

19 JUSTICE SOTOMAYOR: How can they
20 become permanent when --

21 MR. BRNOVICH: Because you'd have --

22 JUSTICE SOTOMAYOR: -- it's -- the
23 preliminary injunction has been vacated,
24 correct?

25 MR. BRNOVICH: That is correct.

1 JUSTICE SOTOMAYOR: So there is no
2 injunction in place. The only thing that can
3 happen is if the rule is resuscitated, correct?
4 If the rule remains not in place or a new rule
5 comes in, correct?

6 MR. BRNOVICH: That is correct, but --
7 however, the --

8 JUSTICE SOTOMAYOR: So now let's go to
9 when they vacated the rule. Didn't you have the
10 right to file an APA action in the appropriate
11 D.C. court --

12 MR. BRNOVICH: Justice --

13 JUSTICE SOTOMAYOR: -- fighting the
14 fact that they had improperly rescinded the
15 rule?

16 MR. BRNOVICH: The -- if we look at
17 the timeline, Justice --

18 JUSTICE SOTOMAYOR: Just answer yes or
19 no. Did you have --

20 MR. BRNOVICH: Well, we were --

21 JUSTICE SOTOMAYOR: -- a legal
22 opportunity -- I don't remember what the statute
23 of limitations is, but I thought, when a rule
24 has been rescinded, you have a certain number of
25 days to challenge that, don't you?

1 MR. BRNOVICH: That is correct.

2 JUSTICE SOTOMAYOR: And the
3 jurisdiction for that is not in the Ninth
4 Circuit, correct?

5 MR. BRNOVICH: The -- the --

6 JUSTICE SOTOMAYOR: The jurisdiction
7 for that APA action is not in the Ninth Circuit?

8 MR. BRNOVICH: But there was pending
9 cases in the Ninth Circuit. There was --

10 JUSTICE SOTOMAYOR: Well, what does
11 that --

12 MR. BRNOVICH: -- pending cases in the
13 Seventh Circuit --

14 JUSTICE SOTOMAYOR: -- have to do with
15 --

16 MR. BRNOVICH: -- in the Fourth
17 Circuit, in the Second Circuit.

18 JUSTICE SOTOMAYOR: -- the rescission
19 of the rule? The legal harm to you is that a
20 rule that you think favors you was illegally
21 rescinded.

22 You had another jurisdiction to fight
23 that illegal rescission, didn't you?

24 MR. BRNOVICH: On March 9th, the
25 administration --

1 JUSTICE SOTOMAYOR: Just answer the
2 question, counsel.

3 MR. BRNOVICH: Within a day -- we did
4 -- we are. We're trying to -- we think the
5 proper vehicle --

6 JUSTICE SOTOMAYOR: You're trying to
7 do all of that, but I don't know how that issue
8 will be litigated in the Ninth Circuit.

9 MR. BRNOVICH: Because the rule is
10 being -- was being litigated in not only the
11 Ninth Circuit, in other circuits, and that's why
12 the states have an interest in -- in --

13 JUSTICE SOTOMAYOR: The issue of
14 whether the rule was illegally rescinded will
15 not be litigated in the Ninth Circuit, correct?

16 MR. BRNOVICH: It is necessary for us
17 to intervene in the Ninth Circuit, but does --
18 it doesn't mean that it's sufficient for the
19 process to be complete.

20 JUSTICE BARRETT: Can I --

21 CHIEF JUSTICE ROBERTS: Counsel, the
22 rule was rescinded on the basis of -- I don't
23 know how many sentences it was -- on the basis
24 of a judicial decision in another court, right?

25 MR. BRNOVICH: Yes, Justice Roberts.

1 CHIEF JUSTICE ROBERTS: So is the rule
2 --

3 MR. BRNOVICH: Chief Justice.

4 CHIEF JUSTICE ROBERTS: -- that you
5 can challenge the decision in the other circuit
6 as a basis for challenging the rescission of the
7 rule, or do you go back to the district court in
8 D.C. and in the D.C. Court of Appeals or
9 district court, whichever it is, you argue that
10 the judgment in the district court in Illinois
11 was erroneous, or do you go straight to the one
12 in Illinois?

13 MR. BRNOVICH: Justice Roberts, I -- I
14 believe the -- the proper approach is to allow
15 the states to intervene not only in the Ninth
16 Circuit, but, once this Court allows the states
17 to do that, I would fully anticipate that the
18 states then would intervene in the other
19 circuits, including trying to get the decision
20 overturned by the Seventh Circuit and the
21 Northern District of Illinois.

22 And, once again, it was unprecedented,
23 the legal maneuvering by the Department of
24 Justice, when you have all of these different
25 appeals going --

1 JUSTICE KAGAN: Well --

2 MR. BRNOVICH: -- through the process.
3 So it's important for the states --

4 JUSTICE BREYER: Everybody has the
5 same question, I think. My -- my understanding
6 was -- I'd probably put the same question in
7 just a slightly different way -- there are some
8 orders of some district courts in California and
9 in Washington, and those were the orders that
10 went to the Ninth Circuit.

11 Now my last -- well, I'm a little out
12 of date and I've seen how Los Angeles has
13 spread, but I don't think it's yet spread to
14 Arizona. And so there's nothing around that --
15 that actually says anybody has to do anything in
16 Arizona. In this case, it's -- it's in the --
17 it's in the Seventh Circuit case that you have a
18 problem, so I -- I don't see why -- why --
19 because they have a nationwide injunction.

20 So you -- you might say: Look, what
21 we want to do is we want to say that the
22 solicitor general of the former administration
23 was right, that the cases are wrong, and we're
24 going to go to the Supreme Court or we're going
25 to ask for rehearing.

1 But, if you win, you -- you've got
2 something set aside that applies only to
3 California, Eastern District of Washington.
4 Never applied to you in the first place.

5 So what we should do is wait for this
6 thing to come out of the Seventh Circuit, where
7 -- where there really is something that affects
8 you or at least could. So, see, everybody is in
9 the same box here. And I read pretty carefully
10 what you said. I have to admit I maybe didn't
11 read it carefully enough because I didn't quite
12 see how you get out of that box.

13 MR. BRNOVICH: Yeah. Justice Breyer,
14 I think we all agree that we don't want the
15 problems of Los Angeles spreading to the rest of
16 the country, so I think we can be in agreement
17 on that.

18 But, by its very nature, immigration
19 doesn't -- and this Court has recognized that --
20 it doesn't stay in one state. So what happens
21 in California once someone has that status, that
22 does then affect Arizona and the benefits and
23 those programs, those social welfare programs
24 and those safety net programs.

25 So it's not something that's confined

1 to the State of California. And, furthermore,
2 we would anticipate why it's important for this
3 Court to allow the states, the Petitioner
4 states, to intervene as a matter of right is
5 because then it creates the ability to not only
6 intervene in the Ninth Circuit but to intervene
7 in the Seventh Circuit and in the Fourth.

8 JUSTICE BREYER: So, yeah, I got the
9 point. Your point basically is, look, it's
10 really actually not Los Angeles, it's San
11 Francisco, we know that. So you're saying that
12 some of the immigrants under this thing affected
13 come to San Francisco and they would go to
14 Arizona. Now I'm from San Francisco, and I
15 don't know why anyone would leave San Francisco.

16 (Laughter.)

17 JUSTICE BREYER: But is there anything
18 in the record or anywhere else that gives us any
19 kind of idea that there were some people
20 affected by this or a lot or many that really
21 did go to Arizona?

22 MR. BRNOVICH: Justice Breyer, because
23 of the litigation and the lawsuits and the
24 injunctions, the rule didn't have a lot of time
25 to -- to be into place. And so we do know that

1 historically, in immigration-related cases,
2 including the Fifth Circuit in the DAPA case
3 that courts have recognized that what goes on in
4 one state related to immigration affects other
5 states.

6 And all the State of Arizona is asking
7 here, we know this Court has said that states
8 can enforce, you know, immigration laws, so
9 we're at least allowing -- allow the states to
10 step in and defend a federal law when the
11 federal government won't.

12 JUSTICE BARRETT: Well, General --
13 General Brnovich, let me ask you about that. So
14 what do you propose that the federal government
15 should have done here? Because one
16 administration is not obliged to defend the rule
17 adopted by the prior administration.

18 The Biden Administration was entitled
19 to change positions, right? So, once the Biden
20 Administration changed positions, what do you
21 think the Biden Administration should have done
22 to effectuate that?

23 MR. BRNOVICH: Well, they could have
24 done, once this Court accepted certiorari,
25 continued to defend the rule. And it didn't

1 want --

2 JUSTICE BARRETT: But let's posit they
3 don't have to. So --

4 MR. BRNOVICH: Well, then --

5 JUSTICE BARRETT: -- what -- what
6 should they do?

7 MR. BRNOVICH: -- then they should not
8 have objected and they should have allowed the
9 states to step in and defend the rule when they
10 wouldn't.

11 CHIEF JUSTICE ROBERTS: I thought your
12 position was that they should have gone through
13 notice-and-comment rulemaking to repeal the
14 public charge rule, which is, for example, what
15 this Court said that the prior administration
16 had to do in the DACA case.

17 MR. BRNOVICH: Absolutely, Justice
18 Roberts.

19 JUSTICE KAGAN: Well, if that's your
20 position, and I -- I think that's a, you know,
21 very reasonable position, that -- that the
22 government here acted in a way that you would
23 not typically expect or want and that it counts
24 as an evasion of notice-and-comment.

25 But -- but, if it's an evasion of

1 notice-and-comment, I mean, you bring an APA
2 suit. It's an evasion of -- it's -- it's a
3 violation of the APA. That's the proper remedy.

4 I mean, there's a kind of mismatch
5 here between what you're saying went wrong and
6 what you're saying you want. If -- if it's an
7 evasion of notice-and-comment, bring an APA suit
8 saying it's an evasion of notice-and-comment,
9 rather than, like, trying to intervene in a suit
10 that's completely dead that never applied to you
11 in the first place?

12 MR. BRNOVICH: Justice, part of the --
13 the problem is is that you have this Northern
14 District of Illinois decision that's out there
15 that the -- the administration used as their
16 basis to repeal the rule, and that ends up with
17 the rule being repealed. That essentially will
18 serve as a baseline for future rulemaking.

19 And if, for example, there is a
20 lawsuit against the new proposed rule, the 2022
21 rule, then what will the states or what will the
22 government go back to? And so it is
23 important -- the states have that interest not
24 only to intervene because of the financial costs
25 but more broadly speaking, is we do want the

1 administration to follow the Administrative
2 Procedures Act and go through the proper --

3 JUSTICE BARRETT: Well --

4 MR. BRNOVICH: -- notice and rule --

5 JUSTICE BARRETT: -- are you saying
6 then that there would be no -- the APA could
7 some -- I mean, sorry, the administration could
8 say our hands are tied because there's this
9 vacatur of the rule --

10 MR. BRNOVICH: Yes.

11 JUSTICE BARRETT: -- that the district
12 court in the Northern District of Illinois
13 entered, so you really couldn't bring an APA
14 action? Is that your position?

15 MR. BRNOVICH: Justice, that is our --
16 that is part of the concern of the states, is
17 that the administration would use that decision
18 as the basis to say that the rule is no longer
19 in place and -- yes.

20 JUSTICE KAGAN: Well, but, I mean, I
21 think a court would be, you know, quite within
22 its rights to say something along the lines of
23 what you started with if the government said
24 that to them. It's like you -- you can't use
25 some decision out of the Northern District of

1 Illinois to circumvent notice-and-comment.

2 Wrong. You can't do that.

3 And -- and you would -- they would
4 have said this is unprecedented. Of course,
5 governments decide not to defend rules all the
6 time when administrations change. That's not
7 problematic. But this other thing, which is
8 like dismissing everything except one suit in
9 order to say, you know, well, now we -- we get
10 rid of the rule without doing
11 notice-and-comment, that's a different thing.

12 And a court in an APA suit could say
13 exactly that. I mean, that's the -- that's the
14 mechanism for a violation of the APA, is an APA
15 suit.

16 MR. BRNOVICH: Yes, Justice Kagan, but
17 part of the concern is is that you would have
18 inconsistent results with different courts
19 making different decisions, and it would create
20 chaos and uncertainty in the law --

21 CHIEF JUSTICE ROBERTS: What would the
22 --

23 JUSTICE BARRETT: Why didn't it apply
24 --

25 CHIEF JUSTICE ROBERTS: -- what would

1 the --

2 MR. BRNOVICH: -- and I hope the
3 courts --

4 CHIEF JUSTICE ROBERTS: -- what would
5 the APA proceeding look like? You've got a -- a
6 repeal that has one sentence which is saying
7 that the Illinois court says this is no good, we
8 -- you know, we acquiesce in that. We don't
9 want to waste people's time. And so that's why
10 we're repealing this.

11 Now would the -- if you bring an APA
12 suit challenging the repeal, I guess in the
13 District of Columbia, would the District of
14 Columbia Court then review the Illinois court
15 order and say, well, we don't think that's right
16 and so you can't repeal it? Or would they say
17 we think that is right, so you can repeal it?

18 MR. BRNOVICH: Well, Chief Justice,
19 I -- I'm not sure what the courts would do. I
20 learned a long time ago as a young prosecutor
21 not to predict what any judge, especially a
22 federal judge, is going to do.

23 But I do think that there is a
24 legitimate concern, is that you might have some
25 federal judge somewhere saying, well, this

1 decision's out there and they use that as a
2 basis to essentially say that -- that the rule
3 is unconstitutional without allowing the states
4 to get -- to come in and essentially defend the
5 rule.

6 JUSTICE SOTOMAYOR: Counsel --

7 JUSTICE BARRETT: So you didn't try
8 because of that judgment, the predictive
9 judgment that you might lose?

10 MR. BRNOVICH: No. It was -- Justice
11 Barrett, it was more -- more of a matter of
12 timing. Literally, on March 9th, when the
13 administration took the unprecedented step of
14 simultaneously dismissing all of the various
15 appeals and then agreeing that, you know, the
16 decision out of Illinois --

17 JUSTICE BARRETT: No, no, no, and I
18 understand why as a matter of timing you moved
19 to intervene when you did in the Ninth Circuit.
20 I'm just saying, like, you know, to Justice
21 Kagan's point, you haven't then pursued this APA
22 challenge that you could have filed in the
23 District of Columbia, and is that because you
24 think you would lose, that you said, you know,
25 it's hard to predict what a federal judge would

1 do?

2 MR. BRNOVICH: It is. We know,
3 though, that there is -- the four lawsuits are
4 going through the -- the circuit courts, and we
5 think that's the proper vehicle at this point.

6 JUSTICE SOTOMAYOR: Counsel, I'm --

7 JUSTICE ALITO: Well, in the case in
8 the --

9 JUSTICE SOTOMAYOR: -- I'm so totally
10 confused about why this suit is here and not
11 either an APA suit or simply the Seventh Circuit
12 suit.

13 If you go back and you -- we -- we
14 permit you to intervene, we say you should have
15 intervened, can you proceed with the Ninth
16 Circuit case in light of the Seventh Circuit
17 injunction?

18 MR. BRNOVICH: Well, Justice
19 Sotomayor, our -- our intention or our plan
20 would be to ask for an en banc review of the
21 entire panel of the Ninth Circuit. And if that
22 didn't work --

23 JUSTICE SOTOMAYOR: But they've
24 already vacated the preliminary injunction, so
25 there's nothing for them to review. So the en

1 banc -- there is no injunction from the Ninth
2 Circuit. There's no injunction against you.
3 There's no injunction against the three states
4 and California that are at issue because that
5 was vacated as a result of the dismissal of this
6 action. So I don't know how you can proceed
7 until the Seventh Circuit injunction is lifted.

8 MR. BRNOVICH: Justice, we -- we have
9 also moved to intervene in the Seventh Circuit.
10 This is the case time-wise --

11 JUSTICE SOTOMAYOR: No, no, no, but
12 until you get that --

13 MR. BRNOVICH: -- that the Court
14 accepted.

15 JUSTICE SOTOMAYOR: -- until you get
16 that -- until you get that lifted and until you
17 get the rescission of the rule lifted, something
18 that can't be done by the Ninth Circuit, there's
19 nothing further you could do in any other
20 circuit.

21 MR. BRNOVICH: Justice Sotomayor, we
22 -- we could -- if we are allowed to intervene
23 not only in the Ninth Circuit, we would
24 intervene and -- and move to vacate the judgment
25 from the Northern District of Illinois.

1 JUSTICE SOTOMAYOR: It's already --
2 but --

3 MR. BRNOVICH: But my --

4 JUSTICE SOTOMAYOR: -- you're
5 suggesting the Ninth Circuit could vacate the
6 Seventh Circuit's judgment?

7 MR. BRNOVICH: No, I didn't suggest
8 that, Your Honor. What I --

9 JUSTICE SOTOMAYOR: So you just said
10 to me --

11 MR. BRNOVICH: What I'm suggesting,
12 though, it's the --

13 JUSTICE SOTOMAYOR: -- you would --
14 you would say I would use what happened in the
15 Ninth Circuit so that I can get into the Seventh
16 Circuit?

17 MR. BRNOVICH: Yes, Justice.

18 JUSTICE SOTOMAYOR: It's an
19 interesting proposition.

20 JUSTICE BREYER: You have an
21 interesting point. I -- I -- I mean, I've never
22 seen anything like this. I think that your
23 suggestion, which is quite -- I don't know the
24 answer. You say, look, they just withdrew this
25 rule. And they're saying they're just

1 acquiescing in a court decision, so, of course,
2 we have the power to acquiesce in the court
3 decision.

4 And you say, but, wait a minute, if
5 they want to change the rule, they should go
6 through notice and comment. They say, we're
7 acquiescing.

8 So you're here because you say that
9 decision that they want to acquiesce in is
10 really wrong, and we want to intervene to make
11 sure that the Supreme Court or their court en --
12 you know, en banc or something says it's wrong,
13 because, if not, we're not going to have the
14 chance to say that they could go through
15 notice -- they should go through notice and
16 comment when they change the rule for the reason
17 that they're just acquiescing, and we want there
18 to be nothing to acquiesce in.

19 Now that is a -- now don't -- you're
20 just going to agree because it sounds if I'm
21 agreeing with you.

22 MR. BRNOVICH: Of course. Thank you.

23 JUSTICE BREYER: But you --

24 MR. BRNOVICH: Can I sit down now,
25 Justice?

1 (Laughter.)

2 JUSTICE BREYER: Yeah. Yeah, yeah.
3 Good. I know. I know. But just don't do that
4 because later on I'd think how wrong I was, you
5 see? So --

6 MR. BRNOVICH: Yeah. No, you're
7 absolutely right.

8 JUSTICE BREYER: Yeah. Okay. Now --

9 MR. BRNOVICH: I will assure you
10 you're right. Yes.

11 JUSTICE BREYER: -- now I -- but what
12 I wonder, looked at that way, I can't think of
13 anything I ever saw like that, and -- and I'll
14 be interested if the government has. And it --
15 it is sort of a point, and -- and -- and the
16 simplest thing would be to wait for the Seventh
17 Circuit. When is that going to -- when is that
18 going to happen?

19 MR. BRNOVICH: Well, the federal
20 government, the government dismissed all of
21 those appeals, and so the only decision that's
22 final is that Northern District of Illinois
23 decision.

24 JUSTICE BREYER: No, no, no, no, but
25 you could intervene in the Seventh Circuit, you

1 see? And you have a much --

2 MR. BRNOVICH: Yeah.

3 JUSTICE BREYER: -- better argument
4 because you get rid of that point that it
5 doesn't apply to you because that one does apply
6 to you.

7 JUSTICE BARRETT: They moved to
8 intervene.

9 MR. BRNOVICH: Yeah. We did.

10 JUSTICE BARRETT: They moved to
11 intervene in that district.

12 JUSTICE BREYER: Yeah. So what
13 happened? What's happened?

14 MR. BRNOVICH: The government objected
15 to that. I mean, part of the whole theory of
16 this case is -- fundamentally is that do the
17 states have the ability to intervene in a case
18 when -- when the federal government won't defend
19 the law?

20 JUSTICE BREYER: Mm-hmm.

21 MR. BRNOVICH: And I've addressed that
22 already.

23 JUSTICE BREYER: All right. Yeah,
24 yeah, yeah, I understand that. But, I mean, I
25 asked you, what's happening in the Seventh

1 Circuit? Because it certainly would be a
2 simpler case if we just had that Seventh Circuit
3 case. What's happening?

4 MR. BRNOVICH: Well, the -- we -- we
5 have tried to intervene in that case, Justice
6 Breyer, and the case that this Court accepted
7 was the case out of the Ninth Circuit.

8 JUSTICE BREYER: I know that --

9 MR. BRNOVICH: But the theory -- the
10 theory --

11 JUSTICE BREYER: -- but I'm asking you
12 what's --

13 MR. BRNOVICH: -- the theory --

14 JUSTICE BREYER: -- happening in the
15 Seventh Circuit.

16 MR. BRNOVICH: -- the theory still
17 applies.

18 JUSTICE BREYER: Well, please. What
19 -- do you know what's going on in the Seventh
20 Circuit? I would like -- just like to know.

21 MR. BRNOVICH: There's the --

22 JUSTICE BREYER: You may not know.
23 That's all right.

24 MR. BRNOVICH: I do. There -- there
25 -- there is briefing under way, and those --

1 there is briefing under way, and those issues
2 are on appeal. But the question, once again, is
3 do the states have allowed to --

4 JUSTICE KAGAN: Sorry. Those issues
5 on appeal are which issues in the Seventh
6 Circuit now? The -- this exact issue?

7 MR. BRNOVICH: Yes.

8 CHIEF JUSTICE ROBERTS: And -- and you
9 moved to intervene in that case?

10 MR. BRNOVICH: Yes, Chief Justice.

11 CHIEF JUSTICE ROBERTS: And what
12 happened with that motion?

13 MR. BRNOVICH: Those motions, they're
14 still pending. This court just made it to the
15 -- the Court first.

16 JUSTICE BARRETT: I thought the
17 district court denied your motion to intervene
18 in the Northern District of Illinois and you're
19 -- it's on appeal in the Seventh Circuit.

20 MR. BRNOVICH: Justice Barrett, yes,
21 that is correct.

22 JUSTICE BARRETT: How important is the
23 APA to your argument? What if this were a
24 statute?

25 MR. BRNOVICH: Justice, I think that

1 it's important because there's not only the
2 financial interests the states have at stake,
3 but rule and comment -- the rule and notice
4 commenting rulemaking is something that's very
5 important. It allows the states to express
6 their interests and to -- you know, it's a
7 complicated, sometimes --

8 JUSTICE BARRETT: But let's imagine
9 the public charge rule were a statute and not an
10 APA rule, so you're not losing the ability to
11 participate in notice and comment, but you would
12 presumably be suffering the same downstream
13 economic effects that you say that you're
14 suffering here. So would you be here making the
15 same arguments?

16 MR. BRNOVICH: We would in
17 relationship to Rule 24 and whether the states
18 have a right to intervene. That's just part of
19 -- it's part of the interest the states have in
20 that interest being impaired.

21 JUSTICE BARRETT: So this isn't driven
22 entirely by your inability to participate in
23 notice-and-comment and the administration's
24 circumvention of notice-and-comment in your
25 view?

1 MR. BRNOVICH: Justice, not entirely,
2 but that is part of the states' reasoning, is
3 that there's not only a financial impact but
4 that it's important, that integrity of the
5 process, so in the future, states have the
6 ability to provide notice and comment on
7 rulemaking so their interests are considered.

8 JUSTICE KAGAN: But -- but, when you
9 say "not entirely," just to follow up that
10 question, do you mean that even if the APA
11 weren't involved here, that you're trying to
12 vindicate the point that when the federal
13 government decides to change course, the states
14 have the ability to come in pretty much anywhere
15 they want and -- and step into the federal
16 government's shoes?

17 MR. BRNOVICH: Justice Kagan, I think
18 the analysis is really that Rule 24 analysis,
19 was it timely filed, is there an interest, is
20 that interest being impaired, and maybe most
21 importantly, that fourth prong of are those --
22 is there adequate representation in protecting
23 those interests.

24 JUSTICE KAGAN: Yeah, so I'm -- I'm --

25 MR. BRNOVICH: So I think it --

1 JUSTICE KAGAN: -- I'm -- I'm
2 hypothesizing a world in which the federal
3 government has dropped out, and so the states
4 can say, you know, if -- if not for us, there
5 will be nobody to defend the law, that -- that
6 you're saying even put aside any APA issues that
7 there might be, whether it's a statute or -- or
8 what have you, that -- that there is -- there is
9 -- that the -- the courts should understand the
10 intervention mechanism as a way for states to
11 take the place of a departing federal
12 government.

13 MR. BRNOVICH: Yes, Justice Kagan.
14 This very Court recognized in Massachusetts
15 versus EPA that states have a special
16 solicitude. We do have special interest -- or
17 there's interests even going back to the Cascade
18 versus El Paso Natural Gas case, that economic
19 interests within a state is something that, you
20 know, this Court can consider when it looks at
21 intervention as a matter of right.

22 And I think even the Respondent states
23 agree that, you know, there -- there's interests
24 here that we have and that states should be
25 allowed to intervene when the federal government

1 won't do its job.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Breyer?

6 Justice Alito?

7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: No.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: Yeah. When the --
13 when a court says that a rule is unlawful and
14 the government then acquiesces in that court
15 decision, is it the usual practice that the
16 government then has to go through notice and
17 comment to repeal what they've just accomplished
18 through acquiescence? Or is that the issue that
19 you're -- you're raising here implicitly in this
20 case? Because I'm not aware of a practice of
21 doing that. I'm not aware of a practice of not
22 doing that either.

23 MR. BRNOVICH: Yeah, Justice
24 Kavanaugh, this is unprecedented, so, in many
25 ways, this --

1 JUSTICE KAVANAUGH: Well, it's not --
2 let me just interrupt. You've used that word a
3 lot. It's very much not unprecedented, as
4 Justice Thomas says, for the government to
5 acquiesce in an adverse judgment invalidating a
6 rule. That is not unprecedented at all.

7 So what is unprecedented here?

8 MR. BRNOVICH: Well, Justice
9 Kavanaugh, what is unprecedented is that the
10 federal government didn't let the states come
11 in. They opposed our intervention and they
12 wouldn't let us defend a rule that they no
13 longer wanted to defend.

14 So I'm not -- we're not -- our
15 position to the states is not that the
16 administration has to defend a rule that it
17 doesn't like. We -- we believe that if -- if
18 they're not going to defend the rule, then the
19 states have an interest in defending the rule.

20 And if there's a future
21 administration, it's important because, you
22 know, California and Arizona could be on -- on
23 opposite sides in the future on this issue, but,
24 as a matter of right, we do believe the states
25 have a right to intervene.

1 And we do think that using a district
2 court decision to essentially then create a
3 baseline for what a future rule would be, I
4 think --

5 JUSTICE KAGAN: May -- may I?

6 MR. BRNOVICH: -- is -- it makes it
7 more difficult --

8 JUSTICE KAVANAUGH: Please.

9 MR. BRNOVICH: -- in the future to --

10 JUSTICE KAGAN: Is that all right?

11 JUSTICE KAVANAUGH: Yeah.

12 MR. BRNOVICH: It makes it more
13 difficult in the future to promulgate or if the
14 states --

15 JUSTICE KAGAN: I mean, under that --
16 under that theory, General, there would never be
17 an effective acquiescence by the federal
18 government. I mean, there's always some state
19 out there that wants -- that has a different
20 position from the federal government's when the
21 federal government acquiesces. Whoever the
22 federal government is, there's always going to
23 be a state that thinks it's done the wrong
24 thing.

25 You're essentially saying there shall

1 be no further federal government acquiescence in
2 court decisions.

3 MR. BRNOVICH: Justice, that -- that's
4 not the state -- what the state is saying. What
5 the state is saying is is that when the federal
6 government refuses to defend a law or tries to
7 undermine a rule, the states have special
8 certitude, and especially when you go through
9 that Rule 24 analysis, you know, is there an
10 interest? Is that interest being impaired? And
11 is it adequately being protected by the
12 representation?

13 So the courts would have to do that
14 analysis. But I -- but I do think it would
15 allow the states more opportunities to defend
16 rules when the federal government won't.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh, anything further?

19 JUSTICE KAVANAUGH: No.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: One -- one question.
23 So I'm just trying to isolate the scope of your
24 argument and I asked you before how important
25 the APA was to it. How important to your

1 argument is it that we already had granted cert
2 on this issue? Does that matter?

3 MR. BRNOVICH: Justice Barrett, I -- I
4 think it matters in the context of the
5 unprecedented nature of what the federal
6 government did in this case.

7 JUSTICE BARRETT: But it wouldn't
8 change your argument -- if -- if this had
9 happened and you had moved for intervention
10 before we had acted to grant cert, you would
11 still be making the same argument?

12 MR. BRNOVICH: I believe so, Justice.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Fletcher.

16 ORAL ARGUMENT OF BRIAN H. FLETCHER
17 ON BEHALF OF THE FEDERAL RESPONDENTS

18 MR. FLETCHER: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 The 2019 Public Charge Rule did not
21 regulate or confer any rights on the Petitioner
22 states. Instead, Petitioners assert an indirect
23 economic interest in the rule's downstream
24 consequences. Relying on predictions that were
25 made when the rule was drafted, they say that it

1 would cause DHS to deny adjustment of status to
2 people who would be more likely to use
3 state-funded public benefits at some point in
4 the future.

5 But we now know that those predictions
6 were wrong. During the year that the 2019 rule
7 was in effect, we know that it affected only
8 about five of the approximately 50,000
9 adjustment of status applications to which it
10 was applied or about 1-100th of 1 percent.

11 The states do not have a legally
12 protectable interest in preserving that
13 negligible indirect effect, and, even if it did,
14 they could not justify intervention in appeals
15 from preliminary injunctions that do not apply
16 in Petitioners' jurisdictions and that now have
17 no effect anywhere because the 2019 rule has
18 been vacated in a separate final judgment.

19 The court of appeals did not abuse its
20 discretion in declining to allow Petitioners to
21 prolong appeals that no longer have any
22 practical consequence.

23 And Petitioners' criticisms of the
24 government's litigation conduct do not call for
25 a different result. Congress made a policy

1 choice to vest in the Department of Justice the
2 decision whether to seek further review of
3 decisions against the United States.

4 This Court has emphasized that both
5 the government and the courts benefit from that
6 policy precisely because the solicitor general
7 takes a selective approach and often decides
8 against seeking further review, and as some of
9 the questions this morning have suggested, it's
10 not at all uncommon for the solicitor general to
11 make that decision when the decision in question
12 invalidated a regulation.

13 Here, DHS had decided to issue a new
14 Public Charge Rule. The ongoing litigation
15 would have complicated that rulemaking and
16 required intrusive discovery. The 2019 rule was
17 not producing its intended effects, and the
18 rule's unintended and unwanted effects were
19 aggravated in the public health crisis.

20 Now Petitioners disagree with the
21 government's decision to dismiss its appeals
22 when faced with those circumstances, but that
23 disagreement does not allow them to revive this
24 litigation that the government had decided was
25 not in the best interests of the United States.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Fletcher, I think
3 Petitioner was doing a little bit more than
4 simply disagreeing with the acquiescence. From
5 my understanding, they were disagreeing with the
6 government's refusal to allow them to
7 participate or to intervene at the appellate
8 level in very -- in litigation that they thought
9 would affect them significantly.

10 So how do you -- rather than simply
11 focusing on the underlying issue, would you also
12 respond to the fact that they think that
13 intervention is a normal practice in these --
14 some of these cases at the end of
15 administrations?

16 I don't recall the government opposing
17 such interventions, so would you simply address
18 that a little bit?

19 MR. FLETCHER: Of -- of course,
20 Justice Thomas. So this is a point that they
21 made in the reply brief and they pointed to two
22 examples where they say the government did not
23 oppose intervention in analogous circumstances.

24 Actually, in both of those cases, the
25 request for intervention came long before the

1 government had decided against seeking further
2 review, so those aren't analogous examples.

3 Candidly, Justice Thomas, I'm not
4 aware of a lot of cases where this has come up,
5 where parties have sought to come in after the
6 government decided to dismiss appeals. Here,
7 the government made its decision to oppose that
8 intervention because we don't think the
9 Petitioners satisfy the requirements for
10 intervention as of right, and we don't think
11 permissive intervention is appropriate either.

12 And that's -- that's really part and
13 parcel with the judgment that we don't think
14 continued litigation of these cases in the face
15 of ongoing notice-and-comment rulemaking is in
16 the government's interest or the public
17 interest.

18 JUSTICE ALITO: Mr. Fletcher, the way
19 you have briefed this case is rather strange
20 because there's -- you focus entirely on Federal
21 Rule of Civil Procedure 24, which has no
22 application to the courts of appeals, nor does
23 it have any application to us.

24 The rules for appellate intervention
25 and intervention before this Court have to be

1 judge-made rules if intervention is going to be
2 allowed at all. So there's no reason why the
3 courts of appeals or this Court should be tied
4 to the strict letter of Rule 24.

5 And, in fact, some of what Rule 24
6 says is very difficult to -- to -- to fit with
7 considerations for appellate litigation. So why
8 have you briefed the case this way?

9 MR. FLETCHER: Well, Justice Alito,
10 this Court said in Scofield that although Rule
11 24 doesn't strictly apply in the courts of
12 appeals, it's a distillation of traditional
13 principles of intervention, so it's a helpful
14 guide.

15 That's the way the parties briefed
16 things in the Ninth Circuit, and that's
17 principally the way that the states have tried
18 to justify their intervention, is that they meet
19 the standards of Rule 24. We don't think that
20 they do. And so we've met their arguments on
21 those terms.

22 I completely take the point that Rule
23 24 doesn't apply by its terms, that intervention
24 in the courts of appeals, which is what this is
25 about, is about sort of judge-made rules about

1 courts controlling their own docket.

2 I think, if that cuts in any direction
3 in this case, though, it sort of cuts further
4 against the Petitioner states because it
5 suggests that the Court is reviewing the Ninth
6 Circuit's exercise of its own judge-made
7 authority to decide whether or not to allow
8 intervention.

9 JUSTICE ALITO: Well, why is that so?
10 If we step back and refuse to let the trees
11 obscure our view of the forest, we can take into
12 account everything that happened in this
13 situation, which seems to be quite unique.

14 I -- I congratulate whoever it is in
15 the Justice Department or the executive branch
16 who devised this strategy and was able to
17 implement it with military precision to effect
18 the removal of the issue from our docket and to
19 sidestep notice-and-comment rulemaking, but all
20 of that took place. I'm not aware of a
21 precedent where an incoming administration has
22 done anything quite like this.

23 And this was an issue that we had
24 agreed to hear before. So, if we step back and
25 recognize that we're not tied to the minutiae of

1 Rule 24, why shouldn't intervention be allowed?
2 It doesn't mean you're going to lose. It
3 doesn't mean that the old rule is sound or that
4 it's going to be entered -- that it's -- it's
5 going to be resuscitated.

6 Why shouldn't intervention be allowed?
7 Why would it be inequitable to allow
8 intervention, or, to put it the other way, why
9 doesn't equity argue in favor of allowing
10 intervention?

11 MR. FLETCHER: So, Justice Alito,
12 there's a lot packed into the question that I
13 hope we get to come back to, but I -- I want to
14 sort of get right to the point.

15 I think the first thing to think about
16 when stepping back and looking at the entirety
17 of this situation is that this is not a
18 circumvention of notice-and-comment regulation.
19 DHS is engaged in notice-and-comment rulemaking
20 that the states will be free to participate in
21 to make a new Public Charge Rule.

22 Now I -- I take the point that
23 Petitioners have said this is unprecedented, and
24 they've been pressed on what is unprecedented
25 because not seeking further review of a decision

1 against the government is not, even when it
2 involves a regulation. I think we all now agree
3 with that.

4 And they focused on the fact that the
5 case was in this Court. And I do take the
6 point. I'm not aware of another case that
7 transpired like that. But that's because
8 anything that the government did in that
9 situation would have been unprecedented if those
10 --

11 JUSTICE KAGAN: Well, to me, Mr.
12 Fletcher, the -- the -- the issue about the
13 government's behavior here is not that the case
14 was in the court. I mean, the case could have
15 been in the court, and if the administration had
16 come in and said we don't want to defend
17 anymore, I mean, the government doesn't have to
18 come up here and defend something that it no
19 longer believes in.

20 The real issue to me is the evasion of
21 notice and comment. And, I mean, basically, the
22 government bought itself a bunch of time where
23 the rule was not in effect. If you -- if the
24 administration had come in and said, oh, my
25 gosh, we have a notice-and-comment rule, we

1 really hate it, we have to change it, I mean, it
2 would have taken months to change it. And the
3 administration didn't have to do that.

4 Now you -- I'm sure you will tell me
5 why that way of looking at the essential problem
6 here is wrong, but I also want you to assume
7 that that is a problem and that we shouldn't be
8 green-lighting that behavior for your
9 administration or any other administration, all
10 right?

11 And -- and -- and -- and, on that
12 assumption, what should be the remedy? Because
13 it -- it just seems as though you're here and
14 saying, you know, you can just tell us to go
15 home and -- and -- and nothing is going to
16 happen to us, and everybody will just do it the
17 next time.

18 What -- what's the remedy for
19 something like this if I think that this does
20 present at least a significant APA question?

21 MR. FLETCHER: So let me take that
22 question on its terms and then, hopefully, come
23 back to some of the premises later.

24 I think, if you have that concern, the
25 solution is not changing the rules of

1 intervention. It's not letting the states come
2 in and make it impossible for the government to
3 acquiesce in adverse decisions, as you suggested
4 the other side's approach would.

5 The solution, I think, is the one that
6 Justice Gorsuch highlighted in his opinion when
7 this case -- this rule was before the Court on a
8 stay from the Second Circuit, and it is the
9 nationwide relief that the district court
10 entered here.

11 We don't think that the APA authorizes
12 district courts to enter that relief. We don't
13 think it's consistent with principles of equity
14 or with Article III. And if this Court makes
15 clear in an appropriate case that that's not
16 within the authority of district courts to
17 enter, then you don't have this problem because
18 the government -- what I take to be, everyone
19 agrees, that the government has the ability to
20 decide not to seek further review of district
21 court decisions. And if you make clear that
22 district courts do not have the authority to
23 issue this sort of relief, then the problem goes
24 away.

25 JUSTICE GORSUCH: Mr. Fletcher, that's

1 -- I think you put your finger right where I --
2 my concern has been, is I'm not familiar with
3 the APA's "set aside" language, which was
4 supposed to adopt prior practice at the time,
5 any prior practice in which a district court
6 purported to be able to do more than set aside
7 the rule with respect to the litigants in the
8 case or controversy before it. Are you?

9 MR. FLETCHER: I'm not, Your Honor.

10 JUSTICE GORSUCH: And, in fact, for
11 most of our history even after the APA's
12 adoption, I'm not aware of district courts doing
13 that until relatively recent times.

14 MR. FLETCHER: I think there's some
15 scholarly debate about exactly when, but, yes,
16 in general, correct.

17 JUSTICE GORSUCH: And so you -- you
18 agree that, therefore, the Northern District of
19 Illinois erred when it issued a nationwide
20 injunction?

21 MR. FLETCHER: We do.

22 JUSTICE GORSUCH: Okay.

23 MR. FLETCHER: Just -- just a little
24 thing. I don't think anything turns on this.
25 Technically, it wasn't an injunction. It was a

1 vacatur of the rule. But I -- we'd say exactly
2 the same thing.

3 JUSTICE KAGAN: Okay. But now you
4 present me with another issue because that has
5 not been the question in this case, and so, hmm.

6 MR. FLETCHER: So I -- I take the --

7 JUSTICE KAGAN: What do I do with
8 that?

9 MR. FLETCHER: So I take the point. I
10 think, you know, one thing it -- it can do is
11 give you some comfort that there is a solution
12 to these problems to the extent that you think
13 they are a problem.

14 And I think what some of the
15 questioning so far this morning has highlighted
16 is that the solutions that are being offered up,
17 you know, by the parties in this case, where
18 they are trying to get at that concern, are
19 really overbroad because --

20 CHIEF JUSTICE ROBERTS: Is that an
21 issue that, for example, the -- your friend on
22 the other side could raise if he's successful in
23 intervening in the cases?

24 MR. FLETCHER: If he's successful in
25 intervening in --

1 CHIEF JUSTICE ROBERTS: Yeah. It's an
2 argument. Why didn't you intervene before?
3 Well, one thing is that there shouldn't be a
4 nationwide injunction issued in Illinois or one
5 beyond the parties in the Ninth Circuit and,
6 therefore, you should vacate the injunctions?

7 MR. FLETCHER: That would be one of
8 many arguments that he could raise, yes.

9 CHIEF JUSTICE ROBERTS: Well --

10 JUSTICE BARRETT: And so --

11 CHIEF JUSTICE ROBERTS: -- but I
12 thought part of your -- your -- your briefing
13 was that, you know, this is a useless exercise,
14 why are we here? You know, everything's done.
15 Well, apparently not everything is done.

16 MR. FLETCHER: Well, the -- the
17 "everything is done" was focused on the specific
18 circumstances of this case, where it's about a
19 preliminary injunction that don't apply in the
20 Petitioner states' jurisdictions and that don't
21 have any practical consequences so long as that
22 -- the Seventh Circuit's --

23 CHIEF JUSTICE ROBERTS: The Illinois
24 one is nationwide, right?

25 MR. FLETCHER: The Illinois one is

1 nationwide, but --

2 CHIEF JUSTICE ROBERTS: So it applies
3 to them.

4 MR. FLETCHER: But the question before
5 this Court is what -- whether they're entitled
6 to get into the --

7 JUSTICE BARRETT: But, Mr. Fletcher,
8 this --

9 CHIEF JUSTICE ROBERTS: Well, they
10 have to get rid of this one if they want to
11 proceed against the one in Illinois. Otherwise,
12 it does them no good.

13 MR. FLETCHER: Well, I -- I -- I don't
14 know that that's true. These are two
15 preliminary injunctions that don't apply in
16 their jurisdictions at all.

17 CHIEF JUSTICE ROBERTS: Well, you
18 agree, don't you, that they have standing
19 because people who are illegally or -- not
20 illegally -- they don't meet the new public
21 charge rule in the United States, they're going
22 to go throughout the United States, as people
23 do?

24 MR. FLETCHER: Justice -- Chief
25 Justice Roberts, I think it's very, very hard to

1 make that case given the record that we have
2 about the low number of adjustment of status
3 decisions that were actually affected by this
4 rule while it was in place. And the rule -- the
5 injunctions don't apply to applications by
6 residents of the Petitioner states.

7 I think, in those circumstances, it's
8 getting very, very attenuated to say that maybe
9 the rule will result in someone being granted
10 adjustment of status, maybe sometime down the
11 road they will apply for and receive benefits,
12 and maybe they will have in the interim moved
13 into one of the Petitioner states. That's --
14 that's --

15 JUSTICE BARRETT: But, Mr. Fletcher,
16 can I follow up on what the Chief just asked
17 you? You opposed intervention in the Northern
18 District of Illinois, right?

19 MR. FLETCHER: We did.

20 JUSTICE BARRETT: So the -- the
21 principle that you're arguing for really doesn't
22 turn on the fact that the Ninth Circuit's
23 preliminary injunction was not nationwide. I
24 mean, your -- you opposed their ability to enter
25 in the Seventh Circuit and challenge the scope

1 of the injunction.

2 MR. FLETCHER: That's correct, Justice
3 Barrett. We have -- I'm just highlighting that
4 we have arguments here that we -- that don't
5 apply in the Seventh Circuit case. We also have
6 arguments that apply in both cases, and there
7 are some arguments that apply in the Seventh
8 Circuit case that aren't at issue here.

9 JUSTICE BARRETT: Because you just
10 flatly think that the states shouldn't be able
11 to interdeem -- intervene, period?

12 MR. FLETCHER: That's correct, yes.

13 JUSTICE KAVANAUGH: Can I ask a --

14 JUSTICE BREYER: But suppose they --
15 what about their argument, which is, look,
16 one -- you say only five people were affected,
17 but you added change of status applicants. So
18 what they think is there may be millions of
19 people, just across different borders, who will
20 be here, you see, if -- a question of food
21 stamps, and so all those people, we don't know,
22 the record doesn't tell us whether they're in
23 Arizona or not. And they say it's a billion
24 dollars, and you say it's five people, and so
25 forth. Okay. That's one thing.

1 But then they say we have a totally
2 different ground. Our ground for intervening is
3 simply this: The decision of the courts about
4 the merits of the old rule is completely wrong.
5 And if you allow this to stand, this totally
6 wrong decision, courts of the United States,
7 what the government will do is just acquiesce.
8 And that way they avoid notice-and-comment
9 rulemaking. And that should be a ground for our
10 being able to intervene to ask for rehearing en
11 banc or maybe ask the Supreme Court.

12 Pretty similar to what we just allowed
13 in that case of the attorney general. You know,
14 it was a different party. What was it, Kentucky
15 or -- we just -- and pretty similar. See? They
16 won't defend it, but we'll defend it because
17 it's totally wrong.

18 And we -- you see what we gain? Now,
19 to me, that is a law professor's issue. My God,
20 I don't know what the answer is. And we don't
21 have to get into any of this mess if we can only
22 get the Illinois case here in front of us.
23 That's why I keep asking, what should we do?

24 MR. FLETCHER: Justice Breyer, let me
25 start with the effect of the rule because I

1 think it's important to disaggregate a couple of
2 things. The rule does apply to people seeking
3 to come into the United States, to be admitted
4 at the border, but it very, very seldom actually
5 has application there because the State
6 Department has vetted those people before they
7 come if they are coming on a visa. If they're
8 not coming on a visa, if they're coming
9 illegally, there are other grounds to deny them
10 admission. So the rule has very, very little
11 practical effect at the border.

12 Where it has effect -- and this has
13 been common ground across all of the rulemakings
14 and between the parties -- is in those
15 adjustment of status decisions, where, as I
16 explained, it has turned out to have very little
17 effect at all. So that's the practical stakes.

18 The billions of dollars, I think it's
19 important to understand, are not about the
20 intended effects of the rule. Justice Barrett
21 laid out in her dissent in the Cook County case
22 on this issue that, actually, the rule does not
23 apply to very many people at all who are
24 actually entitled to receive public benefits
25 because generally you're not entitled to receive

1 them until after you adjust status or if you're
2 in a vulnerable category like an asylee or a
3 refugee that's not subject to the public charge
4 bar at all.

5 The billions of dollars are about
6 people who are confused about the rule or
7 mistaken about its effects and who are dropping
8 benefits even though those benefits would not
9 affect their entitlement to come into the case.

10 JUSTICE KAVANAUGH: Can I --

11 MR. FLETCHER: And --

12 JUSTICE KAVANAUGH: Keep going. I'm
13 sorry.

14 MR. FLETCHER: I was just going to
15 say, and I think that highlights that -- that
16 it's hard for the Petitioner states to say that
17 they have a legally protectable interest in an
18 unintended consequence.

19 JUSTICE BREYER: Yeah, but the second
20 point is my real point.

21 MR. FLETCHER: So the second point is
22 about what about the Seventh Circuit case? So
23 it --

24 JUSTICE BREYER: Well, they have
25 another ground, but then, yeah, what about the

1 Seventh Circuit?

2 MR. FLETCHER: So -- right. If you're
3 -- if you're interested in the Seventh Circuit
4 case, I guess what I would say is the Seventh
5 Circuit case is not the one that's before you
6 now, and the one that's before you now has not
7 only the reasons why we think they shouldn't
8 come into the Seventh Circuit case but other
9 problems as well.

10 And you -- what you shouldn't do is do
11 what they're asking you to do, which is sort of
12 decide this case as a way of telling what -- the
13 Seventh Circuit what to do in that case, which
14 presents different issues and additional
15 arguments. So we would urge you not to sort of
16 decide this case with a view towards what the
17 right answer in the Seventh Circuit case is.

18 JUSTICE KAVANAUGH: I have a question
19 about historical practice to the extent you're
20 aware. When a notice-and-comment rule is issued
21 and then a court finds that that rule is
22 unlawful and then the government chooses to
23 acquiesce in that judgment, what then usually
24 happens?

25 I suppose one thing is notice and

1 comment about a new rule, but that would be
2 about the new rule. Another option is notice
3 and comment about the repeal of the rule, even
4 though it's an acquiescence in the judgment.

5 A third option is just nothing
6 happens, the old rule is just gone, and the
7 government keeps going without any replacement
8 rule.

9 Do you know what the -- that second
10 thing, notice and comment about the repeal after
11 an acquiescence, I'm not sure I've seen that,
12 but I want to get your understanding of
13 historical practice.

14 MR. FLETCHER: So I can't pretend to
15 have an exhaustive understanding of this. We
16 have looked into it. I'm aware of cases in the
17 first category and the third category. We have
18 not found cases in that second category, at
19 least where what you're talking about is a
20 decision that sets aside the rule or vacates the
21 rule on a nationwide basis.

22 JUSTICE KAVANAUGH: That -- that's my
23 understanding too. I think it's odd to think
24 about notice and comment for repeal after an
25 acquiescence. I think there would usually be

1 notice and comment for the new rule, and -- and
2 that's now started up here. And I guess you've
3 looked into it and haven't found anything either
4 way, I guess.

5 MR. FLETCHER: I haven't found any
6 examples of it happening. And, you know, there
7 are -- there are court decisions from the D.C.
8 Circuit, including, I think, your opinion in the
9 EME Homer City case that say -- recognized
10 sometimes this is a thing that the government
11 does and that it is good cause to forego notice
12 and comment when what it's doing is effectively
13 compelled by a court decision.

14 JUSTICE KAVANAUGH: And then second
15 question, which is kind of on a different tack,
16 I think what they're trying to do here, if I'm
17 piecing it together, and this picks up on
18 Justice Sotomayor's questions a bit, is to
19 intervene here to Munsingwear these -- these
20 decisions and then to bring an APA challenge to
21 the repeal, I think, would be the next part of
22 the strategy if I'm understanding it and then to
23 win or to do better in that APA challenge
24 because the government wouldn't be able to rely
25 on the adverse decisions because they've been

1 Munsingweared. Is that --

2 MR. FLETCHER: So that -- that's about
3 my understanding of what they're trying to do as
4 well.

5 JUSTICE KAVANAUGH: Okay. So why is
6 it -- why is it wrong for them to intervene to
7 try to Munsingwear the adverse decisions?

8 MR. FLETCHER: So for a couple of
9 reasons. I think, first of all, even on that
10 account of their strategy and assuming that the
11 strategy otherwise works, that doesn't justify
12 them getting into this case because this case
13 doesn't include the judgment that was the basis
14 for the --

15 JUSTICE KAVANAUGH: Okay. Would it
16 justify them getting into the other case?

17 MR. FLETCHER: So I -- I think not.
18 There, we wouldn't have that argument about the
19 limited scope of this appeal.

20 JUSTICE KAVANAUGH: Intervention for
21 the purpose of seeking to Munsingwear a case is
22 not good enough?

23 MR. FLETCHER: Well, I don't think so.
24 I don't think -- you know, normally, Munsingwear
25 is about relieving the parties to the case of

1 the effects of the judgment. I'm not aware of
2 any precedent for allowing new parties to come
3 into the case to seek Munsingwear vacatur.

4 JUSTICE KAVANAUGH: There's no
5 precedent either way on that question, right?

6 MR. FLETCHER: That -- that's fair
7 enough. But -- but also, you know, Munsingwear
8 is also about relieving the parties of the
9 effects of a judgment after a case has become
10 moot.

11 You know, here, the mooting event was
12 the government's decision not to seek further
13 review of that Northern District of Illinois
14 decision, and so it's a little hard to see how
15 you Munsingwear the decision that actually
16 produces the mootness in the other cases. So I
17 think that's an additional obstacle for them.

18 And then the other thing I'd just say
19 sort of stepping back a little bit more broadly
20 is -- is, you know, this is a case about
21 intervention and when they have a right to
22 intervene or when the Ninth Circuit would have
23 abused its discretion in keeping them out.

24 And there are a lot of parties that
25 might have interest in judicial precedent or in

1 the development of the law more generally.
2 That's the sort of interest that I take them to
3 be trying to vindicate with this Munsingwear
4 argument, and that's just never been recognized
5 as the sort of thing that justifies intervention
6 as of right.

7 JUSTICE SOTOMAYOR: Can we talk about
8 Munsingwear here? It's Munsingwear of what? It
9 --

10 MR. FLETCHER: So I --

11 JUSTICE SOTOMAYOR: -- what --
12 assuming that they -- the equity, and that's,
13 you know, putting that on hold, what would they
14 Munsingwear? I thought the preliminary
15 injunction had dissolved once the case was
16 dismissed.

17 MR. FLETCHER: Justice Sotomayor, I
18 don't think that's right. We dismissed --

19 JUSTICE SOTOMAYOR: Okay.

20 MR. FLETCHER: -- our appeals in the
21 Ninth Circuit. The litigation in these cases is
22 still stayed in the Northern District of
23 California --

24 JUSTICE SOTOMAYOR: Ah, okay.

25 MR. FLETCHER: -- and the District of

1 Washington. The preliminary injunction is still
2 in force. It just doesn't have any practical
3 effect because of the Seventh Circuit's
4 decision -- or, I'm sorry, the Northern District
5 of Illinois vacatur of the rule.

6 JUSTICE SOTOMAYOR: So it would --

7 CHIEF JUSTICE ROBERTS: Thank you.

8 JUSTICE SOTOMAYOR: -- still have to
9 be -- it would still have to be -- you still
10 have to get the Seventh Circuit injunction
11 lifted before anything happens in the Ninth
12 Circuit?

13 MR. FLETCHER: Before the Ninth
14 Circuit decision has any practical consequence,
15 yes.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. Just one further point.

18 What would you do -- put your yourself
19 in Mr. -- General Brnovich's shoes. You think
20 it was wrong for the new administration not to
21 go through notice-and-comment rulemaking before
22 repealing the -- the order. What would you do?

23 MR. FLETCHER: Well, I suppose, if --
24 if I was in his shoes, you know, I might try to
25 intervene, but, again, there are rules about who

1 has an entitlement to intervene, and we don't
2 think the states satisfy them because --

3 CHIEF JUSTICE ROBERTS: So --

4 MR. FLETCHER: -- their disagreement
5 --

6 CHIEF JUSTICE ROBERTS: -- so what
7 would -- so there's nothing that an affected
8 state could do in your view? You would give up
9 if you were in General Brnovich's shoes because
10 you say, well, you know, I can't intervene. I
11 can't go and complain about the fact that there
12 wasn't notice-and-comment because it's a
13 judicial decision that allowed them to dispense
14 with notice-and-comment. So you think that in
15 this situation there's nothing that can be done?

16 MR. FLETCHER: I don't think so, but,
17 again, that's -- that's tied to the fact that
18 this is not a rule that gives them any rights,
19 that regulates them, that really has any effect
20 on them.

21 CHIEF JUSTICE ROBERTS: So then it's
22 really quite a license for collusive action for
23 any incoming administration to change rules that
24 were enacted pursuant to the APA and, therefore,
25 can only be repealed under the APA? It's a way

1 to avoid that burden across the board.

2 MR. FLETCHER: So I guess I just
3 disagree with that characterization, Mr. Chief
4 Justice. I mean, this is a case where the --
5 when the administration changed, the President
6 ordered a review of the rule, DHS decided it
7 wanted to issue a new rule, and then the
8 administration was confronted with the question
9 what to do about the litigation. And it had
10 sought this Court's review but had done so on
11 the premise that this was a rule that was
12 important to DHS that DHS wanted to preserve.

13 CHIEF JUSTICE ROBERTS: Right, right.
14 I'm not questioning anybody's motives. I'm --
15 I'm questioning the ease with which a decision
16 in your favor will make it for the -- an
17 incoming administration to avoid
18 notice-and-comment review, because what -- and
19 you say, well, if you were in Mr. Brnovich's
20 shoes, you would sort of take your briefcase and
21 go home, there's nothing to do. And yet
22 circumventing the APA is a pretty big deal.

23 MR. FLETCHER: Well, Mr. Chief
24 Justice, we may have a disagreement about
25 whether this is correctly characterized as

1 circumventing the APA. I -- I guess --

2 CHIEF JUSTICE ROBERTS: Well, it does
3 avoid notice-and-comment rule -- rulemaking on
4 the repeal of the rule.

5 MR. FLETCHER: So that's correct. You
6 know, in this case, of course, DHS is going
7 through notice-and-comment rulemaking.

8 CHIEF JUSTICE ROBERTS: No, that's the
9 new one --

10 MR. FLETCHER: That -- that's --

11 CHIEF JUSTICE ROBERTS: -- an entirely
12 different thing.

13 MR. FLETCHER: That -- that's correct.
14 But it does put all the same issues before them
15 and give them the opportunity to comment. You
16 know, I think beyond that, we cite in Footnote
17 11 a bunch of decisions of DOJ deciding not to
18 seek further review of decisions vacating the
19 rule. You could call each of those
20 circumventing the APA if you wanted to because
21 they have the same effect of taking a
22 notice-and-comment rule off the books without
23 the opportunity for further notice and comment.

24 And I think it's -- it's hard. I
25 understand that because this is a change in

1 administration, this was a controversial case,
2 there's a temptation to view it differently, but
3 I don't think we can have different principles
4 of intervention for what Petitioners in the
5 reply brief call run-of-the-mill cases where the
6 government decides not to seek further review
7 and different rules for intervention for cases
8 that are -- have attracted a lot of controversy
9 or that states are in -- looking into.

10 CHIEF JUSTICE ROBERTS: I'm not
11 suggesting there ought to be different rules.
12 I'm suggesting that we have to think long and
13 hard before adopting a rule that allows anybody,
14 any administration, to circumvent
15 notice-and-comment rulemaking before the repeal
16 of a -- of a rule.

17 And as far as I can hear from -- from
18 you, in Mr. Brnovich's shoes, you're saying
19 there's nothing to do -- no -- nothing to be
20 done.

21 MR. FLETCHER: Well, so I would say a
22 couple of things about the consequences of a
23 decision agreeing with us in this case.

24 It wouldn't apply in cases where
25 someone actually could satisfy the requirements

1 of Rule 24(a) where their legal rights were
2 directly affected. The part of our argument
3 here is based on the fact that Arizona and the
4 other states are not actually -- do not have a
5 legally protected stake in the rule. The answer
6 might be different if you had parties before you
7 who did have such a stake.

8 The other thing I'd say is, just to go
9 back to the answer that I gave to Justice Kagan,
10 you know, I -- I -- I take it everyone agrees
11 that the government has the prerogative to
12 decline to seek further review.

13 The effect of taking the rule off the
14 books without notice-and-comment is an effect of
15 the remedial authority that the Northern
16 District of Illinois asserted in this case.

17 If this Court makes clear that that's
18 not remedial authority that district courts
19 have, then that solves that problem without
20 disrupting principles of intervention or
21 countermanding Congress's choice to put
22 decisions about further review in the hands of
23 the Department.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 Justice Breyer, anything further?

2 Justice Alito?

3 JUSTICE ALITO: Has the government
4 previously argued that district courts lack the
5 power to issue nationwide injunctions in
6 situations like this?

7 MR. FLETCHER: We have pretty
8 consistently, Your Honor.

9 JUSTICE ALITO: In this Court? In
10 this Court?

11 MR. FLETCHER: In this Court? I -- I
12 -- in -- I believe we made that a feature of our
13 stay application in the DHS versus New York case
14 where Justice Gorsuch wrote the opinion that I
15 talked about.

16 Also, I believe in the contraceptive
17 coverage case that was argued in the last
18 administration.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Counsel, this is a
22 very complex issue. What I understood that the
23 prior administration had in two cases been
24 before district courts that issued injunction,
25 injunctions of rules, that the -- I think, in

1 Nevada versus U.S. Department of Labor, the
2 prior administration filed an appeal but then
3 decided to put it in abey -- abeyance and
4 decided to comply with the district court's
5 invalidation, correct? So this happens -- has
6 happened across generations, correct?

7 MR. FLETCHER: That's right. Each
8 case differs in its particulars. And, you know,
9 I think one of the things that made this case
10 different and that's important to keep in mind
11 when looking at the forest, as Justice Alito
12 said earlier, is that this was a case that the
13 government had brought into this Court and
14 gotten certiorari granted and gotten
15 extraordinary stays entered before DHS decided
16 that it wanted to replace the rule.

17 And if DHS had made the decision that
18 it wanted to engage in new rulemaking and
19 replace the rule and if it was clear that the
20 rule wasn't having its intended effect, it would
21 be very unusual for the government to come to
22 this Court and ask it to grant certiorari.

23 Now, here, those changes, those facts
24 came to light after the petitions had been
25 filed, and the decision was made after cert had

1 been granted, but it's the same sort of decision
2 not to ask this Court to review an adverse
3 decision of the government.

4 JUSTICE SOTOMAYOR: So this has
5 happened for generations then?

6 MR. FLETCHER: In different forms.
7 Again, I don't want to represent that I can
8 point to a case --

9 JUSTICE SOTOMAYOR: No, no, no. No,
10 not like this --

11 MR. FLETCHER: -- just like this
12 because --

13 JUSTICE SOTOMAYOR: -- but in
14 different --

15 MR. FLETCHER: -- the situation that
16 was presented was unprecedented, but the idea
17 that the government can choose for legal and
18 prudential reasons not to seek further review
19 has happened across administrations in a lot of
20 different circumstances.

21 JUSTICE KAGAN: Mr. Fletcher, just
22 going back to your colloquy with the Chief
23 Justice, I guess I'm a little bit surprised that
24 you didn't say something else. And, you know,
25 maybe the -- the Solicitor General never stands

1 up at the podium and says somebody can bring an
2 APA action against us.

3 But isn't that the answer? Somebody
4 can bring an APA action. I mean, if there has
5 been circumvention of the APA, like, rather than
6 go through this quadruple bank shot, I mean, why
7 don't we just say, you know, you have a good
8 point about circumvention of the APA, go bring
9 an APA action?

10 MR. FLETCHER: So they could bring an
11 APA action. That's right. Candidly, we would
12 argue in that APA action --

13 JUSTICE KAGAN: You would -- you would
14 take the other side. You would say, well, they
15 don't have an APA action either. I understand
16 that. But, I mean, because you think that what
17 you did was not circumvention and -- look, I
18 understand that the government is here to defend
19 what it did, and that's perfectly appropriate.

20 But, on the assumption that the
21 government circumvented the APA, isn't the right
22 remedy an APA action?

23 MR. FLETCHER: So they can bring an
24 APA action. If they do, we'll make the argument
25 that the rescission of the rule was justified by

1 the fact that the vacatur had become final. And
2 I think we're right about that.

3 But I -- you disagree -- may disagree.
4 And so, if they want to bring that argument and
5 try to persuade a court that you're right and
6 I'm wrong, they can absolutely do that.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: Yeah, just a couple
10 questions just to follow up on Justice Kagan.

11 So the government -- I just want to
12 make sure I understand. So, if -- if a state
13 were to bring an APA action, the government's
14 position would be what?

15 MR. FLETCHER: So I think we're
16 talking about an APA action that's challenging
17 the rescission that --

18 JUSTICE GORSUCH: Yes.

19 MR. FLETCHER: -- in March of 2021.

20 JUSTICE GORSUCH: Yes.

21 MR. FLETCHER: And we would say that
22 that was valid without notice and comment
23 because the existence of the vacatur judgment by
24 the district court was good cause to forgo
25 notice and comment and that the fact that that

1 judgment had been entered finally vacated the
2 rule and was no longer being appealed justified
3 the rescission of the rule.

4 JUSTICE GORSUCH: Even though, on --
5 on the government's view, the -- the scope of
6 the vacatur was unlawful?

7 MR. FLETCHER: That's correct, yes.

8 JUSTICE GORSUCH: Okay. And I guess
9 that leads me to my -- kind of where I'm stuck
10 in this case, and it's sort of where the Chief
11 Justice is. Any administration coming in, of
12 course, can agree not to contest a judicial
13 opinion. That's often good practice.

14 But, in this case, the government is
15 relying on an injunction or a vacatur of
16 nationwide scope that it believes to be unlawful
17 as the basis for the rescission.

18 How do I think about that when we come
19 to the equitable considerations associated with
20 intervention, that the government's rescission
21 here is premised on what it admits to be an
22 unlawful order?

23 MR. FLETCHER: So, Justice Gorsuch, I
24 think often, when the government decides not to
25 seek further review of a decision, including a

1 decision setting aside a regulation, it may
2 disagree very strongly with the legal grounds
3 for that decision and think that the order was
4 wrong and that the judge didn't have the
5 authority to enter it but, nonetheless, decide
6 that the sort of high standards that the
7 government applies before seeking further
8 review, especially this Court's review, aren't
9 meant --

10 JUSTICE GORSUCH: I -- I -- I -- Mr.
11 Fletcher, I -- I -- I don't disagree with any of
12 that. I accept that. Of course, the government
13 often disagrees with the judges. That's --
14 that's the independence of the judiciary, and --
15 and we're all stuck with that.

16 But what -- what is kind of a little
17 different in this case is to tell a state that
18 it has no recourse through the APA, through
19 litigation, all because the government's
20 acquiescence in a judicial order that it agrees
21 is wrong and -- and is that an equitable
22 consideration that we should as judges take into
23 account when we're deciding a question of
24 intervention, noting that intervention is
25 ultimately an equitable sort of considered --

1 question?

2 MR. FLETCHER: So it is an equitable
3 question. I would hesitate to encourage courts
4 to rely on those sorts of judgments because one
5 of the themes that I've been trying to convey
6 this morning is that Congress has decided that
7 these are decisions for the government to make
8 about whether or not to seek further review.

9 JUSTICE GORSUCH: Of course.

10 MR. FLETCHER: Different story if you
11 have a party that actually has the sort of
12 intervention that justifies -- stake that
13 justifies intervention as of right. But, if
14 you're not in that world and you're talking
15 about permissive intervention, I'd warn the
16 Court away from suggesting that courts ought to
17 sort of look under the hood about whether or not
18 they agree with the government's decision-making
19 or the way that it weighed all of the competing
20 considerations.

21 JUSTICE GORSUCH: Of -- of -- of
22 course. I -- I -- I get that. I guess I'm just
23 wondering, would that be the narrowest basis of
24 decision if -- if -- if the Court were to rule
25 against you, that those are unique circumstances

1 that might justify permissive intervention at
2 least here?

3 MR. FLETCHER: So those aren't narrow
4 circumstances. I'm not sure that they're the
5 basis for an administrable rule because, of
6 course, I've just told you that we disagree
7 with district courts. Often --

8 JUSTICE GORSUCH: No, I know you -- I
9 know you --

10 MR. FLETCHER: -- often that doesn't
11 happen.

12 JUSTICE GORSUCH: -- I know you
13 disagree. But, if we were to rule against you,
14 would that be the narrowest basis, or do you
15 have another narrow one?

16 MR. FLETCHER: Another narrow way to
17 lose?

18 JUSTICE GORSUCH: Yeah.

19 (Laughter.)

20 MR. FLETCHER: I, you know --

21 JUSTICE GORSUCH: A tough question. I
22 -- I've had it presented to me. Nobody likes
23 it. And I'm sorry to ask it.

24 MR. FLETCHER: Well, I take that. You
25 know, I think, if -- we, of course, don't think

1 we should lose at all. We think a lot of the
2 concerns that have been addressed would be
3 addressed by adopting your view about the scope
4 of district courts' remedial authority.

5 If you're not willing to go down that
6 road and you think that the states ought to be
7 permitted to intervene, I think the narrowest
8 basis for a decision in this case, which is,
9 again, about these preliminary injunction
10 appeals, would be to say that under these
11 circumstances, because the controversy has
12 become moot because the government acquiesced in
13 a different judgment, they can come in and seek
14 Munsingwear vacatur and that's all.

15 I think that, you know, relieves them
16 of some of their concerns and doesn't create the
17 problems that we have about forcing the
18 government to continue litigating about this
19 rule that it's simultaneously trying to replace,
20 which was really a big part of the concern that
21 we had when we were approaching what to do about
22 this litigation.

23 JUSTICE GORSUCH: Thank you.

24 JUSTICE KAVANAUGH: Just want to pick
25 up right there. So intervening for the purpose

1 of Munsingwear -- seeking Munsingwear is the --
2 is the narrowest ground, you -- you suggest?

3 MR. FLETCHER: I -- I'm open to other
4 even narrower grounds.

5 (Laughter.)

6 MR. FLETCHER: But that is the
7 narrowest one that I can come up with, yes.

8 JUSTICE KAVANAUGH: And -- okay. And
9 then going back to the APA suit challenging the
10 rescission of the rule, I think that raises a
11 big question. The Chief Justice raises
12 important concerns, but I think there are
13 important concerns going both ways there because
14 it's never been the case, as I understand it and
15 our colloquy illustrated that, acquiescence in
16 adverse judgment triggers notice-and-comment
17 responsibilities for the repeal of that rule,
18 right? At least you haven't found anything.

19 MR. FLETCHER: Correct. I don't want
20 to represent that there's nothing out there, but
21 I -- I certainly haven't found anything.

22 JUSTICE KAVANAUGH: So it would be a
23 big deal, I think, to hold that all of a sudden
24 the government, when it acquiesces in a
25 judgment, also has to go through notice and

1 comment for the repeal, different from the new
2 rule, for the repeal. That would be a big deal.

3 MR. FLETCHER: Correct, I agree. And
4 I think --

5 JUSTICE KAVANAUGH: And that would
6 hamstring new administrations, which is, you
7 know, the flip -- the Chief raises important
8 concerns. The flip side is, of course, not
9 allowing a -- a new administration to get out of
10 the starting blocks because they're -- they're
11 stuck.

12 MR. FLETCHER: I -- I agree with that,
13 and I'd just add that it's not just the
14 transition to a new administration. You know,
15 this happens even within an administration, that
16 there's a rule --

17 JUSTICE KAVANAUGH: Sure. There's a
18 new secretary who comes in, new political or
19 policy views. Yeah.

20 MR. FLETCHER: Or the government
21 decides, you know, this rule, there's too much
22 litigation risk. We might make bad law if we
23 pursue it. Or it turns out actually we don't
24 think it's such a good idea. There are all
25 sorts of reasons why the government might

1 acquiesce or decline to seek further review of
2 these decisions, and a rule saying -- a judgment
3 saying that anyone can intervene if they have
4 Article III standing and force continued
5 litigation or that there has to be
6 notice-and-comment rulemaking would be quite
7 disruptive.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: I do have a question
12 about historical practice.

13 So, you know, as Footnote 11 in your
14 brief makes clear, lots of historical practice
15 for the government acquiescing in -- in judicial
16 decisions and not appealing.

17 What about the government opposing
18 intervention in this circumstance? Because I
19 think these are two separate threads, right? We
20 can all agree that the government has the
21 ability to acquiesce -- acquiesce in a judgment
22 in its favor.

23 But that's a distinct question from
24 whether the government should oppose or a court
25 should deny permission to a state who wants to

1 intervene at that point. What has the
2 historical practice been there?

3 MR. FLETCHER: So I don't have a lot
4 of examples of that, I think, in part, because
5 it just hasn't come up. You know, the two
6 examples that they offer in their reply brief,
7 as I explained, aren't really examples of this
8 --

9 JUSTICE BARRETT: Yeah.

10 MR. FLETCHER: -- because intervention
11 happened earlier. I guess what I'd say, though,
12 is we don't view them as being quite that
13 distinct because, when the government decides
14 not to seek further review, it's often because
15 the government has made a decision that further
16 review isn't in the government's interest
17 because it might make bad law because it turns
18 out the agency is about to replace the policy
19 anyway, you know, for all sorts of reasons.

20 And when that happens, sort of part
21 and parcel of that decision is a judgment also
22 that we don't want other parties to step in and
23 continue the litigation, which forces us to
24 continue litigating the case, which is exactly
25 what we tried not to do by declining to seek

1 further review.

2 So I think they're two decisions that
3 are linked in our mind.

4 JUSTICE BARRETT: So the examples that
5 they come up with in their reply brief, I mean,
6 you just haven't -- nobody has been able to come
7 up with more. So when they say that this is
8 unprecedented on the government's part, you're
9 saying it's also unprecedented on the state's
10 part to try to intervene in this circumstance.

11 MR. FLETCHER: I'm -- I'm saying that
12 I -- I have not looked -- you know, I haven't
13 done an exhaustive survey for this. I'm sure
14 there are cases where it has happened before.
15 It just has not happened a lot.

16 And when it does happen, the
17 government, if we thought that they were
18 entitled to intervene, that they met the Rule
19 24(a) standards, then we'd be taking a different
20 position about whether or not they're entitled
21 to intervene.

22 But if -- when we think they don't
23 meet the Rule 24(a) standards and when the
24 question is, as a permissive matter, should a
25 court allow them into a case that the government

1 has decided continued litigation is not in the
2 interest of the United States, then I don't
3 think it's surprising that we -- we'd oppose
4 that precisely because we do want to avoid
5 continued litigation.

6 JUSTICE BARRETT: Right, okay.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Ms. Hong.

10 ORAL ARGUMENT OF HELEN H. HONG
11 ON BEHALF OF THE STATE RESPONDENTS

12 MS. HONG: Mr. Chief Justice and may
13 it please the Court:

14 There are many ways in which we agree
15 with Petitioners about the legal standards
16 governing intervention. Those standards are
17 broad and we've relied on them ourselves to
18 intervene in cases that threaten to impair our
19 interests.

20 But those standards do impose limits.
21 And under the particular circumstances of this
22 case, Petitioners' motion to intervene in the
23 Ninth Circuit exceeded those limits. The
24 central problem with that motion is that there's
25 no practical sense in which the Ninth Circuit

1 proceedings threatened to impair Petitioners'
2 asserted interests.

3 The 2019 Public Charge Rule was
4 vacated through a final judgment in a separate
5 case in a different circuit, and there is no
6 rule left for Petitioners to defend in the
7 courts below.

8 This case can be resolved on that
9 straightforward basis alone. I welcome the
10 Court's questions.

11 JUSTICE THOMAS: Would you be just a
12 bit more -- give us a bit more detail about why
13 you oppose intervention here? You said you
14 generally agree with Petitioner that there
15 should be intervention available.

16 I think, of course, like California
17 may have intervened in cases like Affordable
18 Care Act. How is this different? And I think
19 some of those have involved matters, perhaps not
20 exclusively, but matters that were nationwide or
21 other states, involved other states.

22 So would you just be -- give us a
23 little more detail?

24 MS. HONG: Yes, Your Honor. I think
25 it goes to the Rule 24 standards that requires

1 impairment of the Petitioners' interest. But as
2 a more practical matter, the question is what
3 would the courts do below if Petitioners were
4 authorized to intervene?

5 There is no rule to litigate. There's
6 nothing that the Ninth Circuit can do to restore
7 the rule. So the Petitioners' motion really
8 achieves nothing of significance.

9 That's why we think that Petitioners'
10 motion was properly denied in the court of
11 appeals here in the Ninth Circuit.

12 JUSTICE KAVANAUGH: What about
13 Munsingwear?

14 MS. HONG: Your Honor, Munsingwear
15 raises two separate issues, one that goes to the
16 scope of the Munsingwear doctrine, and the
17 second is a separate case specific question
18 about Rule 24's requirements.

19 Munsingwear itself, I think as -- as
20 my friend from the federal government has
21 explained, is a doctrine that was designed to
22 relieve existing parties of the consequences of
23 a judgment once a case became moot.

24 I'm not aware of an extension of
25 Munsingwear that has been sort of applied in

1 this circumstance for non-parties to intervene
2 in a moot case to seek vacatur, but even if it
3 were theoretically possible, that still raises
4 the Rule 24 question, which is what practical
5 stake or what stake has Arizona identified to
6 seek vacatur in these circumstances?

7 And we think that's where Petitioners
8 fall short.

9 JUSTICE KAVANAUGH: But wouldn't --

10 MS. HONG: Their legal --

11 JUSTICE KAVANAUGH: -- the theory be,
12 and you've heard me say this, they seek
13 Munsingwear of the adverse -- to get the adverse
14 decisions off the books, and they have an APA
15 suit where they challenge the repeal, and the
16 government in that is no longer able to rely on
17 the adverse judgments, which Mr. Fletcher said
18 they would certainly be relying on in any such
19 APA suits.

20 So the chain of logic seems pretty
21 straight to me of how they would use
22 intervention here if I -- if I have the -- have
23 it right.

24 MS. HONG: Yeah, there's -- but
25 there's no judgment here. So their concern is

1 the Ninth Circuit's decision on a preliminary
2 injunction appeal, which isn't tantamount to a
3 decision on the merits.

4 And the decision doesn't require the
5 state to do anything or refrain from doing
6 anything. And the federal government has
7 represented that it doesn't feel encumbered by
8 the decision from reimposing the same rule in
9 the future.

10 So what this boils down to then is the
11 Petitioners' legal disagreement with the
12 reasoning of the court of appeals' decision.
13 And we don't think that's enough to give them
14 the necessary stake to intervene under the
15 standards of Rule 24 to seek vacatur in these
16 circumstances.

17 CHIEF JUSTICE ROBERTS: So you'd have
18 a different view if this were the case from the
19 Seventh Circuit?

20 MS. HONG: Your Honor, it's -- it's a
21 different question there. I think that both the
22 Rule 24 analysis is different because, of
23 course, our basis for intervening -- or opposing
24 an intervention motion here is that their
25 interests can't be impaired because of the

1 vacatur judgment.

2 That basis for opposing doesn't exist
3 in Illinois. The district court there ruled
4 solely on timeliness grounds and denied the
5 motion concluding that the Petitioners had
6 intervened too late in that proceeding. That is
7 not --

8 CHIEF JUSTICE ROBERTS: Do you
9 remember how much -- how long they waited before
10 moving to intervene in that case?

11 MS. HONG: Your Honor, the judgment --
12 the final judgment that vacated the rule was
13 issued in November of 2020. They attempted to
14 intervene on March 11th in the Seventh Circuit.
15 It was -- we acknowledged, just two days after
16 the Seventh Circuit dismissed the appeal and
17 issued the --

18 CHIEF JUSTICE ROBERTS: Two -- two
19 days is the answer to my question, right?

20 MS. HONG: Yes, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 MS. HONG: But we're not pressing
23 timeliness as a ground here. And of course as
24 -- as we've discussed earlier today, I think
25 those ongoing proceedings are subject to an

1 appeal, and proceedings in the Seventh Circuit.

2 And even if Petitioners are able to
3 successfully intervene there, there's still a
4 number of steps that would have to occur before
5 there would be any prospect of live litigation
6 here in the Ninth Circuit.

7 After intervention, they would still
8 have to secure modification of the final vacatur
9 judgment, and then rescission of the rescission
10 rule before the rule could spring back to life
11 and there could be any meaningful litigation in
12 the Ninth Circuit.

13 And that's primarily the basis for our
14 opposition to the motion to intervene here,
15 which is nothing in this case can restore the
16 rule and nothing then can redress the
17 Petitioners' asserted claims of injury.

18 JUSTICE SOTOMAYOR: Let's go back to
19 that equity question. And you answered to
20 Justice Kavanaugh.

21 You said the preliminary injunction
22 ruling here is not a judgment, correct?

23 MS. HONG: The preliminary injunction
24 orders are not a judgment, yes, Your Honor.

25 JUSTICE SOTOMAYOR: And so they can't

1 hurt them in terms of any arguments they have
2 elsewhere, because it's not a merits decision,
3 correct?

4 MS. HONG: Correct, Your Honor.

5 JUSTICE SOTOMAYOR: It's an equity
6 balance?

7 MS. HONG: That -- the preliminary
8 injunction factors certainly included an
9 equitable balance. I -- I -- I take
10 Petitioners' arguments to be that the Ninth
11 Circuit's decision on the likelihood of success
12 is what they would like to wipe off the books.

13 JUSTICE SOTOMAYOR: Correct. So why
14 is that not an interest adequate in equity to
15 grant them intervention?

16 MS. HONG: Right. And the question is
17 whether they have a necessary stake to seek
18 that. And we don't think that Petitioners have
19 identified anything different than their legal
20 disagreement with the reasoning of the decision.

21 Again, it doesn't require them to do
22 anything. The federal government is not
23 thwarted from reimposing the same rule. And of
24 course a court considering the merits would not
25 be bound by or controlled by the Ninth Circuit's

1 decision on the likelihood of success prong.

2 JUSTICE KAGAN: Ms. Hong, I'm -- I'm
3 curious to know what your answer would be to the
4 series of questions that both the Chief Justice
5 and I were -- were -- were asking about if one
6 thinks that there is a kind of circumvention of
7 the APA, that the federal government did here,
8 this is not your problem, it's their problem,
9 but if one thinks that, and Justice Kavanaugh
10 presents some real reasons to -- to think that
11 that's a hard question, but if one thinks that,
12 and one is concerned about green lighting that
13 kind of government conduct, what should we do in
14 this case? What should we do in some other
15 case?

16 MS. HONG: Your Honor, I think that
17 might be a basis for intervention in the
18 proceedings where the rule was actually vacated.
19 So that would be the Seventh Circuit
20 proceedings, which is an ongoing appeal.

21 Separately, I think Your Honors have
22 discussed this morning the prospect of a
23 separate lawsuit under the APA challenging the
24 federal government's reliance on the good cause
25 exception to notice-and-comment rulemaking.

1 Those -- Petitioners concerns about
2 the federal government's evasion of the APA
3 really is a core -- at its core a concern about
4 the scope of that good cause exception. We
5 think those are two alternative fora where
6 Petitioners could try to make their case.

7 But even if the Court has concerns
8 about the federal government's conduct that led
9 to the vacatur of the rule and then the issuance
10 of the rescission rule, those concerns do
11 nothing to -- to permit the Ninth Circuit in
12 this case to restore the rule.

13 And I think Petitioners functionally
14 concede that in their reply brief when they
15 recognize there's nothing that the Ninth Circuit
16 can do while the vacatur judgment exists to get
17 them to have the rule restored in these
18 proceedings.

19 And that's why we think the court of
20 appeals properly denied intervention both as a
21 matter of right and as a matter of permissive
22 intervention.

23 JUSTICE GORSUCH: Counsel, let's --
24 let's suppose that Arizona succeeds in the
25 Seventh Circuit, just hypothetically. Would --

1 would California take the position that the
2 Ninth Circuit's preliminary injunction should
3 apply and applies nationwide or not?

4 MS. HONG: Well, the preliminary
5 injunction by its terms that issued in our case
6 is limited geographically and, of course, the
7 Washington case injunction was narrowed by the
8 Ninth Circuit.

9 I guess to go back to Your Honor's --
10 the premise of the question, which is if
11 Petitioners succeed in intervention --
12 intervening in Arizona, does that mean that we
13 have a live dispute here, and that's just not
14 the case.

15 JUSTICE GORSUCH: No, my -- my
16 question was a little more specific than that.
17 What -- what would California's position be in
18 the Ninth Circuit litigation about the scope of
19 the appropriate relief?

20 MS. HONG: Your Honor, if the rule
21 were restored, then the preliminary injunctions
22 that were issued in our case are geographically
23 limited.

24 We -- are geographically limited.

25 JUSTICE GORSUCH: I understand that

1 currently. But what would California's position
2 be as to their proper scope?

3 MS. HONG: We -- we did seek a
4 nationwide injunction in the district court. We
5 were not successful in that endeavor. And I
6 think we would have to live with both the
7 district court's conclusion that the --

8 JUSTICE GORSUCH: Are you representing
9 you wouldn't seek nationwide relief before the
10 Ninth Circuit?

11 MS. HONG: In terms of the final
12 relief, that might be different. We might seek
13 nationwide relief, but -- but that's only if the
14 rule was restored. At present, there's no rule
15 to litigate and there's no way the district
16 court, we think, could properly issue a vacatur
17 judgment in our case.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Breyer, anything further?

22 JUSTICE SOTOMAYOR: Just one question
23 following up on what Justice Gorsuch said.
24 There'd have to be a vacatur of the nationwide
25 rule -- rule in the Seventh Circuit, correct?

1 MS. HONG: Correct, Your Honor.

2 JUSTICE SOTOMAYOR: And the grounds
3 for that would inform whatever position you took
4 with respect to nationwide relief later,
5 correct?

6 MS. HONG: Potentially, Your Honor.
7 If there were a ruling from this Court in those
8 Seventh Circuit proceedings, for example, that
9 bore on what arguments we could make, then
10 certainly that would have a -- bear a
11 relationship to --

12 JUSTICE SOTOMAYOR: If -- if --

13 MS. HONG: What we could argue.

14 JUSTICE SOTOMAYOR: -- we ruled that
15 nationwide injunctions are improper, you
16 couldn't seek one, then?

17 MS. HONG: Correct.

18 JUSTICE SOTOMAYOR: All right.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?
20 Justice Gorsuch, anything further?
21 Justice Barrett?

22 Thank you, counsel.

23 General, rebuttal?

24

25

1 REBUTTAL ARGUMENT OF GEN. MARK BRNOVICH
2 ON BEHALF OF THE PETITIONERS

3 MR. BRNOVICH: Thank you, Mr. Chief
4 Justice.

5 I can't help but hearing my mom's
6 voice in my head that it's better to remain
7 quiet and be thought of a fool than open your
8 mouth and remove all doubt.

9 But I do think it's important for the
10 record to emphasize that the question pending
11 before this Court today and what seemingly none
12 of us disagree with is whether the Ninth Circuit
13 erred in denying Arizona's motion to intervene.

14 The -- the answer to that question is
15 clearly yes. Nothing the Respondents have said
16 today casts any real doubt on that. It is
17 indeed the Solicitor's prerogative to decide
18 what rulings she may well appeal, but it is not
19 her choice and her choice alone to determine
20 whether a party or a state can intervene in a
21 case.

22 And, ultimately, if you allow the
23 actions of the Department of Justice to stand in
24 this case, it sets a dangerous precedent for
25 future administrations to essentially do an

1 end-around the APA.

2 Thank you very much.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 11:22 a.m., the case
7 was submitted.)

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1	acquiesced [1] 80:12 acquiescence [9] 35:18 37:17 38:1 42:4 60:4,11, 25 77:20 81:15 acquiesces [3] 35:14 37: 21 81:24 acquiescing [4] 27:1,7,17 83:15 across [5] 55:19 57:13 67: 1 72:6 73:19 Act [2] 20:2 87:18 acted [2] 18:22 39:10 action [15] 10:10 11:7 20: 14 25:6 66:22 74:2,4,9,11, 12,15,22,24 75:13,16 actions [1] 99:23 actually [13] 14:15 16:10 42:24 54:3 57:4,22,24 63: 15 69:25 70:4 78:11 82:23 94:18 add [1] 82:13 added [1] 55:17 additional [2] 59:14 63:17 address [1] 42:17 addressed [3] 29:21 80:2, 3 adequate [2] 33:22 93:14 adequately [1] 38:11 adjust [1] 58:1 adjustment [5] 40:1,9 54:2, 10 57:15 administrable [1] 79:5 Administration [44] 3:21 4:3 6:15,16,18,23 7:15,21 9:11 11:25 14:22 17:16,17, 18,20,21 18:15 19:15 20:1, 7,17 23:13 36:16,21 45:21 47:15,24 48:3,9,9 65:20 66:23 67:5,8,17 69:1,14 71:18,23 72:2 76:11 82:9, 14,15 administration's [2] 3:15 32:23 administrations [7] 5:5 6: 14 21:6 42:15 73:19 82:6 99:25 Administrative [1] 20:1 admission [1] 57:10 admit [1] 15:10 admits [1] 76:21 admitted [1] 57:3 adopt [1] 50:4 adopted [1] 17:17 adopting [2] 69:13 80:3 adoption [1] 50:12 adverse [10] 6:19 36:5 49: 3 61:25 62:7 73:2 81:16 89:13,13,17 affect [3] 15:22 42:9 58:9 affected [8] 6:2 16:12,20 40:7 54:3 55:16 66:7 70:2 affects [2] 15:7 17:4 Affordable [1] 87:17 agency [1] 84:18	2	aggravated [1] 41:19 ago [1] 22:20 agree [14] 8:16 15:14 27:20 34:23 47:2 50:18 53:18 76: 12 78:18 82:3,12 83:20 86: 14 87:14 agreed [1] 45:24 agreeing [3] 23:15 27:21 69:23 agreement [1] 15:16 agrees [3] 49:19 70:10 77: 20 Ah [1] 64:24 AL [2] 1:3,7 ALITO [10] 24:7 35:6 43:18 44:9 45:9 46:11 71:2,3,9 72:11 allow [12] 13:14 16:3 17:9 38:15 40:20 41:23 42:6 45: 7 46:7 56:5 85:25 99:22 allowed [10] 7:17 18:8 25: 22 31:3 34:25 44:2 46:1,6 56:12 66:13 allowing [5] 17:9 23:3 46:9 63:2 82:9 allows [3] 13:16 32:5 69: 13 alone [2] 87:9 99:19 already [4] 24:24 26:1 29: 22 39:1 alternative [1] 95:5 although [1] 44:10 analogous [2] 42:23 43:2 analysis [5] 33:18,18 38:9, 14 90:22 Angeles [3] 14:12 15:15 16:10 announced [1] 5:24 another [9] 7:17 11:22 12: 24 47:6 51:4 58:25 60:2 79:15,16 answer [12] 9:3 10:18 12:1 26:24 56:20 59:17 70:5,9 74:3 91:19 94:3 99:14 answered [1] 92:19 anticipate [2] 13:17 16:2 anybody [2] 14:15 69:13 anybody's [1] 67:14 anyway [1] 84:19 APA [52] 4:22 5:5,16 10:10 11:7 19:1,3,7 20:6,13 21: 12,14,14 22:5,11 23:21 24: 11 31:23 32:10 33:10 34:6 38:25 48:20 49:11 61:20, 23 66:24,25 67:22 68:1,20 74:2,4,5,8,9,11,12,15,21, 22,24 75:13,16 77:18 81:9 89:14,19 94:7,23 95:2 100: 1 APA's [2] 50:3,11 apparently [1] 52:15 appeal [12] 6:19,24 31:2,5, 19 62:19 72:2 90:2 91:16 92:1 94:20 99:18	3	appealed [1] 76:2 appealing [1] 83:16 appeals [19] 3:25 7:1 13:8, 25 23:15 28:21 40:14,19, 21 41:21 43:6,22 44:3,12, 24 64:20 80:10 88:11 95: 20 appeals' [1] 90:12 APPEARANCES [1] 1:18 appellate [3] 42:7 43:24 44:7 applicants [1] 55:17 application [4] 43:22,23 57:5 71:13 applications [2] 40:9 54:5 applied [4] 15:4 19:10 40: 10 88:25 applies [5] 15:2 30:17 53:2 77:7 96:3 apply [17] 21:23 29:5,5 40: 15 44:11,23 52:19 53:15 54:5,11 55:5,6,7 57:2,23 69:24 96:3 approach [3] 13:14 41:7 49:4 approaching [1] 80:21 appropriate [5] 10:10 43: 11 49:15 74:19 96:19 approximately [1] 40:8 aren't [5] 43:2 55:8 77:8 79: 3 84:7 argue [4] 13:9 46:9 74:12 98:13 argued [2] 71:4,17 arguing [1] 54:21 argument [23] 1:15 2:2,5,8, 11 3:4,7 29:3 31:23 38:24 39:1,8,11,16 52:2 55:15 62:18 64:4 70:2 74:24 75: 4 86:10 99:1 arguments [10] 32:15 44: 20 52:8 55:4,6,7 59:15 93: 1,10 98:9 ARIZONA [19] 1:3,20 3:4, 12 4:6,14,20 14:14,16 15: 22 16:14,21 17:6 36:22 55: 23 70:3 89:5 95:24 96:12 Arizona's [1] 99:13 around [1] 14:14 Article [2] 49:14 83:4 aside [6] 15:2 34:6 50:3,6 60:20 77:1 assert [1] 39:22 asserted [3] 70:16 87:2 92: 17 associated [1] 76:19 assume [1] 48:6 assuming [2] 62:10 64:12 assumption [2] 48:12 74: 20 assure [1] 28:9 asylee [1] 58:2 attempted [1] 91:13 attenuated [1] 54:8	4	Attorney [2] 1:19 56:13 attracted [1] 69:8 authority [7] 45:7 49:16,22 70:15,18 77:5 80:4 authorized [1] 88:4 authorizes [1] 49:11 available [1] 87:15 avoid [5] 56:8 67:1,17 68:3 86:4 aware [11] 7:9 35:20,21 43: 4 45:20 47:6 50:12 59:20 60:16 63:1 88:24 away [2] 49:24 78:16	B	back [17] 6:6 13:7 19:22 24: 13 34:17 45:10,24 46:13, 16 48:23 63:19 70:9 73:22 81:9 92:10,18 96:9 bad [2] 82:22 84:17 balance [2] 93:6,9 banc [4] 24:20 25:1 27:12 56:11 bank [1] 74:6 bar [4] 4:13 8:24 9:11 58:4 BARRETT [35] 12:20 17: 12 18:2,5 20:3,5,11 21:23 23:7,11,17 29:7,10 31:16, 20,22 32:8,21 38:21,22 39: 3,7 52:10 53:7 54:15,20 55:3,9 57:20 83:10,11 84: 9 85:4 86:6 98:21 Based [2] 4:2 70:3 baseline [2] 19:18 37:3 basically [2] 16:9 47:21 basis [18] 12:22,23 13:6 19: 16 20:18 23:2 60:21 62:13 76:17 78:23 79:5,14 80:8 87:9 90:23 91:2 92:13 94: 17 bear [1] 98:10 became [1] 88:23 become [6] 4:21 9:17,20 63:9 75:1 80:12 behalf [11] 1:20,22,25 2:4,7, 10,13 3:8 39:17 86:11 99: 2 behavior [3] 5:19 47:13 48: 8 believe [7] 6:5 13:14 36:17, 24 39:12 71:12,16 believes [2] 47:19 76:16 below [3] 4:8 87:7 88:3 benefit [1] 41:5 benefits [6] 15:22 40:3 54: 11 57:24 58:8,8 best [1] 41:25 better [3] 29:3 61:23 99:6 between [2] 19:5 57:14 beyond [2] 52:5 68:16 Biden [5] 3:21 4:3 17:18,19, 21 big [5] 67:22 80:20 81:11, 23 82:2		
5	1-100th [1] 40:10 10:00 [2] 1:16 3:2 11 [2] 68:17 83:13 11:22 [1] 100:6 11th [1] 91:14	6	20-1775 [1] 3:4 2019 [6] 8:11 39:20 40:6,17 41:16 87:3 2020 [1] 91:13 2021 [1] 75:19 2022 [2] 1:12 19:20 23 [1] 1:12 24 [14] 32:17 33:18 38:9 43: 21 44:4,5,11,19,23 46:1 87: 25 89:4 90:15,22 24's [1] 88:18 24(a) [3] 70:1 85:19,23	7	3 [1] 2:4 39 [1] 2:7	8	50,000 [1] 40:8	9	86 [1] 2:10	A	a.m [3] 1:16 3:2 100:6 abandoned [1] 3:22 abey [1] 72:3 abeyance [1] 72:3 ability [9] 5:18 16:5 29:17 32:10 33:6,14 49:19 54:24 83:21 able [8] 45:16 50:6 55:10 56:10 61:24 85:6 89:16 92: 2 above-entitled [1] 1:14 Absolutely [3] 18:17 28:7 75:6 abuse [1] 40:19 abused [1] 63:23 accept [1] 77:12 accepted [3] 17:24 25:14 30:6 accomplished [1] 35:17 account [3] 45:12 62:10 77:23 achieves [1] 88:8 acknowledged [1] 91:15 acknowledges [1] 5:12 acquiesce [11] 22:8 27:2,9, 18 36:5 49:3 56:7 59:23 83:1,21,21

Official - Subject to Final Review

<p>billion [4] 4:16 5:14 6:2 55:23</p> <p>billions [3] 8:13 57:18 58:5</p> <p>bit [7] 42:3,18 61:18 63:19 73:23 87:12,12</p> <p>blocks [1] 82:10</p> <p>blueprint [1] 4:22</p> <p>board [1] 67:1</p> <p>boils [1] 90:10</p> <p>books [4] 68:22 70:14 89:14 93:12</p> <p>border [2] 57:4,11</p> <p>borders [1] 55:19</p> <p>bore [1] 98:9</p> <p>both [8] 41:4 42:24 55:6 81:13 90:21 94:4 95:20 97:6</p> <p>bought [1] 47:22</p> <p>bound [1] 93:25</p> <p>box [2] 15:9,12</p> <p>branch [1] 45:15</p> <p>BREYER [28] 14:4 15:13 16:8,17,22 26:20 27:23 28:2,8,11,24 29:3,12,20,23 30:6,8,11,14,18,22 35:5 55:14 56:24 58:19,24 71:1 97:21</p> <p>BRIAN [3] 1:21 2:6 39:16</p> <p>brief [7] 5:12 42:21 69:5 83:14 84:6 85:5 95:14</p> <p>briefcase [1] 67:20</p> <p>briefed [3] 43:19 44:8,15</p> <p>briefing [3] 30:25 31:1 52:12</p> <p>bring [12] 19:1,7 20:13 22:11 61:20 74:1,4,8,10,23 75:4,13</p> <p>BRNOVICH [95] 1:19 2:3,12 3:6,7,9 5:10,23 6:20 7:12 8:10,15,19 9:1,6,9,15,21,25 10:6,12,16,20 11:1,5,8,12,16,24 12:3,9,16,25 13:3,13 14:2 15:13 16:22 17:13,23 18:4,7,17 19:12 20:4,10,15 21:16 22:2,18 23:10 24:2,18 25:8,13,21 26:3,7,11,17 27:22,24 28:6,9,19 29:2,9,14,21 30:4,9,13,16,21,24 31:7,10,13,20,25 32:16 33:1,17,25 34:13 35:23 36:8 37:6,9,12 38:3 39:3,12 99:1,3</p> <p>Brnovich's [4] 65:19 66:9 67:19 69:18</p> <p>broad [1] 86:17</p> <p>broadly [2] 19:25 63:19</p> <p>brought [1] 72:13</p> <p>bunch [2] 47:22 68:17</p> <p>burden [1] 67:1</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>CALIFORNIA [11] 1:7,25 14:8 15:3,21 16:1 25:4 36:22 64:23 87:16 96:1</p> <p>California's [2] 96:17 97:1</p> <p>call [3] 40:24 68:19 69:5</p>	<p>came [3] 1:14 42:25 72:24</p> <p>Candidly [2] 43:3 74:11</p> <p>capped [1] 3:13</p> <p>Care [1] 87:18</p> <p>carefully [2] 15:9,11</p> <p>Cascade [1] 34:17</p> <p>Case [107] 3:4 4:8,17,21 5:9,20 6:12,13,18 7:14,16 14:16,17 17:2 18:16 24:7,16 25:10 29:16,17 30:2,3,5,6,7 31:9 34:18 35:20 39:6 43:19 44:8 45:3 47:5,6,13,14 49:7,15 50:8 51:5,17 52:18 54:1 55:5,8 56:13,22 57:21 58:9,22 59:4,5,8,12,13,16,17 61:9 62:12,12,16,21,25 63:3,9,20 64:15 67:4 68:6 69:1,23 70:16 71:13,17 72:8,9,12 73:8 76:10,14 77:17 80:8 81:14 84:24 85:25 86:22 87:5,8 88:17,23 89:2 90:18 91:10 92:15 94:14,15 95:6,12 96:5,7,14,22 97:17 99:21,24 100:5,6</p> <p>cases [23] 5:16 6:17 11:9,12 14:23 17:1 42:14,24 43:4,14 51:23 55:6 60:16,18 63:16 64:21 69:5,7,24 71:23 85:14 86:18 87:17</p> <p>casts [1] 99:16</p> <p>category [4] 58:2 60:17,17,18</p> <p>cause [5] 40:1 61:11 75:24 94:24 95:4</p> <p>central [1] 86:24</p> <p>cert [3] 39:1,10 72:25</p> <p>certain [1] 10:24</p> <p>certainly [5] 30:1 81:21 89:18 93:8 98:10</p> <p>certiorari [5] 3:21 6:25 17:24 72:14,22</p> <p>certitude [1] 38:8</p> <p>chain [1] 89:20</p> <p>challenge [8] 5:8 10:25 13:5 23:22 54:25 61:20,23 89:15</p> <p>challengers [2] 3:18,23</p> <p>challenging [5] 13:6 22:12 75:16 81:9 94:23</p> <p>chance [1] 27:14</p> <p>change [13] 6:14,15 17:19 21:6 27:5,16 33:13 39:8 48:1,2 55:17 66:23 68:25</p> <p>changed [4] 6:23 7:21 17:20 67:5</p> <p>changes [2] 6:16 72:23</p> <p>changing [1] 48:25</p> <p>chaos [1] 21:20</p> <p>characterization [1] 67:3</p> <p>characterized [1] 67:25</p> <p>charge [10] 3:13 4:23 18:14 32:9 39:20 41:14 46:21 53:21 58:3 87:3</p>	<p>CHIEF [62] 3:3,9 7:25 12:21 13:1,3,4 18:11 21:21,25 22:4,18 31:8,10,11 35:2,9 38:17,20 39:13,18 51:20 52:1,9,11,23 53:2,9,17,24 54:16 65:7,16 66:3,6,21 67:3,13,23 68:2,8,11 69:10 70:24 71:19 73:22 75:7 76:10 81:11 82:7 83:9 86:7,12 90:17 91:8,18,21 94:4 97:18 98:19 99:3 100:3</p> <p>choice [4] 41:1 70:21 99:19,19</p> <p>choose [1] 73:17</p> <p>chooses [1] 59:22</p> <p>circuit [88] 4:7,9 7:1,2 9:13 11:4,7,9,13,17,17 12:8,11,15,17 13:5,16,20 14:10,17 15:6 16:6,7 17:2 23:19 24:4,11,16,16,21 25:2,7,9,18,20,23 26:5,15,16 28:17,25 30:1,2,7,15,20 31:6,19 44:16 49:8 52:5 54:25 55:5,8 58:22 59:1,3,5,8,13,17 61:8 63:22 64:21 65:10,12,14 86:23,25 87:5 88:6,11 90:19 91:14,16 92:1,6,12 94:19 95:11,15,25 96:8,18 97:10,25 98:8 99:12</p> <p>Circuit's [12] 3:11 5:9 8:7 26:6 45:6 52:22 54:22 65:3 90:1 93:11,25 96:2</p> <p>circuits [3] 3:18 12:11 13:19</p> <p>circumstance [3] 83:18 85:10 89:1</p> <p>circumstances [12] 5:3 41:22 42:23 52:18 54:7 73:20 78:25 79:4 80:11 86:21 89:6 90:16</p> <p>circumvent [2] 21:1 69:14</p> <p>circumvented [1] 74:21</p> <p>circumventing [3] 67:22 68:1,20</p> <p>circumvention [6] 32:24 46:18 74:5,8,17 94:6</p> <p>cite [1] 68:16</p> <p>CITY [2] 1:6 61:9</p> <p>Civil [1] 43:21</p> <p>claims [1] 92:17</p> <p>clear [6] 5:2 49:15,21 70:17 72:19 83:14</p> <p>cleared [1] 4:13</p> <p>clearly [1] 99:15</p> <p>collectively [1] 4:16</p> <p>colloquy [2] 73:22 81:15</p> <p>collusive [1] 66:22</p> <p>Columbia [3] 22:13,14 23:23</p> <p>come [25] 15:6 16:13 23:4 33:14 36:10 43:4,5 46:13 47:16,18,24 48:22 49:1 57:3,7 58:9 59:8 63:2 72:21 76:18 80:13 81:7 84:5 85:5,6</p>	<p>comes [2] 10:5 82:18</p> <p>comfort [1] 51:11</p> <p>coming [4] 57:7,8,8 76:11</p> <p>comma [1] 4:25</p> <p>comment [23] 4:25,25 5:18,21 7:7 27:6,16 32:3,11 33:6 35:17 47:21 60:1,3,10,24 61:1,12 68:15,23 75:22,25 82:1</p> <p>commented [1] 6:4</p> <p>commenting [2] 7:7 32:4</p> <p>common [1] 57:13</p> <p>compelled [1] 61:13</p> <p>competing [1] 78:19</p> <p>complain [1] 66:11</p> <p>complete [1] 12:19</p> <p>completely [3] 19:10 44:22 56:4</p> <p>complex [1] 71:22</p> <p>complicated [2] 32:7 41:15</p> <p>comply [1] 72:4</p> <p>concede [1] 95:14</p> <p>concern [9] 20:16 21:17 22:24 48:24 50:2 51:18 80:20 89:25 95:3</p> <p>concerned [2] 8:6 94:12</p> <p>concerns [8] 80:2,16 81:12,13 82:8 95:1,7,10</p> <p>concluding [1] 91:5</p> <p>conclusion [1] 97:7</p> <p>conduct [3] 40:24 94:13 95:8</p> <p>confer [1] 39:21</p> <p>confined [1] 15:25</p> <p>confronted [1] 67:8</p> <p>confused [2] 24:10 58:6</p> <p>congratulate [1] 45:14</p> <p>Congress [2] 40:25 78:6</p> <p>Congress's [1] 70:21</p> <p>consequence [3] 40:22 58:18 65:14</p> <p>consequences [4] 39:24 52:21 69:22 88:22</p> <p>consider [1] 34:20</p> <p>consideration [1] 77:22</p> <p>considerations [3] 44:7 76:19 78:20</p> <p>considered [2] 33:7 77:25</p> <p>considering [1] 93:24</p> <p>consistent [1] 49:13</p> <p>consistently [1] 71:8</p> <p>contest [1] 76:12</p> <p>context [1] 39:4</p> <p>continue [3] 80:18 84:23,24</p> <p>continued [5] 17:25 43:14 83:4 86:1,5</p> <p>contraceptive [1] 71:16</p> <p>controlled [1] 93:25</p> <p>controlling [1] 45:1</p> <p>controversial [1] 69:1</p> <p>controversy [3] 50:8 69:8</p>	<p>80:11</p> <p>convey [1] 78:5</p> <p>Cook [1] 57:21</p> <p>coordinated [1] 3:23</p> <p>core [2] 95:3,3</p> <p>correct [37] 7:13,13 8:5,9,18,19,25 9:5,7,14,24,25 10:3,5,6 11:1,4 12:15 31:21 50:16 55:2,12 68:5,13 72:5,6 76:7 81:19 82:3 92:22 93:3,4,13 97:25 98:1,5,17</p> <p>correctly [1] 67:25</p> <p>costs [2] 4:19 19:24</p> <p>couldn't [3] 7:15 20:13 98:16</p> <p>Counsel [16] 7:11,24 8:14 12:2,21 23:6 24:6 35:3 39:14 65:17 71:21 86:8 95:23 97:19 98:22 100:4</p> <p>countermanding [1] 70:21</p> <p>country [1] 15:16</p> <p>counts [1] 18:23</p> <p>COUNTY [2] 1:6 57:21</p> <p>couple [4] 57:1 62:8 69:22 75:9</p> <p>course [18] 21:4 27:1,22 33:13 42:19 68:6 76:12 77:12 78:9,22 79:6,25 82:8 87:16 90:23 91:23 93:24 96:6</p> <p>COURT [88] 1:1,15 3:10,20,24 4:8 6:24 7:5,16,17 10:11 12:24 13:7,8,9,10,16 14:24 15:19 16:3 17:7,24 18:15 20:12,21 21:12 22:7,14,14 25:13 27:1,2,11,11 30:6 31:14,15,17 34:14,20 35:13,14 37:2 38:2 39:19 40:19 41:4 43:25 44:3,10 45:5 47:5,14,15 49:7,9,14,21 50:5 53:5 56:11 59:21 61:7,13 70:17 71:9,10,11 72:13,22 73:2 75:5,24 78:16,24 83:24 85:25 86:13 88:10 90:12 91:3 93:24 95:7,19 97:4,16 98:7 99:11</p> <p>Court's [6] 42:1 67:10 72:4 77:8 87:10 97:7</p> <p>courts [31] 3:25 7:2,3 14:8 17:3 21:18 22:3,19 24:4 34:9 38:13 41:5 43:22 44:3,11,24 45:1 49:12,16,22 50:12 56:3,6 70:18 71:4,24 78:3,16 79:7 87:7 88:3</p> <p>courts' [1] 80:4</p> <p>coverage [1] 71:17</p> <p>create [3] 21:19 37:2 80:16</p> <p>creates [1] 16:5</p> <p>criminal [1] 7:14</p> <p>crisis [1] 41:19</p> <p>criticisms [1] 40:23</p> <p>curious [1] 94:3</p> <p>currently [1] 97:1</p>
--	---	---	--	---

Official - Subject to Final Review

<p>cuts [2] 45:2,3</p> <hr/> <p style="text-align: center;">D</p> <p>D.C. [6] 1:11,22 10:11 13:8, 8 61:7</p> <p>DACA [1] 18:16</p> <p>dangerous [1] 99:24</p> <p>DAPA [1] 17:2</p> <p>date [1] 14:12</p> <p>day [1] 12:3</p> <p>Days [5] 4:5,5 10:25 91:15, 19</p> <p>dead [1] 19:10</p> <p>deal [3] 67:22 81:23 82:2</p> <p>debate [1] 50:15</p> <p>decide [7] 21:5 45:7 49:20 59:12,16 77:5 99:17</p> <p>decided [10] 41:13,24 43:1, 6 67:6 72:3,4,15 78:6 86:1</p> <p>decides [6] 33:13 41:7 69: 6 76:24 82:21 84:13</p> <p>deciding [2] 68:17 77:23</p> <p>decision [57] 4:18 7:5,19 8: 18,21 12:24 13:5,19 19:14 20:17,25 23:16 27:1,3,9 28:21,23 35:15 37:2 41:2, 11,11,21 43:7 46:25 56:3,6 60:20 61:13 63:12,14,15 65:4,14 66:13 67:15 69:23 72:17,25 73:1,3 76:25 77: 1,3 78:24 80:8 84:15,21 90:1,3,4,8,12 93:2,11,20 94:1</p> <p>decision's [1] 23:1</p> <p>decision-making [1] 78: 18</p> <p>decisions [19] 21:19 38:2 41:3 49:3,21 54:3 57:15 61:7,20,25 62:7 68:17,18 70:22 78:7 83:2,16 85:2 89:14</p> <p>decline [2] 70:12 83:1</p> <p>declines [1] 6:18</p> <p>declining [2] 40:20 84:25</p> <p>defend [23] 3:12 4:8 7:15 17:10,16,25 18:9 21:5 23: 4 29:18 34:5 36:12,13,16, 18 38:6,15 47:16,18 56:16, 16 74:18 87:6</p> <p>defending [1] 36:19</p> <p>defense [1] 3:22</p> <p>denied [5] 4:9 31:17 88:10 91:4 95:20</p> <p>deny [3] 40:1 57:9 83:25</p> <p>denying [1] 99:13</p> <p>departing [1] 34:11</p> <p>Department [12] 1:22 3:16 5:11,24 6:22 13:23 41:1 45:15 57:6 70:23 72:1 99: 23</p> <p>Deputy [2] 1:21,24</p> <p>designed [1] 88:21</p> <p>detail [2] 87:12,23</p> <p>determine [1] 99:19</p>	<p>development [1] 64:1</p> <p>devised [1] 45:16</p> <p>DHS [10] 40:1 41:13 46:19 67:6,12,12 68:6 71:13 72: 15,17</p> <p>Diego [1] 1:24</p> <p>different [36] 3:18 6:12,17 13:24 14:7 21:11,18,19 37: 19 40:25 55:19 56:2,14 59: 14 61:15 68:12 69:3,7,11 70:6 72:10 73:6,14,20 77: 17 78:10 80:13 82:1 85:19 87:5,18 90:18,21,22 93:19 97:12</p> <p>differently [1] 69:2</p> <p>differs [1] 72:8</p> <p>difficult [3] 37:7,13 44:6</p> <p>direction [1] 45:2</p> <p>directly [1] 70:2</p> <p>disaggregate [1] 57:1</p> <p>disagree [9] 41:20 67:3 75: 3,3 77:2,11 79:6,13 99:12</p> <p>disagreeing [2] 42:4,5</p> <p>disagreement [5] 41:23 66:4 67:24 90:11 93:20</p> <p>disagrees [1] 77:13</p> <p>discovery [1] 41:16</p> <p>discretion [2] 40:20 63:23</p> <p>discussed [2] 91:24 94:22</p> <p>dismiss [2] 41:21 43:6</p> <p>dismissal [1] 25:5</p> <p>dismissed [6] 3:24 7:1 28: 20 64:16,18 91:16</p> <p>dismissing [2] 21:8 23:14</p> <p>dispense [1] 66:13</p> <p>dispute [1] 96:13</p> <p>disregard [1] 3:15</p> <p>disrupting [1] 70:20</p> <p>disruptive [1] 83:7</p> <p>dissent [1] 57:21</p> <p>dissolved [1] 64:15</p> <p>distillation [1] 44:12</p> <p>distinct [2] 83:23 84:13</p> <p>district [47] 4:7 7:4,5 13:7, 9,10,21 14:8 15:3 19:14 20:11,12,25 22:13,13 23: 23 25:25 28:22 29:11 31: 17,18 37:1 49:9,12,16,20, 22 50:5,12,18 54:18 63:13 64:22,25 65:4 70:16,18 71: 4,24 72:4 75:24 79:7 80:4 91:3 97:4,7,15</p> <p>docket [2] 45:1,18</p> <p>doctrine [2] 88:16,21</p> <p>doing [7] 21:10 35:21,22 42:3 50:12 61:12 90:5</p> <p>DOJ [1] 68:17</p> <p>dollars [7] 4:16 5:14 6:3 8: 13 55:24 57:18 58:5</p> <p>done [13] 17:15,21,24 25: 18 37:23 45:22 52:14,15, 17 66:15 67:10 69:20 85: 13</p> <p>doubt [2] 99:8,16</p>	<p>down [4] 27:24 54:10 80:5 90:10</p> <p>downstream [2] 32:12 39: 23</p> <p>drafted [1] 39:25</p> <p>driven [1] 32:21</p> <p>dropped [2] 6:24 34:3</p> <p>dropping [1] 58:7</p> <p>during [2] 8:11 40:6</p> <hr/> <p style="text-align: center;">E</p> <p>each [2] 68:19 72:7</p> <p>earlier [3] 72:12 84:11 91: 24</p> <p>ease [1] 67:15</p> <p>easily [1] 4:13</p> <p>Eastern [1] 15:3</p> <p>economic [3] 32:13 34:18 39:23</p> <p>effect [15] 40:7,13,17 45:17 47:23 56:25 57:11,12,17 65:3 66:19 68:21 70:13,14 72:20</p> <p>effective [1] 37:17</p> <p>effectively [1] 61:12</p> <p>effects [7] 32:13 41:17,18 57:20 58:7 63:1,9</p> <p>effectuate [1] 17:22</p> <p>effort [1] 3:14</p> <p>either [6] 24:11 35:22 43: 11 61:3 63:5 74:15</p> <p>EI [1] 34:18</p> <p>elsewhere [1] 93:2</p> <p>EME [1] 61:9</p> <p>emphasize [1] 99:10</p> <p>emphasized [1] 41:4</p> <p>en [5] 24:20,25 27:11,12 56: 10</p> <p>enacted [2] 4:23 66:24</p> <p>encourage [1] 78:3</p> <p>encumbered [1] 90:7</p> <p>end [1] 42:14</p> <p>end-around [1] 100:1</p> <p>endeavor [1] 97:5</p> <p>ends [1] 19:16</p> <p>enforce [1] 17:8</p> <p>enforcement [2] 8:8,24</p> <p>enforcing [1] 9:11</p> <p>engage [1] 72:18</p> <p>engaged [1] 46:19</p> <p>enough [4] 15:11 62:22 63: 7 90:13</p> <p>ensure [3] 4:21 5:4,4</p> <p>ensuring [1] 5:17</p> <p>enter [4] 49:12,17 54:24 77: 5</p> <p>entered [5] 20:13 46:4 49: 10 72:15 76:1</p> <p>entire [1] 24:21</p> <p>entirely [5] 32:22 33:1,9 43: 20 68:11</p> <p>entirety [1] 46:16</p> <p>entitled [6] 17:18 53:5 57: 24,25 85:18,20</p>	<p>entitlement [2] 58:9 66:1</p> <p>EPA [1] 34:15</p> <p>equitable [5] 76:19 77:21, 25 78:2 93:9</p> <p>equity [6] 46:9 49:13 64:12 92:19 93:5,14</p> <p>erred [2] 50:19 99:13</p> <p>erroneous [1] 13:11</p> <p>error [2] 4:11,20</p> <p>especially [3] 22:21 38:8 77:8</p> <p>ESQ [4] 2:3,6,9,12</p> <p>essential [1] 48:5</p> <p>essentially [6] 19:17 23:2, 4 37:2,25 99:25</p> <p>ET [2] 1:3,7</p> <p>evading [1] 4:22</p> <p>evasion [7] 18:24,25 19:2, 7,8 47:20 95:2</p> <p>even [19] 5:11,25 6:8 33:10 34:6,17,22 40:13 47:1 50: 11 58:8 60:3 62:9 76:4 81: 4 82:15 89:2 92:2 95:7</p> <p>event [1] 63:11</p> <p>Everybody [3] 14:4 15:8 48:16</p> <p>everyone [2] 49:18 70:10</p> <p>everything [4] 21:8 45:12 52:15,17</p> <p>everything's [1] 52:14</p> <p>exact [1] 31:6</p> <p>exactly [4] 21:13 50:15 51: 1 84:24</p> <p>example [4] 18:14 19:19 51:21 98:8</p> <p>examples [7] 42:22 43:2 61:6 84:4,6,7 85:4</p> <p>exceeded [1] 86:23</p> <p>except [1] 21:8</p> <p>exception [2] 94:25 95:4</p> <p>exclusively [1] 87:20</p> <p>executive [1] 45:15</p> <p>exercise [2] 45:6 52:13</p> <p>exhaustive [2] 60:15 85: 13</p> <p>exist [1] 91:2</p> <p>existence [1] 75:23</p> <p>existing [1] 88:22</p> <p>exists [1] 95:16</p> <p>expect [1] 18:23</p> <p>explain [1] 5:7</p> <p>explained [3] 57:16 84:7 88:21</p> <p>express [1] 32:5</p> <p>extension [1] 88:24</p> <p>extent [2] 51:12 59:19</p> <p>extraordinary [1] 72:15</p> <hr/> <p style="text-align: center;">F</p> <p>face [1] 43:14</p> <p>faced [1] 41:22</p> <p>fact [12] 7:12 10:14 42:12 44:5 47:4 50:10 54:22 66: 11,17 70:3 75:1,25</p>	<p>factors [1] 93:8</p> <p>facts [1] 72:23</p> <p>fair [1] 63:6</p> <p>faith [1] 7:16</p> <p>fall [1] 89:8</p> <p>familiar [1] 50:2</p> <p>far [4] 8:6,23 51:15 69:17</p> <p>favor [4] 9:14 46:9 67:16 83:22</p> <p>favors [1] 11:20</p> <p>feature [1] 71:12</p> <p>February [1] 1:12</p> <p>Federal [33] 1:23 2:7 17:10, 11,14 22:22,25 23:25 28: 19 29:18 33:12,15 34:2,11, 25 36:10 37:17,20,21,22 38:1,5,16 39:5,17 43:20 88:20 90:6 93:22 94:7,24 95:2,8</p> <p>feel [1] 90:7</p> <p>felt [1] 7:15</p> <p>fifth [2] 6:15 17:2</p> <p>fight [1] 11:22</p> <p>fighting [2] 3:17 10:13</p> <p>file [1] 10:10</p> <p>filed [4] 23:22 33:19 72:2, 25</p> <p>final [9] 4:1 6:11 28:22 40: 18 75:1 87:4 91:12 92:8 97:11</p> <p>finally [1] 76:1</p> <p>financial [3] 19:24 32:2 33: 3</p> <p>finds [1] 59:21</p> <p>finger [1] 50:1</p> <p>First [7] 8:4 15:4 19:11 31: 15 46:15 60:17 62:9</p> <p>fiscally [1] 5:13</p> <p>fit [1] 44:6</p> <p>five [3] 40:8 55:16,24</p> <p>Fixing [1] 4:20</p> <p>flatly [1] 55:10</p> <p>FLETCHER [89] 1:21 2:6 39:15,16,18 42:2,19 43:18 44:9 46:11 47:12 48:21 49: 25 50:9,14,21,23 51:6,9,24 52:7,16,25 53:4,7,13,24 54: 15,19 55:2,12 56:24 58:11, 14,21 59:2 60:14 61:5 62: 2,8,17,23 63:6 64:10,17,20, 25 65:13,23 66:4,16 67:2, 23 68:5,10,13 69:21 71:7, 11 72:7 73:6,11,15,21 74: 10,23 75:15,19,21 76:7,23 77:11 78:2,10 79:3,10,16, 20,24 81:3,6,19 82:3,12,20 84:3,10 85:11 89:17</p> <p>flip [2] 82:7,8</p> <p>focus [1] 43:20</p> <p>focused [2] 47:4 52:17</p> <p>focusing [1] 42:11</p> <p>follow [5] 5:5 20:1 33:9 54: 16 75:10</p> <p>following [1] 97:23</p>
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Official - Subject to Final Review

<p>food ^[1] 55:20 fool ^[1] 99:7 Footnote ^[2] 68:16 83:13 fora ^[1] 95:5 force ^[2] 65:2 83:4 forces ^[1] 84:23 forcing ^[1] 80:17 forego ^[1] 61:11 forest ^[2] 45:11 72:11 forgo ^[1] 75:24 former ^[1] 14:22 forms ^[1] 73:6 forth ^[1] 55:25 forward ^[1] 5:6 found ^[5] 60:18 61:3,5 81:18,21 four ^[4] 3:18 4:12 7:1 24:3 Fourth ^[3] 11:16 16:7 33:21 FRANCISCO ^[6] 1:6 3:5 16:11,13,14,15 Frankly ^[1] 7:9 free ^[1] 46:20 friend ^[2] 51:21 88:20 front ^[1] 56:22 fully ^[1] 13:17 functionally ^[1] 95:13 fundamentally ^[1] 29:16 further ^[27] 25:19 38:1,18 41:2,8 43:1 45:3 46:25 49:20 63:12 65:17 68:18,23 69:6 70:12,22 71:1 73:18 76:25 77:7 78:8 83:1 84:14,15 85:1 97:21 98:20 furthermore ^[2] 5:15 16:1 future ^[14] 4:22 5:4,16,18 19:18 33:5 36:20,23 37:3,9,13 40:4 90:9 99:25</p>	<p>95:23 96:15,25 97:8,23 98:20 gosh ^[1] 47:25 got ^[4] 6:15 15:1 16:8 22:5 gotten ^[2] 72:14,14 governing ^[1] 86:16 government ^[78] 17:11,14 18:22 19:22 20:23 28:14,20,20 29:14,18 33:13 34:3,12,25 35:14,16 36:4,10 37:18,21,22 38:1,6,16 39:6 41:5,24 42:16,22 43:1,6,7 47:1,8,17,22 49:2,18,19 56:7 59:22 60:7 61:10,24 69:6 70:11 71:3 72:13,21 73:3,17 74:18,21 75:11 76:14,24 77:7,12 78:7 80:12,18 81:24 82:20,25 83:15,17,20,24 84:13,15 85:17,25 88:20 89:16 90:6 93:22 94:7,13 government's ^[18] 33:16 37:20 40:24 41:21 42:6 43:16 47:13 63:12 75:13 76:5,20 77:19 78:18 84:16 85:8 94:24 95:2,8 governments ^[1] 21:5 grant ^[3] 39:10 72:22 93:15 granted ^[7] 3:20,24 6:25 39:1 54:9 72:14 73:1 green ^[1] 94:12 green-lighting ^[1] 48:8 ground ^[7] 56:2,2,9 57:13 58:25 81:2 91:23 grounds ^[5] 57:9 77:2 81:4 91:4 98:2 guess ^[11] 22:12 59:4 61:2,4 67:2 68:1 73:23 76:8 78:22 84:11 96:9 guide ^[1] 44:14</p>	<p>HELEN ^[3] 1:24 2:9 86:10 help ^[1] 99:5 helpful ^[1] 44:13 hesitate ^[1] 78:3 high ^[1] 77:6 highlighted ^[2] 49:6 51:15 highlighting ^[1] 55:3 highlights ^[1] 58:15 historical ^[5] 59:19 60:13 83:12,14 84:2 historically ^[1] 17:1 history ^[1] 50:11 hmm ^[1] 51:5 hold ^[2] 64:13 81:23 home ^[2] 48:15 67:21 Homer ^[1] 61:9 HONG ^[27] 1:24 2:9 86:9,10,12 87:24 88:14 89:10,24 90:20 91:11,20,22 92:23 93:4,7,16 94:2,16 96:4,20 97:3,11 98:1,6,13,17 Honor ^[16] 5:10,23 26:8 50:9 71:8 87:24 88:14 90:20 91:11,20 92:24 93:4 94:16 96:20 98:1,6 Honor's ^[1] 96:9 Honors ^[1] 94:21 hood ^[1] 78:17 hope ^[2] 22:2 46:13 hopefully ^[1] 48:22 however ^[1] 10:7 hurt ^[1] 93:1 hypothesizing ^[1] 34:2 hypothetically ^[1] 95:25</p>	<p>19:23 31:22 32:1,5 33:4 36:21 38:24,25 57:1,19 67:12 72:10 81:12,13 82:7 99:9 importantly ^[1] 33:21 impose ^[1] 86:20 impossible ^[1] 49:2 improper ^[1] 98:15 improperly ^[1] 10:14 inability ^[1] 32:22 include ^[1] 62:13 included ^[1] 93:8 including ^[4] 13:19 17:2 61:8 76:25 incoming ^[3] 45:21 66:23 67:17 inconsistent ^[1] 21:18 indeed ^[1] 99:17 independence ^[1] 77:14 indirect ^[2] 39:22 40:13 inequitable ^[1] 46:7 inform ^[1] 98:3 injunction ^[40] 3:19 4:2 5:9 8:5,7,8,17,17,22 9:4,13,23 10:2 14:19 24:17,24 25:1,2,3,7 50:20,25 52:4,19 54:23 55:1 64:15 65:1,10 71:24 76:15 80:9 90:2 92:21,23 93:8 96:2,5,7 97:4 injunction's ^[1] 8:23 injunctions ^[10] 9:2 16:24 40:15 52:6 53:15 54:5 71:5,25 96:21 98:15 injury ^[1] 92:17 input ^[1] 5:20 Instead ^[1] 39:22 integrity ^[1] 33:4 intended ^[3] 41:17 57:20 72:20 intention ^[1] 24:19 interdeem ^[1] 55:11 interest ^[27] 4:15 5:17 6:8,10,10 8:3 12:12 19:23 32:19,20 33:19,20 34:16 36:19 38:10,10 39:23 40:12 43:16,17 58:17 63:25 64:2 84:16 86:2 88:1 93:14 interested ^[2] 28:14 59:3 interesting ^[2] 26:19,21 interests ^[14] 4:18 7:18,23 32:2,6 33:7,23 34:17,19,23 41:25 86:19 87:2 90:25 interim ^[1] 54:12 interrupt ^[1] 36:2 intervene ^[55] 3:12 4:7 5:2 6:7 12:17 13:15,18 16:4,6,6 19:9,24 23:19 24:14 25:9,22,24 27:10 28:25 29:8,11,17 30:5 31:9,17 32:18 34:25 36:25 42:7 52:2 55:11 56:10 61:19 62:6 63:22 65:25 66:1,10 80:7 83:3 84:1 85:10,18,21 86:18,22 88:4 89:1 90:14 91:10,14</p>	<p>92:3,14 99:13,20 intervened ^[3] 24:15 87:17 91:6 intervening ^[7] 7:22 51:23,25 56:2 80:25 90:23 96:12 intervention ^[53] 4:9,12,14 34:10,21 36:11 39:9 40:14 42:13,23,25 43:8,10,11,24,25 44:1,13,18,23 45:8 46:1,6,8,10 49:1 54:17 62:20 63:21 64:5 69:4,7 70:20 76:20 77:24,24 78:12,13,15 79:1 83:18 84:10 86:16 87:13,15 89:22 90:24 92:7 93:15 94:17 95:20,22 96:11 interventions ^[1] 42:17 intrusive ^[1] 41:16 invalidated ^[1] 41:12 invalidating ^[1] 36:5 invalidation ^[1] 72:5 involved ^[3] 33:11 87:19,21 involves ^[1] 47:2 ironically ^[1] 5:25 isn't ^[5] 32:21 74:3,21 84:16 90:2 isolate ^[1] 38:23 issuance ^[1] 95:9 issue ^[24] 6:5 12:7,13 25:4 31:6 35:18 36:23 39:2 41:13 42:11 45:18,23 47:12,20 49:23 51:4,21 55:8 56:19 57:22 67:7 71:5,22 97:16 issued ^[8] 50:19 52:4 59:20 71:24 91:13,17 96:5,22 issues ^[7] 31:1,4,5 34:6 59:14 68:14 88:15 itself ^[3] 47:22 65:18 88:19</p>
<p style="text-align: center;">G</p> <p>gain ^[1] 56:18 Gas ^[1] 34:18 gave ^[1] 70:9 GEN ^[5] 1:19 2:3,12 3:7 99:1 General ^[16] 1:19,21,24 3:6 14:22 17:12,13 37:16 41:6,10 50:16 56:13 65:19 66:9 73:25 98:23 generally ^[3] 57:25 64:1 87:14 generations ^[2] 72:6 73:5 geographically ^[3] 96:6,22,24 getting ^[3] 54:8 62:12,16 give ^[6] 51:11 66:8 68:15 87:12,22 90:13 given ^[1] 54:1 gives ^[2] 16:18 66:18 God ^[1] 56:19 Gorsuch ^[28] 35:10 49:6,25 50:10,17,22 71:14 75:8,9,18,20 76:4,8,23 77:10 78:9,21 79:8,12,18,21 80:23</p>	<p style="text-align: center;">H</p> <p>half ^[1] 6:2 hamstring ^[1] 82:6 hands ^[2] 20:8 70:22 happen ^[5] 10:3 28:18 48:16 79:11 85:16 happened ^[12] 26:14 29:13,13 31:12 39:9 45:12 72:6 73:5,19 84:11 85:14,15 happening ^[4] 29:25 30:3,14 61:6 happens ^[7] 15:20 59:24 60:6 65:11 72:5 82:15 84:20 hard ^[7] 23:25 53:25 58:16 63:14 68:24 69:13 94:11 harm ^[1] 11:19 hate ^[1] 48:1 head ^[1] 99:6 health ^[1] 41:19 hear ^[3] 3:3 45:24 69:17 heard ^[1] 89:12 hearing ^[1] 99:5</p>	<p style="text-align: center;">I</p> <p>idea ^[3] 16:19 73:16 82:24 identified ^[2] 89:5 93:19 Ill ^[2] 49:14 83:4 illegal ^[1] 11:23 illegally ^[5] 11:20 12:14 53:19,20 57:9 Illinois ^[24] 7:4 13:10,12,21 19:14 20:12 21:1 22:7,14 23:16 25:25 28:22 31:18 50:19 52:4,23,25 53:11 54:18 56:22 63:13 65:5 70:16 91:3 illustrated ^[1] 81:15 imagine ^[1] 32:8 immigrants ^[1] 16:12 immigration ^[3] 15:18 17:4,8 immigration-related ^[1] 17:1 impact ^[2] 8:12 33:3 impacted ^[1] 5:13 impair ^[3] 4:17 86:18 87:1 impaired ^[4] 32:20 33:20 38:10 90:25 impairment ^[1] 88:1 implement ^[1] 45:17 implicitly ^[1] 35:19 important ^[18] 14:3 16:2</p>	<p style="text-align: center;">J</p> <p>job ^[1] 35:1 judge ^[5] 22:21,22,25 23:25 77:4 judge-made ^[3] 44:1,25 45:6 judges ^[2] 77:13,22 judgment ^[33] 7:3 13:10 23:8,9 25:24 26:6 36:5 40:18 43:13 59:23 60:4 62:13 63:1,9 75:23 76:1 80:13 81:16,25 83:2,21 84:21 87:4 88:23 89:25 91:1,11,12 92:9,22,24 95:16 97:17 judgments ^[2] 78:4 89:17 judicial ^[6] 12:24 63:25 66:13 76:12 77:20 83:15 judiciary ^[1] 77:14 jurisdiction ^[4] 8:9 11:3,6,22 jurisdictional ^[1] 8:23 jurisdictions ^[3] 40:16 52:20 53:16</p>	

Official - Subject to Final Review

<p>Justice ^[313] 1:22 3:3,9,16 5:7,21,24 6:11,20,22 7:11, 24,25 8:2,10,14,16,20 9:1, 3,8,10,15,19,22 10:1,8,12, 13,17,18,21 11:2,6,10,14, 18 12:1,6,13,20,21,25 13:1, 3,4,13,24 14:1,4 15:13 16: 8,17,22 17:12 18:2,5,11,17, 19 19:12 20:3,5,11,15,20 21:16,21,23,25 22:4,18 23: 6,7,10,17,20 24:6,7,9,18, 23 25:8,11,15,21 26:1,4,9, 13,17,18,20 27:23,25 28:2, 8,11,24 29:3,7,10,12,20,23 30:5,8,11,14,18,22 31:4,8, 10,11,16,20,22,25 32:8,21 33:1,8,17,24 34:1,13 35:2, 4,5,6,7,8,9,9,11,12,23 36:1, 4,8 37:5,8,10,11,15 38:3, 17,17,19,20,20,22 39:3,7, 12,13,19 41:1 42:2,20 43:3, 18 44:9 45:9,15 46:11 47: 11 49:6,25 50:10,17,22 51: 3,7,20 52:1,9,10,11,23 53: 2,7,9,17,24,25 54:15,20 55: 2,9,13,14 56:24 57:20 58: 10,12,19,24 59:18 60:22 61:14,18 62:5,15,20 63:4 64:7,11,17,19,24 65:6,7,8, 16 66:3,6,21 67:4,13,24 68: 2,8,11 69:10 70:9,24,25 71: 1,2,3,9,14,19,19,21 72:11 73:4,9,13,21,23 74:13 75:7, 7,9,10,18,20 76:4,8,11,23 77:10 78:9,21 79:8,12,18, 21 80:23,24 81:8,11,22 82: 5,17 83:8,9,9,11 84:9 85:4 86:6,7,12 87:11 88:12 89: 9,11 90:17 91:8,18,21 92: 18,20,25 93:5,13 94:2,4,9 95:23 96:15,25 97:8,18,20, 21,22,23 98:2,12,14,18,19, 19,20,21 99:4,23 100:3</p> <p>Justice's ^[1] 5:11</p> <p>justified ^[2] 74:25 76:2</p> <p>justifies ^[3] 64:5 78:12,13</p> <p>justify ^[5] 40:14 44:18 62: 11,16 79:1</p>	<p>keeping ^[1] 63:23</p> <p>keeps ^[1] 60:7</p> <p>Kentucky ^[1] 56:14</p> <p>key ^[1] 7:20</p> <p>kind ^[7] 16:19 19:4 61:15 76:9 77:16 94:6,13</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>Labor ^[1] 72:1</p> <p>lack ^[1] 71:4</p> <p>laid ^[1] 57:21</p> <p>language ^[1] 50:3</p> <p>last ^[3] 7:12 14:11 71:17</p> <p>late ^[1] 91:6</p> <p>later ^[3] 28:4 48:23 98:4</p> <p>Laughter ^[4] 16:16 28:1 79: 19 81:5</p> <p>law ^[9] 17:10 21:20 29:19 34:5 38:6 56:19 64:1 82: 22 84:17</p> <p>laws ^[1] 17:8</p> <p>lawsuit ^[2] 19:20 94:23</p> <p>lawsuits ^[2] 16:23 24:3</p> <p>leads ^[1] 76:9</p> <p>learned ^[1] 22:20</p> <p>least ^[6] 15:8 17:9 48:20 60:19 79:2 81:18</p> <p>leave ^[1] 16:15</p> <p>led ^[1] 95:8</p> <p>left ^[3] 4:1 7:3 87:6</p> <p>legal ^[12] 4:5 6:21 10:21 11: 19 13:23 70:1 73:17 77:2 86:15 89:10 90:11 93:19</p> <p>legally ^[3] 40:11 58:17 70:5</p> <p>legitimate ^[1] 22:24</p> <p>letter ^[1] 44:4</p> <p>letting ^[1] 49:1</p> <p>level ^[1] 42:8</p> <p>license ^[1] 66:22</p> <p>life ^[1] 92:10</p> <p>lifted ^[4] 25:7,16,17 65:11</p> <p>light ^[2] 24:16 72:24</p> <p>lighting ^[1] 94:12</p> <p>likelihood ^[2] 93:11 94:1</p> <p>likely ^[1] 40:2</p> <p>likes ^[1] 79:22</p> <p>limitations ^[1] 10:23</p> <p>limited ^[4] 62:19 96:6,23, 24</p> <p>limits ^[2] 86:20,23</p> <p>lines ^[1] 20:22</p> <p>linked ^[1] 85:3</p> <p>literally ^[3] 6:23 8:12 23:12</p> <p>litigants ^[1] 50:7</p> <p>litigate ^[2] 88:5 97:15</p> <p>litigated ^[3] 12:8,10,15</p> <p>litigating ^[2] 80:18 84:24</p> <p>litigation ^[19] 16:23 40:24 41:14,24 42:8 43:14 44:7 64:21 67:9 77:19 80:22 82: 22 83:5 84:23 86:1,5 92:5, 11 96:18</p> <p>little ^[12] 14:11 42:3,18 50: 23 57:10,16 63:14,19 73:</p>	<p>23 77:16 87:23 96:16</p> <p>live ^[3] 92:5 96:13 97:6</p> <p>logic ^[1] 89:20</p> <p>long ^[5] 22:20 42:25 52:21 69:12 91:9</p> <p>longer ^[6] 20:18 36:13 40: 21 47:19 76:2 89:16</p> <p>look ^[9] 5:6 10:16 14:20 16: 9 22:5 26:24 55:15 74:17 78:17</p> <p>looked ^[4] 28:12 60:16 61: 3 85:12</p> <p>looking ^[4] 46:16 48:5 69:9 72:11</p> <p>looks ^[1] 34:20</p> <p>Los ^[3] 14:12 15:15 16:10</p> <p>lose ^[5] 23:9,24 46:2 79:17 80:1</p> <p>losing ^[1] 32:10</p> <p>lot ^[11] 16:20,24 36:3 43:4 46:12 63:24 69:8 73:19 80: 1 84:3 85:15</p> <p>lots ^[1] 83:14</p> <p>low ^[1] 54:2</p> <p>lower ^[1] 3:25</p>	<p>mind ^[2] 72:10 85:3</p> <p>minute ^[1] 27:4</p> <p>minutiae ^[1] 45:25</p> <p>mismatch ^[1] 19:4</p> <p>mistaken ^[1] 58:7</p> <p>Mm-hmm ^[1] 29:20</p> <p>modification ^[1] 92:8</p> <p>mom's ^[1] 99:5</p> <p>months ^[1] 48:2</p> <p>moot ^[4] 63:10 80:12 88:23 89:2</p> <p>mooting ^[1] 63:11</p> <p>mootness ^[1] 63:16</p> <p>morning ^[5] 3:4 41:9 51:15 78:6 94:22</p> <p>most ^[2] 33:20 50:11</p> <p>motion ^[10] 31:12,17 86:22, 24 88:7,10 90:24 91:5 92: 14 99:13</p> <p>motions ^[1] 31:13</p> <p>motives ^[1] 67:14</p> <p>mouth ^[1] 99:8</p> <p>move ^[1] 25:24</p> <p>moved ^[8] 6:6 23:18 25:9 29:7,10 31:9 39:9 54:12</p> <p>moving ^[1] 91:10</p> <p>Ms ^[24] 86:9,12 87:24 88:14 89:10,24 90:20 91:11,20, 22 92:23 93:4,7,16 94:2,16 96:4,20 97:3,11 98:1,6,13, 17</p> <p>much ^[6] 29:1 33:14 36:3 82:21 91:9 100:2</p> <p>Munsingwear ^[20] 61:19 62:7,21,24 63:3,7,15 64:3, 8,8,14 80:14 81:1,1 88:13, 14,16,19,25 89:13</p> <p>Munsingweared ^[1] 62:1</p>	<p>next ^[2] 48:17 61:21</p> <p>Ninth ^[47] 3:11 4:9 5:8 9:13 11:3,7,9 12:8,11,15,17 13: 15 14:10 16:6 23:19 24:15, 21 25:1,18,23 26:5,15 30:7 44:16 45:5 52:5 54:22 63: 22 64:21 65:11,13 86:23, 25 88:6,11 90:1 92:6,12 93:10,25 95:11,15 96:2,8, 18 97:10 99:12</p> <p>nobody ^[3] 34:5 79:22 85:6</p> <p>non-parties ^[1] 89:1</p> <p>none ^[1] 99:11</p> <p>nonetheless ^[1] 77:5</p> <p>nor ^[1] 43:22</p> <p>normal ^[1] 42:13</p> <p>normally ^[1] 62:24</p> <p>Northern ^[14] 7:4 13:21 19: 13 20:12,25 25:25 28:22 31:18 50:18 54:17 63:13 64:22 65:4 70:15</p> <p>noted ^[1] 6:1</p> <p>nothing ^[19] 14:14 24:25 25:19 27:18 48:15 60:5 66: 7,15 67:21 69:19,19 81:20 88:6,8 92:15,16 95:11,15 99:15</p> <p>notice ^[20] 7:6 20:4 27:6, 15,15 32:3,11 33:6 35:16 47:21 59:25 60:2,10,24 61: 1,11 68:23 75:22,25 81:25</p> <p>notice-and-comment ^[30] 4:4,24 18:13,24 19:1,7,8 21:1,11 32:23,24 43:15 45: 19 46:18,19 47:25 56:8 59: 20 65:21 66:12,14 67:18 68:3,7,22 69:15 70:14 81: 16 83:6 94:25</p> <p>notice-and-rule ^[1] 4:25</p> <p>noting ^[1] 77:24</p> <p>November ^[1] 91:13</p> <p>number ^[3] 10:24 54:2 92: 4</p>
<hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[22] 14:1 18:19 20: 20 21:16 31:4 33:8,17,24 34:1,13 37:5,10,15 47:11 51:3,7 70:9 73:21 74:13 75:10 94:2 98:19</p> <p>Kagan's ^[1] 23:21</p> <p>Kavanaugh ^[30] 35:11,12, 24 36:1,9 37:8,11 38:18,19 55:13 58:10,12 59:18 60: 22 61:14 62:5,15,20 63:4 80:24 81:8,22 82:5,17 83: 8 88:12 89:9,11 92:20 94: 9</p> <p>keep ^[3] 56:23 58:12 72:10</p>		<hr/> <p style="text-align: center;">M</p> <hr/> <p>made ^[10] 31:14 39:25 40: 25 42:21 43:7 71:12 72:9, 17,25 84:15</p> <p>maneuver ^[1] 6:21</p> <p>maneuvering ^[1] 13:23</p> <p>maneuvers ^[2] 4:6 7:10</p> <p>many ^[6] 12:23 16:20 35:24 52:8 57:23 86:14</p> <p>March ^[4] 11:24 23:12 75: 19 91:14</p> <p>MARK ^[5] 1:19 2:3,12 3:7 99:1</p> <p>Massachusetts ^[1] 34:14</p> <p>matter ^[12] 1:14 4:13 16:4 23:11,18 34:21 36:24 39:2 85:24 88:2 95:21,21</p> <p>matters ^[3] 39:4 87:19,20</p> <p>mean ^[26] 6:13 12:18 19:1, 4 20:7,20 21:13 26:21 29: 15,24 33:10 37:15,18 46:2, 3 47:14,17,21 48:1 54:24 67:4 74:4,6,16 85:5 96:12</p> <p>meaningful ^[1] 92:11</p> <p>meant ^[1] 77:9</p> <p>mechanism ^[2] 21:14 34: 10</p> <p>meet ^[3] 44:18 53:20 85:23</p> <p>merits ^[6] 8:18,21 56:4 90: 3 93:2,24</p> <p>mess ^[1] 56:21</p> <p>met ^[2] 44:20 85:18</p> <p>might ^[14] 14:20 22:24 23: 9 34:7 63:25 65:24 70:6 79:1 82:22,25 84:17 94:17 97:12,12</p> <p>military ^[1] 45:17</p> <p>millions ^[1] 55:18</p>	<hr/> <p style="text-align: center;">N</p> <hr/> <p>narrow ^[3] 79:3,15,16</p> <p>narrowed ^[1] 96:7</p> <p>narrower ^[1] 81:4</p> <p>narrowest ^[5] 78:23 79:14 80:7 81:2,7</p> <p>nationwide ^[19] 4:1 14:19 49:9 50:19 52:4,24 53:1 54:23 60:21 71:5 76:16 87: 20 96:3 97:4,9,13,24 98:4, 15</p> <p>Natural ^[1] 34:18</p> <p>nature ^[2] 15:18 39:5</p> <p>necessary ^[3] 12:16 90:14 93:17</p> <p>negligible ^[1] 40:13</p> <p>net ^[1] 15:24</p> <p>Nevada ^[1] 72:1</p> <p>Never ^[7] 15:4 19:10 26:21 37:16 64:4 73:25 81:14</p> <p>new ^[24] 3:21 5:24 6:16 7: 14 10:4 19:20 41:13 46:21 53:20 60:1,2 61:1 63:2 65: 20 67:7 68:9 71:13 72:18 82:1,6,9,14,18,18</p>	<hr/> <p style="text-align: center;">O</p> <hr/> <p>objected ^[2] 18:8 29:14</p> <p>obliged ^[1] 17:16</p> <p>obscure ^[1] 45:11</p> <p>obstacle ^[1] 63:17</p> <p>occur ^[1] 92:4</p> <p>odd ^[1] 60:23</p> <p>offer ^[1] 84:6</p> <p>offered ^[1] 51:16</p> <p>often ^[8] 6:16 41:7 76:13, 24 77:13 79:7,10 84:14</p> <p>Okay ^[1] 28:8 50:22 51:3 55:25 62:5,15 64:19,24 76: 8 81:8 86:6</p> <p>old ^[3] 46:3 56:4 60:6</p> <p>once ^[8] 13:16,22 15:21 17: 19,24 31:2 64:15 88:23</p> <p>one ^[40] 4:1 6:11 7:3 13:11 15:20 17:4,15 21:8 22:6 29:5 38:22,22 49:5 51:10</p>

Official - Subject to Final Review

<p>52:3,4,7,24,25 53:10,11 54:13 55:16,25 59:5,6,25 65:17 68:9 72:9 78:4 79:15 81:7 88:15 94:5,9,11,12 97:22 98:16</p> <p>ongoing [4] 41:14 43:15 91:25 94:20</p> <p>only [2] 4:3 5:3,4 6:23 7:21 10:2 12:10 13:15 15:2 16:5 19:24 25:23 28:21 32:1 33:3 40:7 55:16 56:21 59:7 66:25 97:13</p> <p>open [2] 81:3 99:7</p> <p>opinion [4] 49:6 61:8 71:14 76:13</p> <p>opportunities [1] 38:15</p> <p>opportunity [3] 10:22 68:15,23</p> <p>oppose [5] 42:23 43:7 83:24 86:3 87:13</p> <p>opposed [4] 7:22 36:11 54:17,24</p> <p>opposing [4] 42:16 83:17 90:23 91:2</p> <p>opposite [1] 36:23</p> <p>opposition [1] 92:14</p> <p>option [2] 60:2,5</p> <p>oral [7] 1:15 2:2,5,8 3:7 39:16 86:10</p> <p>order [6] 21:9 22:15 65:22 76:22 77:3,20</p> <p>ordered [1] 67:6</p> <p>orders [3] 14:8,9 92:24</p> <p>other [30] 3:12 4:6 6:13 7:1,9 8:22 9:4 12:11 13:5,18 17:4 21:7 25:19 46:8 48:9 49:4 51:22 57:9 59:8 62:16 63:16,18 70:4,8 74:14 81:3 84:22 87:21,21 94:14</p> <p>otherwise [3] 9:10 53:11 62:11</p> <p>ought [3] 69:11 78:16 80:6</p> <p>ourselves [1] 86:17</p> <p>out [17] 14:11 15:6,12 19:14 20:25 23:1,16 30:7 34:3 37:19 57:16,21 63:23 81:20 82:9,23 84:18</p> <p>outside [1] 8:6</p> <p>overbroad [1] 51:19</p> <p>overturned [1] 13:20</p> <p>own [3] 5:12 45:1,6</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>packed [1] 46:12</p> <p>PAGE [1] 2:2</p> <p>panel [1] 24:21</p> <p>parcel [2] 43:13 84:21</p> <p>part [16] 19:12 20:16 21:17 29:15 32:18,19 33:2 43:12 52:12 61:21 70:2 80:20 84:4,20 85:8,10</p> <p>participate [4] 32:11,22 42:7 46:20</p> <p>particular [1] 86:21</p>	<p>particulars [1] 72:8</p> <p>parties [12] 43:5 44:15 51:17 52:5 57:14 62:25 63:2,8,24 70:6 84:22 88:22</p> <p>party [4] 7:17 56:14 78:11 99:20</p> <p>Paso [1] 34:18</p> <p>pending [7] 3:25 7:2,14 11:8,12 31:14 99:10</p> <p>people [12] 16:19 40:2 53:19,22 55:16,19,21,24 57:2,6,23 58:6</p> <p>people's [1] 22:9</p> <p>per [1] 4:17</p> <p>percent [1] 40:10</p> <p>perfectly [1] 74:19</p> <p>perhaps [1] 87:19</p> <p>period [1] 55:11</p> <p>permanent [2] 9:17,20</p> <p>permission [1] 83:25</p> <p>permissive [6] 4:14 43:11 78:15 79:1 85:24 95:21</p> <p>permit [2] 24:14 95:11</p> <p>permitted [1] 80:7</p> <p>persuade [1] 75:5</p> <p>petition [1] 3:24</p> <p>Petitioner [9] 16:3 39:21 42:3 45:4 52:20 54:6,13 58:16 87:14</p> <p>Petitioners [24] 1:4,20 2:4,13 3:8 4:11 39:22 40:20 41:20 43:9 46:23 69:4 86:15 87:6 88:3 89:7 91:5 92:2 93:18 95:1,6,13 96:11 99:2</p> <p>Petitioners' [10] 40:16,23 86:22 87:1 88:1,7,9 90:11 92:17 93:10</p> <p>petitions [1] 72:24</p> <p>Phoenix [1] 1:19</p> <p>pick [1] 80:24</p> <p>picks [1] 61:17</p> <p>piecing [1] 61:17</p> <p>place [11] 4:2 7:3 10:2,4 15:4 16:25 19:11 20:19 34:11 45:20 54:4</p> <p>plan [1] 24:19</p> <p>please [5] 3:10 30:18 37:8 39:19 86:13</p> <p>plenary [1] 8:17</p> <p>podium [1] 74:1</p> <p>point [24] 9:17,18 16:9,9 23:21 24:5 26:21 28:15 29:4 33:12 40:3 42:20 44:22 46:14,22 47:6 51:9 58:20,20,21 65:17 73:8 74:8 84:1</p> <p>pointed [1] 42:21</p> <p>policy [4] 40:25 41:6 82:19 84:18</p> <p>political [1] 82:18</p> <p>posit [1] 18:2</p> <p>position [13] 6:17 18:12,20,21 20:14 36:15 37:20 75:14 85:20 96:1,17 97:1 98:</p>	<p>3</p> <p>positions [2] 17:19,20</p> <p>possible [1] 89:3</p> <p>Potentially [1] 98:6</p> <p>power [2] 27:2 71:5</p> <p>practical [9] 40:22 52:21 57:11,17 65:2,14 86:25 88:2 89:4</p> <p>practice [12] 35:15,20,21 42:13 50:4,5 59:19 60:13 76:13 83:12,14 84:2</p> <p>precedent [6] 7:9 45:21 63:2,5,25 99:24</p> <p>precisely [2] 41:6 86:4</p> <p>precision [1] 45:17</p> <p>predict [2] 22:21 23:25</p> <p>predictions [2] 39:24 40:5</p> <p>predictive [1] 23:8</p> <p>preliminary [22] 5:9 8:4,8,21 9:12,16,23 24:24 40:15 52:19 53:15 54:23 64:14 65:1 80:9 90:1 92:21,23 93:7 96:2,4,21</p> <p>premise [2] 67:11 96:10</p> <p>premised [1] 76:21</p> <p>premises [1] 48:23</p> <p>prerogative [2] 70:11 99:17</p> <p>present [3] 48:20 51:4 97:14</p> <p>presented [2] 73:16 79:22</p> <p>presents [2] 59:14 94:10</p> <p>preserve [1] 67:12</p> <p>preserving [1] 40:12</p> <p>President [1] 67:5</p> <p>pressed [1] 46:24</p> <p>pressing [1] 91:22</p> <p>presumably [1] 32:12</p> <p>pretend [1] 60:14</p> <p>pretty [7] 15:9 33:14 56:12,15 67:22 71:7 89:20</p> <p>prevailed [1] 7:19</p> <p>previous [1] 6:4</p> <p>previously [1] 71:4</p> <p>primarily [1] 92:13</p> <p>primary [1] 6:5</p> <p>Principal [1] 1:21</p> <p>principally [1] 44:17</p> <p>principle [1] 54:21</p> <p>principles [4] 44:13 49:13 69:3 70:20</p> <p>prior [7] 3:15 17:17 18:15 50:4,5 71:23 72:2</p> <p>probably [1] 14:6</p> <p>problem [11] 14:18 19:13 48:5,7 49:17,23 51:13 70:19 86:24 94:8,8</p> <p>problematic [1] 21:7</p> <p>problems [4] 15:15 51:12 59:9 80:17</p> <p>Procedure [1] 43:21</p> <p>Procedures [1] 20:2</p> <p>proceed [3] 24:15 25:6 53:11</p>	<p>proceeding [2] 22:5 91:6</p> <p>proceedings [7] 87:1 91:25 92:1 94:18,20 95:18 98:8</p> <p>process [4] 8:12 12:19 14:2 33:5</p> <p>produces [1] 63:16</p> <p>producing [1] 41:17</p> <p>professor's [1] 56:19</p> <p>programs [3] 15:23,23,24</p> <p>prolong [1] 40:21</p> <p>promulgate [1] 37:13</p> <p>prong [2] 33:21 94:1</p> <p>proper [7] 7:6 12:5 13:14 19:3 20:2 24:5 97:2</p> <p>properly [3] 88:10 95:20 97:16</p> <p>proposal [1] 6:1</p> <p>propose [1] 17:14</p> <p>proposed [3] 5:19,25 19:20</p> <p>proposition [1] 26:19</p> <p>prosecutor [1] 22:20</p> <p>prospect [2] 92:5 94:22</p> <p>protect [1] 7:22</p> <p>protectable [3] 4:15 40:12 58:17</p> <p>protected [2] 38:11 70:5</p> <p>protecting [1] 33:22</p> <p>provide [1] 33:6</p> <p>prudential [1] 73:18</p> <p>public [14] 3:13 4:23 18:14 32:9 39:20 40:3 41:14,19 43:16 46:21 53:20 57:24 58:3 87:3</p> <p>purported [1] 50:6</p> <p>purpose [2] 62:21 80:25</p> <p>pursuant [1] 66:24</p> <p>pursue [1] 82:23</p> <p>pursued [1] 23:21</p> <p>put [8] 14:6 34:6 46:8 50:1 65:18 68:14 70:21 72:3</p> <p>putting [1] 64:13</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quadruple [1] 74:6</p> <p>question [39] 6:12 12:2 14:5,6 31:2 33:10 38:22 41:11 46:12 48:20,22 51:5 53:4 55:20 59:18 61:15 63:5 67:8 77:23 78:1,3 79:21 81:11 83:11,23 85:24 88:2,17 89:4 90:21 91:19 92:19 93:16 94:11 96:10,16 97:22 99:10,14</p> <p>questioning [3] 51:15 67:14,15</p> <p>questions [7] 5:6 41:9 42:1 61:18 75:10 87:10 94:4</p> <p>quiet [1] 99:7</p> <p>quite [8] 15:11 20:21 26:23 45:13,22 66:22 83:6 84:12</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise [2] 51:22 52:8</p> <p>raises [5] 81:10,11 82:7 88:15 89:3</p> <p>raising [1] 35:19</p> <p>ran [2] 8:22 9:4</p> <p>rather [4] 19:9 42:10 43:19 74:5</p> <p>read [2] 15:9,11</p> <p>real [4] 47:20 58:20 94:10 99:16</p> <p>really [18] 5:20 7:8 15:7 16:10,20 20:13 27:10 33:18 43:12 48:1 51:19 54:21 66:19,22 80:20 84:7 88:7 95:3</p> <p>reason [2] 27:16 44:2</p> <p>reasonable [1] 18:21</p> <p>reasoning [4] 4:10 33:2 90:12 93:20</p> <p>reasons [6] 59:7 62:9 73:18 82:25 84:19 94:10</p> <p>REBUTTAL [3] 2:11 98:23 99:1</p> <p>recall [2] 7:18 42:16</p> <p>receive [3] 54:11 57:24,25</p> <p>recent [1] 50:13</p> <p>recission [1] 11:18</p> <p>recognize [3] 6:9 45:25 95:15</p> <p>recognized [5] 15:19 17:3 34:14 61:9 64:4</p> <p>recollection [1] 7:13</p> <p>record [4] 16:18 54:1 55:22 99:10</p> <p>recourse [1] 77:18</p> <p>redress [1] 92:16</p> <p>refrain [1] 90:5</p> <p>refugee [1] 58:3</p> <p>refusal [2] 3:11 42:6</p> <p>refuse [1] 45:10</p> <p>refused [1] 7:21</p> <p>refuses [1] 38:6</p> <p>regulate [1] 39:21</p> <p>regulates [1] 66:19</p> <p>regulation [4] 41:12 46:18 47:2 77:1</p> <p>rehearing [2] 14:25 56:10</p> <p>reimpose [1] 4:19</p> <p>reimposing [2] 90:8 93:23</p> <p>related [1] 17:4</p> <p>relationship [2] 32:17 98:11</p> <p>relatively [1] 50:13</p> <p>reliance [1] 94:24</p> <p>relied [1] 86:17</p> <p>relief [8] 49:9,12,23 96:19 97:9,12,13 98:4</p> <p>relieve [1] 88:22</p> <p>relieves [1] 80:15</p> <p>relieving [2] 62:25 63:8</p> <p>rely [3] 61:24 78:4 89:16</p> <p>Relying [3] 39:24 76:15 89:18</p> <p>remain [1] 99:6</p>
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Official - Subject to Final Review

<p>remains ^[1] 10:4 remedial ^[3] 70:15,18 80:4 remedy ^[4] 19:3 48:12,18 74:22 remember ^[2] 10:22 91:9 removal ^[1] 45:18 remove ^[1] 99:8 repeal ^[17] 18:13 19:16 22:6,12,16,17 35:17 60:3,10,24 61:21 68:4 69:15 81:17 82:1,2 89:15 repealed ^[2] 19:17 66:25 repealing ^[2] 22:10 65:22 replace ^[5] 5:1 72:16,19 80:19 84:18 replacement ^[2] 5:22 60:7 reply ^[5] 42:21 69:5 84:6 85:5 95:14 represent ^[3] 7:17 73:7 81:20 representation ^[2] 33:22 38:12 represented ^[1] 90:7 representing ^[1] 97:8 request ^[1] 42:25 require ^[2] 90:4 93:21 required ^[2] 5:1 41:16 requirements ^[4] 4:12 43:9 69:25 88:18 requires ^[1] 87:25 rescind ^[2] 5:1 7:5 rescinded ^[6] 4:3 10:14,24 11:21 12:14,22 rescission ^[12] 11:23 13:6 25:17 74:25 75:17 76:3,17,20 81:10 92:9,9 95:10 residents ^[1] 54:6 resolved ^[1] 87:8 respect ^[2] 50:7 98:4 respond ^[1] 42:12 Respondent ^[2] 6:8 34:22 Respondents ^[8] 1:8,23,25 2:7,10 39:17 86:11 99:15 responsibilities ^[1] 81:17 rest ^[1] 15:15 restore ^[3] 88:6 92:15 95:12 restored ^[3] 95:17 96:21 97:14 result ^[3] 25:5 40:25 54:9 results ^[1] 21:18 resuscitated ^[2] 10:3 46:5 review ^[26] 22:14 24:20,25 41:2,8 43:2 46:25 49:20 63:13 67:6,10,18 68:18 69:6 70:12,22 73:2,18 76:25 77:8,8 78:8 83:1 84:14,16 85:1 reviewing ^[1] 45:5 revive ^[1] 41:23 reward ^[1] 5:19 rid ^[3] 21:10 29:4 53:10 rights ^[4] 20:22 39:21 66:</p>	<p>18 70:1 risk ^[1] 82:22 road ^[2] 54:11 80:6 ROBERTS ^[50] 3:3 7:25 12:21,25 13:1,4,13 18:11,18 21:21,25 22:4 31:8,11 35:2,9 38:17,20 39:13 51:20 52:1,9,11,23 53:2,9,17,25 65:7,16 66:3,6,21 67:13 68:2,8,11 69:10 70:24 71:19 75:7 83:9 86:7 90:17 91:8,18,21 97:18 98:19 100:3 rule ^[163] 3:13,15,19,22 4:2,4,8,15,18,23 5:22,22,25 7:5,6 8:9,24 9:12 10:3,4,4,9,15,23 11:19,20 12:9,14,22 13:1,7 16:24 17:16,25 18:9,14 19:16,17,20,21 20:4,9,18 21:10 23:2,5 25:17 26:25 27:5,16 32:3,3,9,10,17 33:18 35:13 36:6,12,16,18,19 37:3 38:7,9 39:20,25 40:6,17 41:14,16 43:21 44:4,5,10,19,22 46:1,3,21 47:23,25 49:7 50:7 51:1 53:21 54:4,4,9 56:4,25 57:2,10,20,22 58:6 59:20,21 60:1,2,3,6,8,20,21 61:1 65:5 66:18 67:6,7,11 68:3,4,19,22 69:13,16 70:1,5,13 72:16,19,20 74:25 76:2,3 78:24 79:5,13 80:19 81:10,17 82:2,16,21 83:2 85:18,23 87:3,6,25 88:5,7,18 89:4 90:8,15,22 91:12 92:10,10,16 93:23 94:18 95:9,10,12,17 96:20 97:14,14,25,25 rule's ^[4] 3:18,23 39:23 41:18 ruled ^[2] 91:3 98:14 rulemaking ^[20] 4:4,24 5:1 8:11 18:13 19:18 32:4 33:7 41:15 43:15 45:19 46:19 56:9 65:21 68:3,7 69:15 72:18 83:6 94:25 rulemakings ^[1] 57:13 rules ^[14] 5:18,19 6:4 21:5 38:16 43:24 44:1,25 48:25 65:25 66:23 69:7,11 71:25 ruling ^[3] 6:19 92:22 98:7 rulings ^[1] 99:18 run ^[2] 8:5 9:14 run-of-the-mill ^[1] 69:5</p>	<p>saved ^[1] 4:15 saw ^[1] 28:13 saying ^[19] 16:11 19:5,6,8 20:5 22:6,25 23:20 26:25 34:6 37:25 38:4,5 48:14 69:18 83:2,3 85:9,11 says ^[7] 14:15 22:7 27:12 35:13 36:4 44:6 74:1 scholarly ^[1] 50:15 Scofield ^[1] 44:10 scope ^[11] 8:23 38:23 54:25 62:19 76:5,16 80:3 88:16 95:4 96:18 97:2 Second ^[8] 11:17 49:8 58:19,21 60:9,18 61:14 88:17 secretary ^[1] 58:18 secure ^[1] 92:8 see ^[9] 14:18 15:8,12 28:5 29:1 55:20 56:15,18 63:14 seek ^[23] 41:2 49:20 63:3,12 68:18 69:6 70:12 73:18 76:25 78:8 80:13 83:1 84:14,25 89:2,6,12 90:15 93:17 97:3,9,12 98:16 seeking ^[7] 41:8 43:1 46:25 57:2 62:21 77:7 81:1 seemingly ^[1] 99:11 seems ^[3] 45:13 48:13 89:20 seen ^[3] 14:12 26:22 60:11 seldom ^[1] 57:4 selective ^[1] 41:7 sense ^[1] 86:25 sentence ^[1] 22:6 sentences ^[1] 12:23 separate ^[6] 40:18 83:19 87:4 88:15,17 94:23 Separately ^[1] 94:21 series ^[1] 94:4 serve ^[1] 19:18 ruled ^[3] 15:2 50:3,6 sets ^[2] 60:20 99:24 setting ^[1] 77:1 Seventh ^[41] 8:7 11:13 13:20 14:17 15:6 16:7 24:11,16 25:7,9 26:6,15 28:16,25 29:25 30:2,15,19 31:5,19 52:22 54:25 55:5,7 58:22 59:1,3,4,8,13,17 65:3,10 90:19 91:14,16 92:1 94:19 95:25 97:25 98:8 shall ^[1] 37:25 shoes ^[6] 33:16 65:19,24 66:9 67:20 69:18 short ^[1] 89:8 shot ^[1] 74:6 shouldn't ^[7] 46:1,6 48:7 52:3 55:10 59:7,10 side ^[3] 51:22 74:14 82:8 side's ^[1] 49:4 sides ^[1] 36:23 sidestep ^[1] 45:19 significance ^[1] 88:8 significant ^[1] 48:20</p>	<p>significantly ^[1] 42:9 similar ^[2] 56:12,15 simpler ^[1] 30:2 simplest ^[1] 28:16 simply ^[5] 24:11 42:4,10,17 56:3 simultaneously ^[3] 6:25 23:14 80:19 sit ^[1] 27:24 situation ^[5] 45:13 46:17 47:9 66:15 73:15 situations ^[1] 71:6 slightly ^[1] 14:7 social ^[1] 15:23 solely ^[1] 91:4 Solicitor ^[6] 1:21,24 14:22 41:6,10 73:25 Solicitor's ^[1] 99:17 solicitude ^[1] 34:16 solution ^[3] 48:25 49:5 51:11 solutions ^[1] 51:16 solves ^[1] 70:19 somebody ^[2] 74:1,3 someone ^[3] 15:21 54:9 69:25 sometime ^[1] 54:10 sometimes ^[2] 32:7 61:10 somewhere ^[1] 22:25 sorry ^[5] 20:7 31:4 58:13 65:4 79:23 sort ^[19] 28:15 44:25 45:3 46:14 49:23 59:11,15 63:19 64:2,5 67:20 73:1 76:10 77:6,25 78:11,17 84:20 88:25 sorts ^[3] 78:4 82:25 84:19 SOTOMAYOR ^[61] 7:11,24 8:2,14,16,20 9:3,8,10,16,19,22 10:1,8,13,18,21 11:2,6,10,14,18 12:1,6,13 23:6 24:6,9,19,23 25:11,15,21 26:1,4,9,13,18 35:7,8 64:7,11,17,19,24 65:6,8 71:20,21 73:4,9,13 92:18,25 93:5,13 97:22 98:2,12,14,18 Sotomayor's ^[1] 61:18 sought ^[2] 43:5 67:10 sound ^[1] 46:3 sounds ^[1] 27:20 speaking ^[1] 19:25 special ^[3] 34:15,16 38:7 specific ^[3] 52:17 88:17 96:16 spent ^[1] 3:16 spread ^[2] 14:13,13 spreading ^[1] 15:15 spring ^[1] 92:10 stake ^[8] 32:2 70:5,7 78:12 89:5,5 90:14 93:17 stakes ^[1] 57:17 stamps ^[1] 55:21 stand ^[2] 56:5 99:23 standards ^[9] 44:19 77:6</p>	<p>85:19,23 86:15,16,20 87:25 90:15 standing ^[3] 5:8 53:18 83:4 stands ^[1] 73:25 start ^[1] 56:25 started ^[2] 20:23 61:2 starting ^[1] 82:10 State ^[22] 1:25 2:10 8:25 9:12 15:20 16:1 17:4,6 34:19 37:18,23 38:4,4,5 57:5 66:8 75:12 77:17 83:25 86:11 90:5 99:20 state's ^[1] 85:9 state-funded ^[1] 40:3 STATES ^[78] 1:1,16 3:12,14 4:6,16,19 5:2,11,12,16 6:1,6,9 7:22 8:11,15,22 9:5 12:12 13:15,16,18 14:3 16:3,4 17:5,7,9 18:9 19:21,23 20:16 23:3 25:3 29:17 31:3 32:2,5,17,19 33:5,13 34:3,10,15,22,24 36:10,15,19,24 37:14 38:7,15 39:22 40:11 41:3,25 44:17 45:4 46:20 49:1 53:21,22 54:6,13 55:10 56:6 57:3 58:16 66:2 69:9 70:4 80:6 86:2 87:21,21 states' ^[2] 33:2 52:20 status ^[8] 15:21 40:1,9 54:2,10 55:17 57:15 58:1 statute ^[4] 10:22 31:24 32:9 34:7 stay ^[3] 15:20 49:8 71:13 stayed ^[2] 3:20 64:22 stays ^[1] 72:15 step ^[7] 17:10 18:9 23:13 33:15 45:10,24 84:22 stepping ^[2] 46:16 63:19 steps ^[1] 92:4 still ^[11] 30:16 31:14 39:11 64:22 65:1,8,9,9 89:3 92:3,7 story ^[1] 78:10 straight ^[2] 13:11 89:21 straightforward ^[1] 87:9 strange ^[1] 43:19 strategy ^[4] 45:16 61:22 62:10,11 strict ^[1] 44:4 strictly ^[1] 44:11 strongly ^[1] 77:2 stuck ^[3] 76:9 77:15 82:11 subject ^[2] 58:3 91:25 submitted ^[2] 100:5,7 succeed ^[1] 96:11 succeeds ^[1] 95:24 success ^[2] 93:11 94:1 successful ^[3] 51:22,24 97:5 successfully ^[2] 3:17 92:3 sudden ^[1] 81:23 suddenly ^[1] 3:22</p>
--	--	---	--	---

Official - Subject to Final Review

<p>suffering [2] 32:12,14 sufficient [1] 12:18 suggest [2] 26:7 81:2 suggested [2] 41:9 49:3 suggesting [5] 26:5,11 69:11,12 78:16 suggestion [1] 26:23 suggests [1] 45:5 suit [12] 19:2,7,9 21:8,12,15 22:12 24:10,11,12 81:9 89:15 suits [1] 89:19 suppose [4] 55:14 59:25 65:23 95:24 supposed [1] 50:4 SUPREME [5] 1:1,15 14:24 27:11 56:11 surprised [1] 73:23 surprising [1] 86:3 survey [1] 85:13</p> <hr/> <p style="text-align: center;">T</p> <p>tack [1] 61:15 talked [1] 71:15 tantamount [1] 90:2 technically [3] 9:6,8 50:25 temptation [1] 69:2 terms [6] 44:21,23 48:22 93:1 96:5 97:11 themes [1] 78:5 theoretically [1] 89:3 theory [7] 29:15 30:9,10,13,16 37:16 89:11 There'd [1] 97:24 there's [37] 14:14 19:4 20:8 24:25 25:2,3,18 30:21 32:1 33:3 34:17,23 36:20 37:18,22 43:20 44:2 46:12 50:14 63:4 66:7,15 67:21 69:2,19 81:20 82:16,17,21 86:24 88:5 89:24,25 92:3 95:15 97:14,15 therefore [4] 4:24 50:18 52:6 66:24 they've [4] 24:23 35:17 46:24 61:25 thinks [4] 37:23 94:6,9,11 third [2] 60:5,17 THOMAS [12] 5:7,21 6:11,20 35:4 36:4 42:2,20 43:3 70:25 87:11 97:20 though [8] 24:3 26:12 45:3 48:13 58:8 60:4 76:4 84:11 threads [1] 83:19 threaten [1] 86:18 threatened [1] 87:1 three [1] 25:3 throughout [1] 53:22 thwarted [1] 93:23 tied [4] 20:8 44:3 45:25 66:17 time-wise [1] 25:10 timeline [1] 10:17</p>	<p>timeliness [2] 91:4,23 timely [2] 6:6 33:19 timing [2] 23:12,18 today [3] 91:24 99:11,16 together [1] 61:17 took [3] 23:13 45:20 98:3 totally [4] 24:9 56:1,5,17 tough [1] 79:21 towards [1] 59:16 traditional [1] 44:12 transition [1] 82:14 transpired [1] 47:7 trees [1] 45:10 tried [4] 4:6 30:5 44:17 84:25 tries [1] 38:6 triggers [1] 81:16 true [1] 53:14 try [6] 23:7 62:7 65:24 75:5 85:10 95:6 trying [12] 12:4,6 13:19 19:9 33:11 38:23 51:18 61:16 62:3 64:3 78:5 80:19 turn [1] 54:22 turned [1] 57:16 turns [3] 50:24 82:23 84:17 two [11] 42:21 53:14 71:23 83:19 84:5 85:2 88:15 91:15,18,18 95:5 type [1] 5:20 types [1] 7:10 typically [1] 18:23</p> <hr/> <p style="text-align: center;">U</p> <p>U.S [1] 72:1 ultimately [3] 7:19 77:25 99:22 uncertainty [1] 21:20 uncommon [1] 41:10 unconstitutional [1] 23:3 under [11] 16:12 30:25 31:1 37:15,16 66:25 78:17 80:10 86:21 90:14 94:23 underlying [1] 42:11 undermine [1] 38:7 understand [10] 23:18 29:24 34:9 57:19 68:25 74:15,18 75:12 81:14 96:25 understanding [7] 14:5 42:5 60:12,15,23 61:22 62:3 understood [1] 71:22 unintended [2] 41:18 58:18 unique [2] 45:13 78:25 UNITED [10] 1:1,16 3:14 41:3,25 53:21,22 56:6 57:3 86:2 unlawful [5] 35:13 59:22 76:6,16,22 unlawfully [1] 3:14 unprecedented [18] 3:13 6:21 7:8 13:22 21:4 23:13 35:24 36:3,6,7,9 39:5 46:</p>	<p>23,24 47:9 73:16 85:8,9 until [7] 25:7,12,15,16,16 50:13 58:1 unusual [1] 72:21 unwanted [1] 41:18 up [17] 19:16 33:9 43:4 47:18 51:16 54:16 61:2,17 66:8 74:1 75:10 80:25 81:7 84:5 85:5,7 97:23 urge [1] 59:15 useless [1] 52:13 using [1] 37:1 usual [1] 35:15</p> <hr/> <p style="text-align: center;">V</p> <p>vacate [3] 25:24 26:5 52:6 vacated [9] 9:23 10:9 24:24 25:5 40:18 76:1 87:4 91:12 94:18 vacates [1] 60:20 vacating [1] 68:18 vacatur [18] 20:9 51:1 63:3 65:5 75:1,23 76:6,15 80:14 89:2,6 90:15 91:1 92:8 95:9,16 97:16,24 valid [1] 75:22 various [1] 23:14 vehicle [2] 12:5 24:5 versus [5] 3:5 34:15,18 71:13 72:1 vest [1] 41:1 vetted [1] 57:6 view [9] 32:25 45:11 59:16 66:8 69:2 76:5 80:3 84:12 90:18 views [1] 82:19 vindicate [2] 33:12 64:3 violation [2] 19:3 21:14 visa [2] 57:7,8 voice [1] 99:6 vulnerable [1] 58:2</p> <hr/> <p style="text-align: center;">W</p> <p>wait [3] 15:5 27:4 28:16 waited [1] 91:9 wanted [6] 36:13 67:7,12 68:20 72:16,18 wants [2] 37:19 83:25 warn [1] 78:15 Washington [6] 1:11,22 14:9 15:3 65:1 96:7 waste [1] 22:9 way [23] 5:3,4,13 14:7 18:22 28:12 30:25 31:1 34:10 43:18 44:8,15,17 46:8 48:5 56:8 59:12 61:4 63:5 66:25 78:19 79:16 97:15 ways [3] 35:25 81:13 86:14 Wednesday [1] 1:12 weighed [1] 78:19 welcome [2] 42:1 87:9 welfare [1] 15:23 whatever [1] 98:3 Whereupon [1] 100:6</p>	<p>whether [17] 6:6,7 12:14 32:17 34:7 41:2 45:7 53:5 55:22 67:25 78:8,17 83:24 85:20 93:17 99:12,20 whichever [1] 13:9 Whoever [2] 37:21 45:14 whole [1] 29:15 will [17] 3:3 12:8,14 19:17,21,21 28:9 34:5 46:20 48:4,16 54:9,11,12 55:19 56:7 67:16 willing [1] 80:5 win [2] 15:1 61:23 wipe [1] 93:12 withdrew [1] 26:24 within [6] 4:5 12:3 20:21 34:19 49:16 82:15 without [10] 4:4,9 7:6 21:10 23:3 60:7 68:22 70:14,19 75:22 wonder [1] 28:12 wondering [1] 78:23 word [1] 36:2 work [1] 24:22 works [1] 62:11 world [2] 34:2 78:14 wrote [1] 71:14</p> <hr/> <p style="text-align: center;">Y</p> <p>year [4] 3:17 4:17 7:13 40:6 York [1] 71:13 young [1] 22:20</p>
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