

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LE ROY TORRES, )  
 )  
Petitioner, )  
 )  
v. ) No. 20-603  
 )  
TEXAS DEPARTMENT OF PUBLIC SAFETY, )  
 )  
Respondent. )  
- - - - -

Pages: 1 through 108  
Place: Washington, D.C.  
Date: March 29, 2022

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 7                                    Respondent.                                    )  
 8   - - - - -

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 10                                   Washington, D.C.  
 11                                   Tuesday, March 29, 2022

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

16  
 17   APPEARANCES:  
 18   ANDREW T. TUTT, ESQUIRE, Washington, D.C.; on behalf  
 19                   of the Petitioner.  
 20   CHRISTOPHER G. MICHEL, Assistant to the Solicitor  
 21                   General, Department of Justice, Washington, D.C.;  
 22                   for the United States, as amicus curiae,  
 23                   supporting the Petitioner.  
 24   JUDD E. STONE, II, Solicitor General, Austin, Texas;  
 25                   on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ANDREW T. TUTT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	CHRISTOPHER G. MICHEL, ESQ.	
7	For United States, as amicus curiae,	
8	supporting Petitioner	40
9	ORAL ARGUMENT OF:	
10	JUDD E. STONE, II, ESQ.	
11	On behalf of the Respondent	69
12	REBUTTAL ARGUMENT OF:	
13	ANDREW T. TUTT, ESQ.	
14	On behalf of the Petitioner	105
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3  
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5  
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Thomas is participating remotely this morning.

We'll hear argument this morning in Case 20-603, Torres versus Texas Department of Public Safety.

Mr. Tutt.

ORAL ARGUMENT OF ANDREW T. TUTT

ON BEHALF OF THE PETITIONER

MR. TUTT: Thank you, Mr. Chief Justice, and may it please the Court:

The Constitution gave Congress the power to raise and support Armies, and the reason for that grant was to ensure the survival of the nation. The Constitution provided Congress with the tools necessary to fulfill its preeminent national defense function, and the ability to authorize lawsuits, including suits against the states themselves, are among those vital tools.

I'd like to make two additional points this morning. First, the war powers, including the Army and Navy clauses, are unique and fundamentally different from the Constitution's

1 other grants of power, unique textually, unique  
2 structurally, and unique historically. The  
3 states could not have read the Constitution  
4 seeing the federal structure it created and  
5 believed they would retain sovereign authority  
6 to interfere with the federal government's  
7 preeminent national defense function.

8           Second, USERRA's protections are  
9 crucial in light of the structure of the modern  
10 military. At the turn of the 20th Century, it  
11 became apparent the United States would be --  
12 would be required to wage war on a global scale  
13 and at a moment's notice and that this would  
14 require an immense fighting force. Rather than  
15 create a massive peacetime standing army, the  
16 United States instead created a reserve  
17 component, trained soldiers who would keep their  
18 civilian jobs but would be ready to respond at a  
19 moment's notice to unpredictable global threats.

20           To convince soldiers to join that  
21 force and to ensure that soldiers in it would be  
22 willing to risk significant injury without  
23 hesitation, Congress promised these soldiers  
24 that they would not be discriminated against on  
25 the basis of their military service or

1 service-connected injuries. USERRA and the  
2 cause of action that makes its rights real is  
3 not a tangential or peripheral exercise of the  
4 war powers but a core exercise of the United  
5 States' power to raise and support its Army to  
6 fulfill its indispensable first task, protecting  
7 the national security.

8 I welcome the Court's questions.

9 CHIEF JUSTICE ROBERTS: Counsel, what  
10 do you do about our decision in Allen, which  
11 seemed to suggest that Katz, on which you rely,  
12 was quite specific and limited to that context?

13 MR. TUTT: Your Honor, Allen does say  
14 that, typically, the -- this is a limited --  
15 that sovereign immunity is limited, but, as  
16 Allen pointed out, Allen is about abrogation,  
17 not a Plan of the Convention waiver.

18 I would also point out that Allen  
19 acknowledged that --

20 JUSTICE KAGAN: I don't quite  
21 understand the distinction that you're making  
22 between those two things. Could you -- could  
23 you explain that, why you think that these are  
24 in two separate buckets?

25 MR. TUTT: Well, the Court has -- the

1 Court has explicitly treated them as -- as  
2 separate buckets, Your Honor. In PennEast, the  
3 Court made clear that abrogation, the taking  
4 away of sovereign immunity, is something  
5 distinct from a waiver in the Plan of the  
6 Convention. And so -- and I could -- and I -- I  
7 could speak more to that, but that -- I think  
8 that it is a distinction in this Court's  
9 precedents and it's -- and it's an important  
10 distinction.

11 The Fourteenth Amendment permits  
12 abrogation. None of the Article I powers have  
13 been found to permit abrogation. But the  
14 eminent domain power and the bankruptcy power  
15 were both -- have both been found to be Plan of  
16 the Convention waivers --

17 JUSTICE BARRETT: But --

18 MR. TUTT: -- because the federal --  
19 yes, Your Honor.

20 JUSTICE BARRETT: Well, Mr. Tutt, both  
21 the eminent domain power and the bankruptcy  
22 power are inextricably intertwined, to use  
23 PennEast's language, with judicial proceedings.  
24 I mean, the eminent domain power, there was  
25 evidence that the United States had delegated

1 this power to private parties since the  
2 beginning, and the way to accomplish eminent  
3 domain is through a condemnation action.  
4 Similarly, with bankruptcy, bankruptcy  
5 proceedings are tied to litigation, and that is  
6 obviously not true of the war power. Litigation  
7 is not its central office. So why isn't that a  
8 distinction here?

9 MR. TUTT: First, I would say that I  
10 think eminent domain is not necessarily  
11 inextricably intertwined with judicial  
12 proceedings. I think, in PennEast, the Court  
13 pointed out that eminent domain has long been  
14 exercised without condemnation actions but  
15 simply by making a taking.

16 But even accepting that it is --

17 JUSTICE BARRETT: Well, it relied  
18 pretty heavily on condemnation actions.

19 MR. TUTT: Yes, Your Honor. So even  
20 accepting that those two powers have a -- a  
21 unique relationship with judicial proceedings,  
22 the -- that is not what actually motivated the  
23 decisions in those cases. I think the -- I  
24 think the better way to think about those two  
25 cases and the war powers is that those powers



1 are not complete unless, in a very ancillary  
2 way, suits against the states are authorized.

3 JUSTICE GORSUCH: Well --

4 MR. TUTT: So it's not --

5 JUSTICE GORSUCH: -- what do we do  
6 about the fact that in, like, the bankruptcy  
7 context, there is a long history, and, here, by  
8 contrast, it appears that the first time  
9 Congress purported to authorize suits against  
10 states was, I believe, 1974?

11 MR. TUTT: Your Honor, the -- the --  
12 we have suits that are -- that go back much  
13 further. We -- we -- we point to the category  
14 of suits that were thought to be contemplated by  
15 the Constitution itself for the peace treaty,  
16 the Treaty of Paris. We also have the suits  
17 against states that were authorized in 1833 in  
18 habeas corpus. Those were official capacity  
19 actions against state officers.

20 JUSTICE GORSUCH: I understand habeas  
21 corpus, but -- but this is a little bit  
22 different than --

23 MR. TUTT: It --

24 JUSTICE GORSUCH: -- than habeas  
25 corpus, right?

1 MR. TUTT: -- it is. It is, Your  
2 Honor. But --

3 JUSTICE GORSUCH: So outside of habeas  
4 corpus and things like -- 1974, is that about  
5 right?

6 MR. TUTT: That's the first time that  
7 private damages actions were deemed by the  
8 political branches of the United States to be  
9 necessary to the effectual exercise of the war  
10 powers. But --

11 JUSTICE GORSUCH: Not exactly the most  
12 contemporaneous evidence of the original meaning  
13 of the Constitution and the Plan of Convention,  
14 is it, counsel?

15 MR. TUTT: It is not, and we are  
16 not -- and we are not relying on -- on that.  
17 What we're relying on is ultimately primarily  
18 the text and structure of the Constitution and  
19 the original understanding that the states must  
20 have had at the time that the Constitution was  
21 ratified. That is our primary submission.

22 But even --

23 JUSTICE KAGAN: Can you give a little  
24 content on that? I mean, just complete the  
25 sentence for me. The war powers are different

1 because what?

2 MR. TUTT: The war powers are  
3 different because they are conferred  
4 unconditionally and without qualification. The  
5 states are divested, textually divested, of the  
6 power to interfere or en- -- engage in actions  
7 that are at -- that are at variance with the war  
8 powers, that endanger --

9 JUSTICE KAGAN: So, in Seminole Tribe,  
10 of course, which was the case that started all  
11 of this off, we dealt with the Indian Commerce  
12 Clause, and the Indian Commerce Clause was  
13 similarly an entirely federal power. It doesn't  
14 have the explicit divestment of the states, but  
15 it has everything else.

16 And the Court was very clear about  
17 this. It said the Indian Commerce Clause  
18 represented -- I'm going to quote some language  
19 here because I think it just applies perfectly  
20 to this case -- a virtual total cessation of  
21 authority by the states, that relations with the  
22 Indian tribes were the exclusive province of  
23 federal law, and that the Constitution had  
24 divested the states of virtually all authority  
25 over Indian commerce and the Indian tribes. And

1 yet we said none of that mattered.

2 So why should it matter here?

3 MR. TUTT: Let me give you -- let me  
4 give you three reasons that it doesn't matter  
5 here.

6 The first is that Seminole Tribe is an  
7 abrogation case. It was considering this in the  
8 context of do these powers allow for the taking  
9 away of power in the same way as Bitzer. So  
10 it's not a Plan of Convention waiver case.

11 Now --

12 JUSTICE KAGAN: Yeah, I -- I don't  
13 know. I mean, I asked you about this before,  
14 and I'm -- I'm -- I'm still trying to figure out  
15 the response a little bit. Maybe I'm just  
16 having a block here. But it seems to me that  
17 both are essentially asking the same question,  
18 which is that they're looking at the founding  
19 period and they're saying what would the states  
20 have expected. And you -- you know, I don't  
21 really see the difference.

22 MR. TUTT: Let me give you -- let me  
23 give you two more distinctions. One is that in  
24 PennEast, the Court made very clear that it was  
25 the exclusivity of eminent domain and the need

1 for a complete eminent domain power in the  
2 federal sovereign that was what would have made  
3 the states understand that federal eminent  
4 domain permitted suits against the states.

5 So this Court has decided cases that  
6 are -- that -- whose reasoning is somewhat in  
7 tension with Seminole Tribe's reasoning about  
8 exclusivity.

9 JUSTICE KAVANAUGH: What's your third?

10 MR. TUTT: My third is that Indian  
11 commerce is exclusive, but it's really exclusive  
12 with respect to the tribes. And something  
13 unusual was being done in Seminole Tribe, which  
14 it was trying to use the Indian commerce power  
15 to regulate the states, which is not the sense  
16 in which this Court has thought of that power as  
17 exclusive.

18 And the state -- the Court has said  
19 that the United States has plenary authority to  
20 divest the tribes of any attributes of  
21 sovereignty. So, when actually regulating the  
22 Indian tribes, exclusivity does permit suits to  
23 be brought.

24 JUSTICE GORSUCH: Counsel, I --

25 JUSTICE KAVANAUGH: How important is

1 --

2 JUSTICE GORSUCH: Oh, please, go  
3 ahead.

4 JUSTICE KAVANAUGH: No.

5 JUSTICE GORSUCH: All right. I --  
6 I -- I'm not sure I followed that answer, and --  
7 and maybe this is what Justice Kavanaugh was  
8 going to say and probably should be saying  
9 rather than me.

10 The -- the -- I had understood the  
11 Indian Commerce Clause -- and you can correct me  
12 if I'm wrong -- to -- to give Congress a lot of  
13 authority with respect to tribes in lieu of what  
14 normally might be local authority, state  
15 authority. So it does speak to state authority,  
16 but -- but perhaps you -- you have a different  
17 view may -- maybe. I'm just a little confused.

18 MR. TUTT: The -- the -- Congress  
19 could permit the states to actually exercise  
20 local control over the Indian tribes in a way  
21 that it would never authorize the states to  
22 participate in war-making.

23 So the exclusivity over the tribes  
24 themselves is really the exclusivity that the  
25 Court has been talking about versus interactions

1 or intercourse with the states.

2 Now it's true that Congress has  
3 exercised that power and taken the -- the tribes  
4 into a trust relationship, but there is a  
5 textual divestment of any ability of the states  
6 to participate in war-making in any similar way.

7 JUSTICE GORSUCH: I guess --

8 MR. TUTT: They cannot --

9 JUSTICE GORSUCH: -- I guess I'm still  
10 stuck, and I'm not sure I understand that.

11 Normally, the states would have  
12 considerable authority over people within their  
13 geographic bounds. That is divested by the  
14 Constitution in large measure by the -- by the  
15 Indian Commerce Clause in the same way  
16 war-making is. I -- I -- I think that's the  
17 parallel I see, and -- and I'm struggling to --  
18 to -- to see your distinction between the two.

19 MR. TUTT: Your Honor, my distinction  
20 is that though the tribes exist within the  
21 states and though the power to regulate the  
22 tribes is granted in the Constitution, that  
23 exclusivity is not something that the federal  
24 government is required to exercise.

25 And it's something that if the

1 Congress had not exercised its power to regulate  
2 the tribes, I think it's unclear how the  
3 Constitution would have dealt with that.

4 Congress did move into that domain and  
5 took full control, but, if you think about it,  
6 it's granted in the same clause as the  
7 Interstate Commerce Clause. It's granted in the  
8 same clause as the other powers that this Court  
9 has long held are concurrent. So that -- that's  
10 all that I'm saying.

11 And if you look at war powers and you  
12 look at the way -- the very nature of the war  
13 powers, 50 separate sovereigns cannot  
14 participate in war-making.

15 JUSTICE BARRETT: But no one --

16 JUSTICE KAVANAUGH: How -- how  
17 important is the text of Article I, Section 10,  
18 which explicitly divests the states of anything  
19 on the war powers?

20 MR. TUTT: I think it's -- I think  
21 it's extremely important, Your Honor. I think  
22 that the textual divestment is powerful evidence  
23 that the states knew that they were giving up  
24 any power to interfere in this realm.

25 The ultimate inquiry for the Court in



1 this case is did the states believe that they  
2 would retain a sovereign immunity that they  
3 could assert that would interfere with  
4 war-making.

5 But they gave up even more sovereign  
6 powers in Article I, Section 10. They gave up  
7 the ability to conduct diplomacy. They gave up  
8 their ambassadors and foreign ministers. They  
9 gave up the very things that almost define  
10 sovereignty.

11 JUSTICE BARRETT: But no one is --

12 JUSTICE ALITO: Can I ask you --

13 JUSTICE BARRETT: -- saying that they  
14 would have the power to do any of those things  
15 now. There's no dispute that the states could  
16 not engage in diplomacy or exercise any kind of  
17 war-making authority.

18 The question is whether they  
19 relinquished their protection from private  
20 discrimination suits, which is a quite different  
21 thing. No one disputes that in this very case,  
22 the United States could come in and sue Texas  
23 and -- and tell Texas that it had to reinstate  
24 Mr. Torres on, you know, terms consistent with  
25 USERRA.

1                   MR. TUTT: Let me give two answers to  
2 that question and -- and I appreciate the  
3 opportunity to.

4                   One is the political branches of the  
5 government determined that the best way to  
6 protect the rights that USERRA guarantees is to  
7 give those whose rights it protects the ability  
8 to protect them themselves. It did not want the  
9 executive branch to be able to exercise  
10 discretion. It did not want to require soldiers  
11 to go to a bureaucrat in Washington and persuade  
12 them that their case was worthwhile.

13                   My co-counsel, Mr. Lawler, has brought  
14 and won USERRA cases where the Department of  
15 Labor has said there is no merit.

16                   And I think this was a wise decision.  
17 The Department of Labor keeps statistics. They  
18 submit a report to Congress. I encourage the  
19 Court to -- to look at this. In the last five  
20 years, they've brought nine USERRA suits total  
21 against any employer in the United States. They  
22 get about a thousand complaints at the  
23 Department of Labor a year, and it's resulted  
24 in -- in nine suits.

25                   So I think that Congress understood

1 that, in fact, if you try to put this through  
2 the United States, it's not going to be  
3 effective.

4 JUSTICE ALITO: Isn't your --

5 MR. TUTT: But --

6 JUSTICE ALITO: -- argument that the  
7 states can't assert sovereign immunity in any  
8 lawsuit that Congress authorizes under the war  
9 powers?

10 MR. TUTT: Your Honor, I don't think  
11 the Court has to reach that today because I  
12 think, in this case, it is central to raising  
13 and supporting Armies. And the Court need not  
14 go further than say that this is a proper  
15 exercise of the Raise and Support Army Clause.

16 But --

17 JUSTICE ALITO: I mean, I -- I don't  
18 quite understand that answer. So you were  
19 emphasizing the exclusivity of the war power,  
20 but now you seem to say that there's some things  
21 that Congress could not do with respect to the  
22 -- under the war -- to authorize a suit against  
23 a state under the war powers?

24 MR. TUTT: No, Your Honor. And, in  
25 fact, I think, in the entire history of the

1 United States, no state has ever successfully  
2 asserted a sovereignty limitation on the war  
3 powers in -- in any context. So -- but what I  
4 am saying is that in this case, I -- in this  
5 Court --

6 JUSTICE ALITO: Well, let me give you  
7 an example. I -- I think one of the -- one of  
8 the things that Congress asserted when it  
9 established the interstate highway system was  
10 the need for those highways for defense  
11 purposes. So would that mean that Congress  
12 could authorize individuals to sue states for  
13 failing to maintain highways properly or failing  
14 to patrol them properly?

15 MR. TUTT: Well, I think that if there  
16 was a limit, it would be a limitation on the war  
17 powers themselves. It would be an internal  
18 limitation, not a sovereign prerogative of the  
19 states to say that that was a limitation on the  
20 war powers. And that -- that's ultimately what  
21 -- what I'm saying.

22 JUSTICE ALITO: Are -- are you saying  
23 that the establishment of the interstate highway  
24 system couldn't be justified under the war  
25 powers?

1           MR. TUTT: No, Your Honor, I'm not.  
2 I'm not saying that. But all -- all I am saying  
3 is that to the degree that that would be a  
4 boundary case or a difficult case, it would be  
5 because it's a difficult case of the ultimate  
6 scope or extent or tie of the war powers to --

7           JUSTICE GORSUCH: I guess I'm -- I'm  
8 -- I'm confused. Why wouldn't that be  
9 heartland? Why aren't you defending that --  
10 that -- that position?

11          MR. TUTT: Well, Your Honor, I want to  
12 make clear that -- that wherever you draw the  
13 line on the war -- scope or extent of the war  
14 powers, the question in this case is whether, if  
15 the states saw the Constitution, read its text,  
16 read the Federalist Number 23, read the  
17 Federalist Number 41 -- and I encourage reading  
18 the whole -- reading those essays --

19          JUSTICE GORSUCH: I -- I think you can  
20 safely assume this bench will and has read a lot  
21 of things --

22          MR. TUTT: Yes, Your Honor.

23          JUSTICE GORSUCH: -- about this case.

24          MR. TUTT: Yes, Your Honor.

25          JUSTICE GORSUCH: And I -- I think the

1 question is, if -- if it's essential to the war  
2 powers, if Congress, which, apparent --  
3 apparently, the United States hasn't made enough  
4 war, right -- it's essential to the war powers  
5 that -- that an individual be able to sue the  
6 state, in this case for forms of discrimination,  
7 whatever, why wouldn't it be equally essential  
8 to allow veterans to sue for making sure our  
9 highways are in good order so that we can deal  
10 with invasions on the West Coast? I mean, that  
11 was -- that was the whole point of the  
12 interstate highway system, I think, Justice  
13 Alito's alluded to.

14 MR. TUTT: Well, this Court -- and  
15 this goes back to -- to Justice Alito's --

16 JUSTICE GORSUCH: Yeah.

17 MR. TUTT: -- original question. In  
18 war powers cases, the Court has typically said  
19 that the war powers are broad, authorize a great  
20 many things, but then limited the holding to the  
21 facts before the Court. And I think it's done  
22 that in -- in recognition of the potential  
23 breadth of the war powers.

24 And so answering that hypothetical  
25 is -- is just difficult and -- and we know it's

1 difficult, and this case is a core exercise of  
2 the war powers because recruitment and retention  
3 of soldiers direct -- it's directly related to  
4 the recruitment and retention of soldiers.

5 JUSTICE BARRETT: But your answer has  
6 to be that if it's within the war powers, then,  
7 yes, Congress could authorize suit, is that  
8 correct? You're -- you're fighting whether  
9 Congress could rely on its war powers to --

10 MR. TUTT: I --

11 JUSTICE BARRETT: -- build an  
12 interstate system.

13 MR. TUTT: Yes, and --

14 JUSTICE BARRETT: Let's -- let's  
15 assume that it can.

16 MR. TUTT: I --

17 JUSTICE BARRETT: Then your answer is  
18 yes, right?

19 MR. TUTT: Yes, Your Honor. I think  
20 that if -- that a -- any -- I mean, our  
21 submission is any appropriate exercise of the  
22 war powers, emphasis on "appropriate exercise"  
23 --

24 JUSTICE BARRETT: Yes or no?

25 MR. TUTT: -- but, if it's within --

1 JUSTICE BARRETT: Just yes or no.  
2 MR. TUTT: Yes. Yes, Your Honor.  
3 JUSTICE BARRETT: Okay.  
4 MR. TUTT: Yes, Your Honor.  
5 CHIEF JUSTICE ROBERTS: I'm sorry, yes  
6 -- yes to -- I've lost track of the question.  
7 (Laughter.)  
8 MR. TUTT: Apologies --  
9 CHIEF JUSTICE ROBERTS: Yes --  
10 MR. TUTT: -- Mr. Chief Justice.  
11 CHIEF JUSTICE ROBERTS: -- yes to  
12 what?  
13 MR. TUTT: Yes, a proper exercise --  
14 it is a proper exercise of the war powers or if  
15 it is a proper exercise of the war powers to --  
16 JUSTICE KAVANAUGH: But the "if" is  
17 big, right?  
18 MR. TUTT: Yes, Your Honor.  
19 JUSTICE KAVANAUGH: So you're not  
20 giving -- yeah.  
21 MR. TUTT: Yes.  
22 JUSTICE KAVANAUGH: Don't give away  
23 the "if."  
24 MR. TUTT: No. The -- the "if" is --  
25 is -- is all in this particular situation.



1 JUSTICE KAVANAUGH: Yeah.

2 MR. TUTT: If it is -- if it is  
3 necessary to raise and support Armies to permit  
4 individuals to sue because otherwise they will  
5 hesitate to take a bullet on a battlefield  
6 because they don't know if they're going to have  
7 their job as a plumber's apprentice when they  
8 come home because their employer can fire them  
9 if they're injured, that is central because  
10 recruitment and retention of the Armed Forces,  
11 this Court has held -- even recently in -- in  
12 Rumsfeld versus FAIR has held is a core exercise  
13 of the raise and support Armies power.

14 And so -- and let me say Texas does  
15 not dispute --

16 JUSTICE BARRETT: Are you limiting  
17 your argument to the raise and support Armies  
18 power? I understood that to be the SG's  
19 position, but I thought your position was  
20 broader than just raise and support Armies and  
21 Navy.

22 MR. TUTT: Well, I -- our position is  
23 that in view of what is at stake, which is the  
24 survival of the nation, the federal government's  
25 indispensable first task of protecting the

1 national security, the war power is the proper  
2 unit of analysis, but --

3 JUSTICE BARRETT: So you're broadly  
4 speaking beyond just the raise and support  
5 Armies?

6 MR. TUTT: Yes, Your Honor.

7 JUSTICE BARRETT: Yeah.

8 MR. TUTT: Because -- and this Court  
9 -- you know, in -- in the Hamilton versus  
10 Kentucky Distilleries case, the 1980 case about  
11 a prohibition on the sale of alcoholic beverages  
12 nationwide, Justice -- just -- Judge Learned  
13 Hand was the district judge, and he -- he said  
14 that, ultimately, whatever the source of  
15 authority in his district opinion -- court  
16 opinion, whatever the source of authority is, a  
17 rather barren question, the real question is,  
18 what are the limits? And that ultimately is  
19 what decides the case. Whether -- whether it's  
20 located in the power to declare war or it's  
21 located in the additional text of raise and  
22 support Armies, what is at stake is so vital and  
23 so unique and essential to the nation that that  
24 ultimately is -- is what's important and -- and  
25 --

1                   JUSTICE SOTOMAYOR: Counsel, I know  
2     you're relying -- or I guess the government's  
3     relying on the Army Clause. You're relying on  
4     all of them.

5                   I take something from the Militia  
6     Clause, and I take what it views as raising and  
7     supporting and providing and maintaining a  
8     militia. It uses the words "to provide for  
9     organizing, arming, and disciplining" the  
10    militia. So, if I take that that is just a  
11    specification of a part of what that power is,  
12    to raise and support an Army or to provide and  
13    maintain a Navy, disciplining seems to me as  
14    purely a federal right. I assume that  
15    retaliation for service is a form of discipline  
16    to the employee.

17                  And I assume that your argument is  
18    that it is by its nature a power that requires a  
19    waiver of a state's immunity because it's giving  
20    over absolute control in a way that the others  
21    are not. There's concurrent. Is that the basis  
22    of your argument? That in most of these,  
23    including commerce with Indians, we have  
24    concurrent state jurisdiction. We have none  
25    with respect to Armies, correct?

1                   MR. TUTT: Correct, Your Honor. Yes.  
2                   The -- the states do not participate in raising  
3                   and supporting the Army. That is an exclusively  
4                   federal power. And they do not discipline the  
5                   militia. The federal government disciplines the  
6                   militia. And so that -- that is absolutely part  
7                   of our argument.

8                   I -- I want to make clear Texas does  
9                   not dispute that the obligations of USERRA are a  
10                  constitutional exercise of the war powers,  
11                  including as to Texas. Texas does not dispute  
12                  that the cause of action in USERRA is  
13                  constitutional, and not just against all  
14                  employers other than Texas but even against  
15                  Texas, just as long as Texas consents.

16                  The only question that Texas raises is  
17                  it says that if it wants to assert a sovereign  
18                  -- an implicit immunity, even when it interferes  
19                  with war-making and is acknowledged to interfere  
20                  with the ability to raise and support an Army,  
21                  that it should have the power to do so and that  
22                  the Constitution contemplated that.

23                  And our submission is the Constitution  
24                  does not contemplate that and that given the  
25                  sovereign authorities that the states gave up

1 textually, given the -- the fundamental  
2 structure of the Constitution, they gave up the  
3 ability to assert sovereign immunity in that  
4 precise context when it would interfere with the  
5 ability of the federal government to wage war --

6 JUSTICE KAGAN: Mr. --

7 CHIEF JUSTICE ROBERTS: Thank -- thank  
8 you.

9 MR. TUTT: Oh, I apologize.

10 CHIEF JUSTICE ROBERTS: No, I was just  
11 going to move us on to the next phase of  
12 questioning.

13 And, Justice Thomas, do you have  
14 anything to -- to ask?

15 JUSTICE THOMAS: Just a couple of  
16 questions, Mr. Chief Justice. Thank you.

17 Counsel, the -- does it make a  
18 difference here that USERRA authorizes suits  
19 against Texas in its own courts?

20 MR. TUTT: This Court has said that --  
21 that whether it was in a state court or a  
22 federal court is not relevant for the analysis  
23 of whether there was a -- a waiver in the Plan  
24 of the Convention. We don't think that -- that  
25 it is relevant, although Texas getting its own

1 judges is pretty -- is pretty good, we think.

2 JUSTICE THOMAS: Why isn't that  
3 commandeering their court system?

4 MR. TUTT: Your Honor, in -- in Printz  
5 and other cases, the Court has said that the --  
6 the states were contemplated to have been the  
7 court system of the United States and that it  
8 was -- creating federal courts was optional, and  
9 in which case all suits, in bankruptcy, in  
10 eminent domain, everything would have been  
11 ultimately vested in -- in federal -- in state  
12 courts even though they would involve suits  
13 against states.

14 JUSTICE THOMAS: I think some of the  
15 early states would have disagreed with that, but  
16 let's move on.

17 You seem to put a lot of weight on the  
18 fact that Congress has -- the national  
19 government has the war power that's  
20 unconditional and without qualification. I  
21 think those were your words.

22 If that's the basis for such broad  
23 authority, why couldn't Congress do the exact  
24 same thing under another provision that is  
25 unconditional and without qualification, such

1 as, for example, the Coinage Clause?

2 MR. TUTT: Your Honor, I think what's  
3 important is that they're provided without  
4 qualification or condition, but the objects to  
5 which they are directed are fundamental  
6 incidents of international sovereignty.

7 And so, when you view them in nature  
8 of their -- in -- in view of their objects and  
9 subjects, you understand that the unconditional  
10 grant carries with it a much more significant  
11 grant of federal authority than with respect to  
12 the concurrent regulatory powers.

13 These are --

14 JUSTICE THOMAS: Well, do you think  
15 that --

16 MR. TUTT: Yeah?

17 JUSTICE THOMAS: -- so you said it had  
18 the -- how -- you know, then the question  
19 becomes is how close this connection should --  
20 must be. I mean, the -- I think, when we had  
21 the -- and Justice Barrett alluded to it -- in  
22 the bank -- case of bankruptcy, I think we said  
23 that -- the Court said that it was inextricably  
24 intertwined with judicial proceedings. The --  
25 this seems to be quite remote from being

1       inextricably intertwined with war powers.

2                   MR. TUTT:  Your Honor, I would say  
3       that the war powers have, since the founding,  
4       had a -- an important relationship with the  
5       adjudication of controversies.

6                   The Constitution understands that  
7       soldiers will need to be tried and make special  
8       provision for that, and the -- the war powers  
9       have been exercised in ways that are uniquely  
10      judicial, and we canvassed this in our briefing  
11      for over 200 years, which always --

12                  JUSTICE THOMAS:  Yeah, but I don't  
13      think that -- that's one thing, to have court  
14      martial proceedings or proceedings involving  
15      military conduct.  This is post-military.

16                  But let's move on.  I don't want to  
17      delay matters.  The final question I have for  
18      you is, can you give me an example where  
19      sovereign immunity has been waived for private  
20      money damages suits against states?

21                  MR. TUTT:  I -- I think you're  
22      speaking about, for instance, in Katz, where it  
23      was a preferential transfer suit.  Is that in  
24      the nature --

25                  JUSTICE THOMAS:  No, just money



1 damages. Aren't we -- aren't money damages  
2 involved here?

3 MR. TUTT: Yes, Your Honor.

4 JUSTICE THOMAS: Give me an example of  
5 a suit in which money damages, not just  
6 compensation for property, that sort of thing,  
7 but money damages.

8 MR. TUTT: Your Honor, I would -- I  
9 would point to both suits by the United States  
10 against a state and suits by --

11 JUSTICE THOMAS: Well, the United  
12 States doesn't really count since that --  
13 that's -- that's -- that's conceded.

14 MR. TUTT: Well, Your Honor, it is  
15 important because Texas says that it would be  
16 willing to entertain these suits, the exact same  
17 suits for the exact same damages that inure to  
18 the exact same beneficiary as long as this was  
19 captioned United States against Texas.

20 And so, you know, if that's all that  
21 it's -- that's at stake, it -- it seems like a  
22 pretty low-stakes question for Texas, so the --  
23 so -- because these suits are -- are authorized  
24 for money damages by the United States on behalf  
25 of the veteran.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Breyer, any questions?

4 JUSTICE BREYER: Do you know, in an  
5 eminent domain suit brought by an individual  
6 under delegation, if something valuable has been  
7 destroyed by the present owner, is that person  
8 who is suing for eminent domain entitled to  
9 money damages and compensation?

10 MR. TUTT: Yes, Your Honor.

11 JUSTICE BREYER: And do you know any  
12 case which says they wouldn't get that as part  
13 of the eminent domain suit?

14 MR. TUTT: I -- I'm aware of no case,  
15 Your Honor.

16 CHIEF JUSTICE ROBERTS: Justice Alito?  
17 Justice Sotomayor?  
18 Justice Kagan?

19 JUSTICE KAGAN: Mr. Tutt, way back  
20 when, when you were giving three reasons for why  
21 Seminole Tribe doesn't apply here, I think the  
22 second -- and I don't want to mischaracterize  
23 you, it was a while ago, so tell me if I've  
24 gotten this wrong -- but you basically says --  
25 said, you know, a lot has happened since

1 Seminole Tribe, a lot of water under the dam,  
2 and we don't have to take some of Seminole  
3 Tribe's statements for quite all their worth.

4 And I'll just say speaking personally  
5 now I doubt I would have been in the majority in  
6 Seminole Tribe, so if you have reasons for why  
7 you think Seminole Tribe should not be read for  
8 every -- for all it's worth, you know, have at  
9 it.

10 MR. TUTT: Well, Your Honor, I  
11 think -- I think the biggest reason is that it  
12 would be extraordinary for Seminole Tribe to  
13 have placed a limitation on the war powers  
14 without any discussion at all of the war powers,  
15 without any discussion at all of the incidental  
16 impact of that reasoning.

17 JUSTICE KAGAN: Well, I guess what I'm  
18 saying, I know that --

19 MR. TUTT: Yeah.

20 JUSTICE KAGAN: -- Seminole Tribe was  
21 not about the war powers, but Seminole Tribe  
22 seemed to take an extremely strong view that the  
23 exclusivity of a federal power really didn't  
24 matter.

25 And I took you to be saying that our

1 cases since Seminole Tribe have suggested that  
2 Seminole Tribe wasn't right. Is that what  
3 you're saying?

4 MR. TUTT: I think that the reasoning  
5 of PennEast puts a -- puts a focus on the  
6 exclusivity and the importance to the complete  
7 exercise of the eminent domain power in the  
8 federal government.

9 I don't -- I -- I don't want to say  
10 that this Court has to overrule a single  
11 precedent to rule for us. The -- the reasoning  
12 of Seminole Tribe is not the best for us, but  
13 it -- it just does not reach beyond the ordinary  
14 domestic Article I powers.

15 The Court could draw a distinction  
16 there and say that the -- that a complete but  
17 ordinary domestic regulatory power is different,  
18 fundamentally different, than an exclusive  
19 international incident of the sovereignty of the  
20 United States and that that is a perfectly sound  
21 reason to overrule nothing in Seminole Tribe but  
22 nonetheless reach the right result in this case.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: On that last  
2 question, I'll say the same thing, Article I,  
3 Section 10 is important too, right?

4 MR. TUTT: Yes, absolutely, Your  
5 Honor. I think it's essential. And its  
6 divestiture --

7 JUSTICE KAVANAUGH: And there's no --  
8 no equivalent of that in -- in the Indian  
9 Commerce Clause.

10 MR. TUTT: There -- there is not,  
11 and -- and the development of the Indian  
12 Commerce Clause exclusivity jurisprudence  
13 followed a different trajectory. Here, it was  
14 written and enumerated in the Constitution  
15 itself they could never exercise those powers.  
16 They cannot enter into a treaty, period.

17 JUSTICE KAVANAUGH: And then you  
18 mentioned earlier it came up in 1974. Why, and  
19 why does -- why is that relevant?

20 MR. TUTT: Oh, yes, yes, Your Honor.  
21 It -- it came up because there was resistance  
22 to -- resistance among the states to reemploy  
23 the veteran in 1974, and the traditional respect  
24 that the federal government --

25 JUSTICE KAVANAUGH: Because?

1           MR. TUTT: Because of opposition to --  
2 to the -- the war at the time. And -- and the  
3 states were basically using their -- their  
4 privilege as states to express in law a view  
5 about what the foreign policy of the United  
6 States should be and how the United States  
7 should wage war, which I think is exemplary of  
8 the issue that we think that the war powers  
9 never could -- could allow. The states do not  
10 have a role to play in this area.

11           CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

13           JUSTICE BARRETT: I do have a  
14 question. I want to take you back to Justice  
15 Kagan's question to you about the buckets and  
16 how do I know what the difference is between the  
17 buckets.

18           Do you think they just made the wrong  
19 argument in Seminole Tribe? You know, you've  
20 said a couple times, well, that was an  
21 abrogation case, that was an Article I case, and  
22 we're not talking about abrogation here.

23           But why not? I mean, maybe -- maybe  
24 we just didn't consider the argument in Seminole  
25 Tribe. I mean, you point out in your briefs

1 that, well, the national defense was one of the  
2 reasons that the Constitution was ratified.

3 Well, so is commerce and trying to get  
4 rid of protectionism. And so I think we've said  
5 again and again in some of our commerce case --  
6 clause cases, we said it in *Wayfair*, that this  
7 is the kind of thing, commerce, free commerce  
8 between the states and giving Congress the  
9 Commerce Clause, the commerce power was a  
10 reason.

11 So do you think that we just -- you  
12 know, that the right argument wasn't made and  
13 that *Seminole Tribe* should come out differently  
14 if we consider the Plan of Convention argument?

15 MR. TUTT: I -- I think that -- that  
16 *Seminole Tribe* is correct and that you do not  
17 have to overrule any --

18 JUSTICE BARRETT: No, I -- I  
19 understand you don't want to --

20 MR. TUTT: Yes.

21 JUSTICE BARRETT: -- overrule it, but  
22 what if the Plan of Convention argument has been  
23 made? Is the answer to Justice Kagan's bucket  
24 questions, well, maybe we should be thinking of  
25 all of this as Plan of the Convention and so

1 maybe Seminole Tribe, they just made the wrong  
2 argument?

3 MR. TUTT: Your Honor, I -- I -- I  
4 don't know. I have not read the briefs. I've  
5 read the relevant passages in Seminole Tribe  
6 many times to try to understand what was -- what  
7 was the reasoning of the case, and I just think  
8 that Seminole Tribe made some statements that  
9 were broader than its holding and made some  
10 assertions about --

11 JUSTICE BARRETT: No, no, no, no.  
12 Just, like, back -- back up. I'm not asking  
13 whether anyone actually made the Plan of the  
14 Convention argument in the case. I haven't gone  
15 back and looked at the briefs either, but I  
16 assume that they did not.

17 I'm saying that if today you were  
18 presented with those facts, could you make a  
19 successful Plan of the Convention argument on  
20 the facts of Seminole Tribe for some of the  
21 reasons I gave?

22 MR. TUTT: No. No, I do not -- I do  
23 not believe that you could make a Plan of the  
24 Convention argument for the Commerce Clause. I  
25 think that the powers of commerce, of copyright,



1 of intellectual property, of coining money, of  
2 counterfeiting securities, of postal roads, all  
3 of the domestic powers that are conferred in  
4 Article I, Section 8, sovereign immunity plays a  
5 fundamental role in preserving democratic  
6 accountability and the role of the states in our  
7 federal system.

8 But, here, we have a different matter.  
9 Here, we have the survival of the nation, and as  
10 to that, there's just a fundamental difference  
11 in how it was talked about at the -- at the time  
12 of the ratification. There's a fundamental  
13 difference in the history of how these powers  
14 have been exercised -- exercised and understood  
15 by the states. There's just no -- I think no  
16 comparison.

17 So thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 MR. TUTT: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Mr. Michel.

22 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL  
23 FOR THE UNITED STATES, AS AMICUS CURIAE,  
24 SUPPORTING THE PETITIONER

25 MR. MICHEL: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 Raising and supporting military forces  
3 is among the United States' express  
4 constitutional powers and most essential  
5 responsibilities. USERRA directly advances that  
6 mission. Its employment protections originated  
7 with the World War II draft. They were extended  
8 to permit suits against states to combat  
9 discrimination against the military during the  
10 Vietnam War. And they are especially important  
11 today to Guard and Reserve forces, who both  
12 serve the nation and work for employers,  
13 disproportionately including state employers.  
14 Those employers have sovereign immunity to most  
15 private suits, but this area is different.

16 The Constitution was adopted in large  
17 part to stop states from undermining federal  
18 efforts to raise a military. This Court has  
19 never imposed a state sovereignty-based  
20 limitation on the federal powers to raise and  
21 support Armies or provide and maintain a Navy.  
22 In this distinctive area, we are one nation with  
23 one sovereign, and USERRA's cause of action can  
24 be fully enforced against all employers.

25 CHIEF JUSTICE ROBERTS: Mr. Michel,

1 the Court in PennEast drew an express  
2 distinction between abrogation of sovereign  
3 immunity and immunity that was -- sovereignty  
4 that was waived, given away, under the Plan of  
5 the Convention.

6 What is the consequence of that -- in  
7 -- in your view, what is the consequence of that  
8 distinction, or could you perhaps articulate  
9 perhaps more clearly than the Court did in  
10 PennEast exactly what that distinction is?

11 MR. MICHEL: So, Mr. Chief Justice,  
12 I'll do my best. I think the -- those two  
13 inquiries go to different sources of evidence.  
14 When you're talking about a surrender of  
15 immunity in the Plan of the Convention, the  
16 Court is looking at what the founders  
17 understood, what the text of the Constitution  
18 provides. When you're asking about abrogation,  
19 the Court has looked to whether a particular  
20 statute provides for suits against states with  
21 particular clarity, and that's the -- the  
22 Fourteenth Amendment inquiry that the Court  
23 has -- has undertaken.

24 Now I don't dispute too much with  
25 Justice Kagan's characterization earlier that

1       there is some commonality in those -- in those  
2       analyses, but I think, ultimately, the Plan of  
3       the Convention test looks to, as it sounds, the  
4       Plan of the Convention, and in this case, there  
5       really is overwhelming evidence that the states  
6       understood they were giving up a fundamental  
7       aspect of their sovereignty with respect to this  
8       particular power to raise and support Armies and  
9       provide and maintain a Navy.

10                 JUSTICE KAGAN: I guess I would have  
11       thought that the abrogation cases are also in  
12       part not only about whether Congress has spoken  
13       clearly but whether, even if Congress did speak  
14       clearly, its word would govern. Isn't that what  
15       they're about? And -- and, in order to answer  
16       that question, aren't we looking at the same  
17       kinds of things that we're looking at to  
18       determine whether there's an exception under the  
19       Plan of the Convention?

20                 MR. MICHEL: I mean, I do think you  
21       might be looking at a lot of the same sources.  
22       I think they're -- they're somewhat analytically  
23       separate, and the Court has described them as  
24       somewhat analytically separate, but I don't want  
25       to resist too much the notion that in both

1 cases, what the Court is analyzing is the  
2 constitutional power and its effect on the  
3 states, namely, whether the states were  
4 relinquishing a fundamental attribute of  
5 sovereignty. And I do think there are some  
6 commonalities in the Court's abrogation and Plan  
7 of the Convention cases that confirm that --  
8 that there is overlap in that area.

9 JUSTICE BARRETT: Mr. Michel, how do  
10 you answer the question that I asked Mr. Tutt  
11 about PennEast and Katz, bankruptcy and eminent  
12 domain, addressing power that was really  
13 uniquely tied to judicial proceedings?

14 And I don't think anybody would  
15 dispute that in the Plan of the Convention,  
16 states relinquished their war power. But war  
17 power isn't inextricably intertwined with  
18 condemnation actions or -- or bankruptcy  
19 proceedings. I mean, it's -- it's -- it's  
20 separate from suit. How do you address that?

21 MR. MICHEL: Sure. A couple of ways,  
22 Justice Barrett. I think I -- I agree with Mr.  
23 Tutt that although that is a common thread  
24 between Katz and PennEast, it doesn't seem to be  
25 reflected all that strongly in the Court's

1 reasoning, but even if you think it is reflected  
2 more strongly than that, it's certainly not in,  
3 for example, the Court's Fourteenth Amendment  
4 cases, where the Court has concluded in cases  
5 like Fitzpatrick versus Bitzer that there is an  
6 abrogation of sovereign immunity or that the  
7 Fourteenth Amendment divested states of  
8 attributes of sovereignty, even though there  
9 could, of course, be suits under all kinds of  
10 different causes of action there that aren't  
11 inherently bound up in litigation.

12 And I think you could say similar  
13 things about suits by the United States against  
14 states, suits by states against other states,  
15 which I take it everybody agrees, under the  
16 older cases like United States versus Texas, did  
17 give way to a surrender in the Plan of the  
18 Convention.

19 JUSTICE KAGAN: Why don't you bring  
20 these suits, Mr. Michel?

21 MR. MICHEL: So we do bring some  
22 suits. As we explained in our invitation brief,  
23 I think my friend for Petitioner maybe  
24 undersells how vigorous the United States has  
25 been in this area. We actually resolve a lot of

1 cases consensually where the Department of  
2 Labor, for example, will call the employer and  
3 explain their USERRA responsibilities and the  
4 cases can reach a successful conclusion for the  
5 servicemember in that way.

6 But I don't dispute Petitioner's point  
7 that the private enforcement remedy is very  
8 important here. It's Congress's judgment. This  
9 Court has said that Congress has broad judgment  
10 in the area of raising and supporting Armies.

11 This is a familiar enforcement  
12 mechanism. For example, Title VII authorizes  
13 private enforcement actions, and I think the  
14 Court has long recognized that those -- Congress  
15 is entitled to include those kind of mechanisms  
16 to --

17 JUSTICE KAGAN: Right. I guess I just  
18 -- I mean, there is a little bit of dissonance  
19 between the importance that you're saying this  
20 has to the federal war powers and, on the other  
21 hand, the actual practice of the federal  
22 government in prosecuting these suits.

23 MR. MICHEL: Well, I -- I respectfully  
24 disagree, Justice Kagan. I think, when the  
25 government has found violations, you know, we've

1 brought cases, and as I said, sometimes we  
2 haven't had to bring litigation, but I think  
3 that's the process working, not the process  
4 failing. And it may be --

5 JUSTICE ALITO: Well, there -- there's  
6 an amicus brief that has statistics about the  
7 number of cases that the Justice Department has  
8 brought. It says that in the 16 years from 2004  
9 to 2020, the court -- the Justice Department  
10 filed 109 lawsuits, which is a little more than  
11 six a year, and that only two were filed from  
12 2015 -- since 2015, only two have been filed.

13 Are those statistics correct?

14 MR. MICHEL: I think they are correct,  
15 but, as we pointed out at our -- in our  
16 invitation brief, the numbers are much larger  
17 when you look at how many soldiers' claims have  
18 been successfully resolved. And I would  
19 respectfully submit that that's the more  
20 important number. I mean, if the government can  
21 resolve a claim without litigation, I think  
22 that's better for everyone, the soldier and the  
23 employer alike.

24 JUSTICE KAVANAUGH: What's the  
25 realistic problem that you foresee if you don't



1 prevail in this case?

2 MR. MICHEL: Well, Justice Kavanaugh,  
3 I think it's the problem that led Congress to  
4 adopt the statute in the first place and, in  
5 particular, to adopt the provision allowing  
6 suits against states, which is there could be  
7 serious problems of discrimination against the  
8 military.

9 Now, happily, I don't think we face  
10 that problem on a systematic basis today the way  
11 that we did during the Vietnam war, but, of  
12 course, that could change and a constitutional  
13 ruling by this Court would take this tool off  
14 the table forever.

15 I also think there are individual  
16 cases like this one where employers -- you know,  
17 there's a good-faith dispute about whether there  
18 was a violation in this case, but being able to  
19 bring these suits is an important remedy for the  
20 individuals and it's an important deterrent  
21 effect for the employers, including state  
22 employers, to know that they have to comply with  
23 the statute or -- or else they'll face, you  
24 know, real consequences.

25 JUSTICE KAVANAUGH: And you said the

1 state employers -- or state employees are  
2 disproportionately part of the Guard and  
3 Reserves? I think you said that.

4 MR. MICHEL: I did, yeah, and I don't  
5 have an exact figure on that, but I think that's  
6 not a particularly surprising fact. I mean,  
7 there's people who are drawn to public service,  
8 people who are like Petitioner in the state  
9 police or, you know, state firefighting  
10 services. Those -- not only are those people  
11 more likely to join the military, but they also  
12 bring a set of skills that's particularly  
13 important to the military.

14 JUSTICE KAGAN: Has the federal  
15 government considered whether, if Texas wins  
16 this lawsuit, the federal government would bring  
17 suit on Mr. Torres's behalf?

18 MR. MICHEL: So there's an  
19 administrative mechanism in the statute by which  
20 a petitioner -- by which a plaintiff can ask the  
21 government to bring a suit, and the Petitioner,  
22 Torres, didn't invoke that in this case. But,  
23 if he were to invoke that, the federal  
24 government would -- would consider it. We don't  
25 have a -- we don't have a position on the merits

1 of this case, but if that claim came to us or a  
2 similar claim came to us in a different case, we  
3 would -- we would consider that.

4 But I do -- I want to make the point  
5 that, you know, the federal government having to  
6 litigate cases all over the country would be a  
7 -- a real departure from what Congress in  
8 exercising these broad powers determined was  
9 necessary to raise and support a military, and I  
10 think the Court owes particular judgment to  
11 Congress's decisions in this -- in this area.

12 JUSTICE BREYER: In 32 -- in  
13 Federalist 32, Hamilton discusses this, and one  
14 of the things he says, the issue here, is  
15 whether the Convention in its plan was to  
16 maintain those "rights of sovereignty which  
17 states had before." And then he lists three  
18 criteria, which I'll ask questions about later.

19 All right. But what are those rights  
20 of sovereignty? Are they just asserting  
21 sovereign immunity in a lawsuit by a private  
22 person, or are there others?

23 MR. MICHEL: I think there are  
24 probably other components.

25 JUSTICE BREYER: And what are the

1 others? Do you -- do you have anything in your  
2 mind about those others?

3 MR. MICHEL: Well, I mean, I --

4 JUSTICE BREYER: Because, of course,  
5 if you win or if you lose, rather, whatever  
6 those others are, they're not infringed either.  
7 And what I've been looking for is, what are  
8 those others?

9 MR. MICHEL: Sure. I mean, I -- I --  
10 I actually -- I don't have a list in mind. I  
11 think --

12 JUSTICE BREYER: Just any one or two.

13 MR. MICHEL: You know, the immunity --  
14 immunity against commandeering, immunity against  
15 coercion. I think this -- this Court has said  
16 that other attributes of sovereignty like that  
17 come up in the -- in the doctrine.

18 JUSTICE BREYER: So, if, in fact,  
19 California had been invaded in 1942 and, as  
20 frequently happened in the Philippines, the Army  
21 had to seize houses so they wouldn't fall into  
22 the hands of the Japanese, at that point, it  
23 couldn't be done if you lose?

24 MR. MICHEL: Well, I don't want to  
25 accept that, Justice Breyer. I think --

1 JUSTICE BREYER: Well, is it a right  
2 of sovereignty or not? You said they're  
3 commandeering. They're commandeering the  
4 sheriff's office. I shouldn't have said a  
5 house. I said they're -- they're commandeering  
6 the governor's palace, they're commandeering.  
7 All kinds of things happen in wars.

8 MR. MICHEL: So a couple of points. I  
9 think we would say if we lost this case that the  
10 government could still do that. The Court in  
11 cases like Case versus Bowles has said that the  
12 Tenth Amendment sovereignty power does not  
13 entitle a state to object to the -- to the  
14 government's exercise --

15 JUSTICE BREYER: Very well.

16 MR. MICHEL: -- of war powers.

17 JUSTICE BREYER: Then you're saying  
18 that Hamilton, when he writes this, did not mean  
19 rights of sovereignty which the state had  
20 before. He only meant some of the rights which  
21 the state had before.

22 MR. MICHEL: Well, my response,  
23 Justice Breyer, would be that he did mean -- at  
24 least for this case, he meant sovereign immunity  
25 and --

1                   JUSTICE BREYER: Well, of course, for  
2 this, but what I'm thinking, if I expose my  
3 thought, is that when you talk about the Indian  
4 Commerce Clause, you're talking about a power to  
5 regulate something that will exist no matter who  
6 wins, namely, commerce. It's going to go on  
7 there and it will be regulated in many ways.  
8 And the same is true of -- of -- of a lot of  
9 these other clauses in the First Amendment.

10                   But, here, it's quite different  
11 because I don't know what is involved when you  
12 say states retain their sovereign rights to  
13 raise Armies, to raise Navies, to -- and then  
14 there were a list of six clauses. So I thought  
15 you might have thought that through better than  
16 me, and I suspect you have, and I want to hear  
17 what you have to say.

18                   MR. MICHEL: Well, I think the most  
19 important part of the Hamilton passage, and I  
20 hope this is at least partly responsive to your  
21 question, is that when you read that in  
22 conjunction with Hamilton's passage in  
23 Federalist 81, which this Court has relied on as  
24 the foundation of its sovereign immunity  
25 jurisprudence all the way back to Hans versus

1 Louisiana, he directly links that list that  
2 you're talking about, Justice Breyer, in  
3 Federalist 32 with the areas in which there was  
4 an alienation of sovereignty to produce a waiver  
5 of sovereign immunity in the Plan of the  
6 Convention.

7           So, if you take Hamilton's word on  
8 what sovereign immunity means, you have to read  
9 the whole paragraph, and he references back to  
10 this paragraph 32. And this is where Article I,  
11 Section 10, I think, is particularly important  
12 because one of the categories on the list, which  
13 you didn't read but were going to go on to read,  
14 is where a power is granted to the federal  
15 government on the one hand and withheld from the  
16 states on the other hand, that's exactly what's  
17 happening with the Raise and Support Armies  
18 Clause and --

19           JUSTICE BREYER: Now is it? Because,  
20 if you read the six clauses that have to do with  
21 the war power in Article VIII, they give to  
22 Congress all these powers, Armies, Navies, et  
23 cetera, but it ends by giving to the states the  
24 power of running the militia in two areas,  
25 reserving, it says, to the states, respectively,

1 the appointment of officers in the militia and  
2 the authority of training the militia according  
3 to discipline preserved by Congress. Hmm.

4 Now does that reserve mean that the  
5 other things listed in the six clauses are  
6 exclusively the business of the fed and  
7 prohibited to the states?

8 MR. MICHEL: Yes. I agree with that.

9 JUSTICE BREYER: And what's your  
10 evidence for that?

11 MR. MICHEL: I mean, I think that both  
12 the text itself once -- when the text is sort of  
13 fully distributing the powers, which I think it  
14 is here.

15 JUSTICE BREYER: Yeah.

16 MR. MICHEL: Now, of course, another  
17 very strong piece of textual evidence for that  
18 is Article I, Section 10, Clause 3, that  
19 expressly withholds the powers from the states.

20 I do want to make the point that --  
21 that differentiates the raise and support Armies  
22 power from all of the other powers that this  
23 Court has considered in cases that have really  
24 gone both ways, with a few exceptions.

25 One is the Fourteenth Amendment. In



1 his opinion for the Court in Fitzpatrick versus  
2 Bitzer, Justice Rehnquist relied on the fact  
3 that the Fourteenth Amendment both grants power  
4 to the federal government and expressly  
5 withholds power from the states. That was the  
6 same framework that Hamilton set up when he  
7 explained when there would be a surrender in the  
8 Plan of the Convention.

9           The Court in Katz, in Footnote 13,  
10 referred to the interaction between Federalist  
11 32 and Federalist 81 in explaining that the  
12 bankruptcy clause falls within another one of  
13 those categories that's in Hamilton's essay,  
14 Federalist 32.

15           So I think that is powerful support,  
16 assuming the Court is going to continue to rely  
17 on Hamilton's account of sovereign immunity, to  
18 understand where there was a surrender of  
19 sovereign immunity in the Plan of the Convention  
20 and to find that these particular powers are  
21 subject to that surrender.

22           CHIEF JUSTICE ROBERTS: Justice  
23 Thomas, any questions?

24           JUSTICE THOMAS: Yes, Chief. I'm  
25 perhaps not as enamored of Hamilton as some are.

1           I -- I'm looking, counsel, at Article  
2 I, Section 10, that it -- it also precludes  
3 states. It says no state shall enter into any  
4 treaty, on and on, but it also mentions the  
5 Coinage Clause.

6           So can -- can you have the exact same  
7 or similar exercise of authority under the  
8 Coinage Clause as you are now suggesting exists  
9 under war powers?

10           MR. MICHEL: So, Justice Thomas, we  
11 don't have a position on that, but I agree with  
12 you that that is one of the few other powers  
13 that fits within that Hamiltonian framework, and  
14 there would be an argument that Congress could  
15 breach sovereign immunity if it -- under that  
16 power, but I would be quick to note that there's  
17 a lot of other evidence with respect to the war  
18 powers, the -- all the tremendous evidence about  
19 the Convention itself and that what states  
20 recognized they were giving up at the time of  
21 the Convention in the area of the military that  
22 I -- although I haven't fully studied it, I -- I  
23 doubt that that's present for the Coinage  
24 Clause, so the argument would be somewhat weaker  
25 there. But the Hamilton point, I agree, would

1 be the same.

2 JUSTICE THOMAS: So does it affect  
3 your argument that this -- that this authorizes  
4 suit in state court and that it authorizes money  
5 damages? And, you know, Justice -- there was  
6 some suggestion by Justice Breyer in his  
7 questioning that there wasn't much difference --  
8 appeared to be not much difference between just  
9 compensation and damages in these cases.

10 So does that -- is there -- does that  
11 affect your analysis at all, one, that it's in  
12 state court, two, that it involves money damage  
13 in what is more, I think, like a tort suit as  
14 opposed to just compensation for taking  
15 property?

16 MR. MICHEL: Sure, Justice Thomas,  
17 I'll take them one at a time.

18 I think, ultimately, the fact that  
19 Congress made the judgment to channel these  
20 suits into state court doesn't affect the  
21 analysis. Congress could always channel suits  
22 into state court. That's the Madisonian  
23 compromise that -- that this Court has  
24 recognized for -- for many years, and the fact  
25 that the Court -- the Congress decided to do

1 that in this case I don't think changes the Plan  
2 of the Convention surrender analysis.

3 As to your second question about  
4 damages, I agree that the damages at issue here  
5 are different than in a takings case, but  
6 they're not different than would be at issue in  
7 a Title VII case under the Fourteenth Amendment,  
8 where I think everybody agrees, including my  
9 friends from Texas, that they're suable,  
10 including in state court, for damages in a -- in  
11 a discrimination case that would look a lot like  
12 the suit in this case, although the basis for  
13 the discrimination obviously would be different.

14 It -- it -- there's nothing for and  
15 about the notion of damages and -- and a waiver  
16 of state sovereign immunity and the same is true  
17 about suits by states against other states.  
18 There are, as this Court is well aware, suits by  
19 states against each other for damages in  
20 water-related actions and other actions, where I  
21 think everyone agrees there is a waiver of  
22 sovereign immunity in the Plan of the  
23 Convention.

24 JUSTICE THOMAS: So the -- you -- you  
25 think that there is no difference between a

1 grant of authority under the Fourteenth  
2 Amendment and implying similar authority under  
3 war powers?

4 MR. MICHEL: Well, I -- I think it  
5 would depend, you know, on -- of course, each  
6 power, you know, comes with its own history and  
7 its own -- and its own analysis, but I do think  
8 there's a lot in common between the Fourteenth  
9 Amendment and the raise and support Armies  
10 power. As I said earlier, both are granted and  
11 withheld by the text of the Constitution, and I  
12 think both indicate an unusual and particularly  
13 sort of superior relationship between the  
14 federal government and the states.

15 Obviously, the Fourteenth Amendment  
16 was adopted as a result of war, and the  
17 understanding of the -- of the Raise and Support  
18 Armies Clause was similar -- similarly a  
19 response to the Revolutionary War and the  
20 failure of the states to provide for the  
21 military and, you know, the paramount purpose of  
22 ensuring that state obstruction of the federal  
23 military would not continue under the new  
24 Constitution.

25 JUSTICE THOMAS: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice

2 Breyer?

3 Justice Alito?

4 Justice Sotomayor?

5 Justice Kagan?

6 Justice Gorsuch?

7 JUSTICE GORSUCH: I'm just wondering  
8 what the limits are of the principle you're  
9 asking us to adopt. I understand the textual  
10 commitments in the Fourteenth Amendment, but,  
11 here, we're being asked to adopt a view  
12 of implicit penumbras emanating from the War  
13 Powers Act -- sorry, from the war powers that  
14 the president and the Congress have in Article I  
15 and Article II.

16 And you're giving us a very broad view  
17 of what those powers are, including to raise  
18 Armies, going so far as to suits against the  
19 states for veterans coming home, and without any  
20 linkage to necessity of any current exigency or  
21 any need for troops today. There's no argument  
22 here, as I understand it, that this is actually  
23 necessary or that Congress couldn't and the  
24 federal government couldn't bring these suits  
25 themselves if they wanted to do so. There's no

1 argument that this is necessary -- allowing  
2 private suits against states is necessary to  
3 raise an Army in the United States today.

4 And so I guess I'm just wondering,  
5 what are the limits? I mean, Justice -- Justice  
6 Alito posited a pretty interesting example about  
7 potholes on interstate highways. Would every  
8 state policy that could be subject to an  
9 argument that it would impair the ability of the  
10 federal government to raise an Army or a Navy or  
11 to conduct war be subject to suit, private suit,  
12 by private individuals with punitive damages and  
13 attorneys' fees?

14 Is -- the broader you argue for the  
15 war powers of the United States, the broader the  
16 consequences are for federalism, and -- and I  
17 just want you to have a chance to address that.

18 MR. MICHEL: Sure. A couple things,  
19 and I -- in answering the later part of the  
20 question, I -- I think I can address the earlier  
21 part too.

22 This -- I think there is an argument  
23 in this case that allowing these lawsuits is  
24 necessary to raising and supporting Armies.  
25 That's obviously the judgment that Congress and

1 the president, the two political branches of the  
2 government, made when they enacted this statute.

3 JUSTICE GORSUCH: You're not arguing,  
4 though, that we -- we have other -- we don't  
5 have other mechanisms to raise and support  
6 Armies? It's just it's the preferred one today.  
7 I get it. Conscription is not very popular, but  
8 it sure worked for about 200 years.

9 MR. MICHEL: Well, Justice Gorsuch, I  
10 don't think that's, with respect, how the Court  
11 normally addresses Congress's exercise of its  
12 enumerated powers. For example, the Court in  
13 Rumsfeld versus FAIR didn't say --

14 JUSTICE GORSUCH: I understand.

15 MR. MICHEL: -- is law school reading  
16 --

17 JUSTICE GORSUCH: My -- my -- my  
18 question is --

19 MR. MICHEL: -- truly necessary.

20 JUSTICE GORSUCH: -- how broad does  
21 this go? The broader you reach -- the broader  
22 you create a war power and -- and you're --  
23 you're extending it very broadly here, the  
24 greater the impact is for federalism, and --  
25 and, at some point, they come to a head, and I'm



1 just asking you where you think that balance  
2 lies.

3 MR. MICHEL: Right. I mean, I think  
4 it lies at the -- at least in this case, at the  
5 perimeter of the Raise and Support Armies  
6 Clause. I don't think that just because  
7 Congress or some litigant asserts that something  
8 is within the Raise and Support Armies Clause --

9 JUSTICE GORSUCH: No, no. Congress  
10 says -- Congress says, you know, you can sue for  
11 potholes on interstate highways and you get  
12 punitive damages.

13 MR. MICHEL: Right. I think this  
14 Court would be very skeptical of a claim that  
15 that falls within the Raise and Support Armies  
16 Clause, but I don't think this Court should be  
17 skeptical --

18 JUSTICE GORSUCH: But what -- Congress  
19 said so. I mean, Congress said so. So you're  
20 asking us to defer to Congress here because  
21 Congress said so, and what -- what then?

22 MR. MICHEL: I mean, if Congress did  
23 say so in -- in a statute enacted by the  
24 representatives of the states, then we would  
25 have -- I think we would probably be here to --

1 JUSTICE GORSUCH: Defend it.

2 MR. MICHEL: -- defend that statute --

3 JUSTICE GORSUCH: Right.

4 MR. MICHEL: -- but it would be a  
5 tougher argument than in this case.

6 JUSTICE GORSUCH: And what happens to  
7 the Tenth Amendment in that world? What -- what  
8 happens to federalism in that world?

9 MR. MICHEL: Well, Justice Gorsuch, I  
10 think it would -- first of all, I don't think  
11 that lawsuit probably would come out in the  
12 federal government's favor, although I think, in  
13 that hypothetical scenario, we would probably  
14 try to defend it.

15 But, to get to the heart of your  
16 question, I think that with respect to raising  
17 and supporting Armies, the power of national  
18 survival, the federalism principles really do  
19 apply differently. And that's what the Court  
20 said in the Selective Draft Law Cases when it  
21 said the states' militia can be drafted into  
22 service by the United States and sent overseas.  
23 That's what the Court said in Case versus Bowles  
24 when it held that Washington's timber can be  
25 sold at a price dictated by the federal

1 government even though the state constitution  
2 dictated otherwise. The Court said that to read  
3 the Constitution differently would be to render  
4 it a self-defeating charter.

5 And so, in this particular area, where  
6 the survival of the nation is at stake, I think  
7 it's fair to say that federalism principles  
8 apply in a somewhat lesser way.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Kavanaugh?

11 JUSTICE KAVANAUGH: When you say the  
12 survival of the nation's at stake, can you  
13 explain that?

14 MR. MICHEL: Sure. When without a  
15 military, you know, the federal government can't  
16 defend itself. That was the exact purpose that  
17 motivated the adoption of these provisions in  
18 the Constitution in the first place.

19 JUSTICE KAVANAUGH: Okay. And you're  
20 relying on the Raise and Support Armies Clause,  
21 the text. You're not relying on penumbra, I  
22 didn't think.

23 MR. MICHEL: I -- I'm not. I mean, I  
24 think state sovereign immunity is itself  
25 something of a penumbra. It's not stated in the

1 -- the text of the Constitution. But, no, we're  
2 relying on the text of the Raise and Support  
3 Armies Clause.

4 JUSTICE KAVANAUGH: And just on the --  
5 you -- you alluded to this, but why is it  
6 necessary today to have this kind of law? Or  
7 maybe looking ahead, I mean, a case like this,  
8 we should not be deciding it without thinking  
9 about 20 years from now, 40 years from now, 60  
10 years from now.

11 MR. MICHEL: Sure. I mean -- and just  
12 -- this, I hope, follows up on Justice Gorsuch's  
13 question too. I mean, the United States has a  
14 -- a military of 2 million people; 800,000 are  
15 National Guard members and Reservists. These  
16 are people who work for civilian employers at  
17 the same time they have jobs. They've never  
18 been more important to the military than they  
19 are right now.

20 And one of the first questions that  
21 people like that will ask when they're  
22 considering whether to join the military is,  
23 well, do I get to keep my job? You know, does  
24 my employer have to let me take leave for  
25 training exercises or be deployed?

1           And it really does matter in the real  
2 world for the Army to be able to tell them, yes,  
3 your employer does have to do that. In fact, as  
4 one of the amicus briefs in this case points  
5 out, the brochure that the Army gives to its  
6 recruits lists the USERRA protections as part of  
7 the incentive package that they receive to join  
8 the military.

9           And it would matter a great deal in  
10 the real world if it was harder for the United  
11 States to recruit Guardsmen and Reservists for  
12 the military. Obviously, you know, the -- the  
13 national security needs are unpredictable, and  
14 the government doesn't know when it's going to  
15 need to deploy troops overseas, and being able  
16 to have a supply of -- of forces to defend the  
17 nation is one of the most existential jobs of  
18 the federal government in the first place.

19           JUSTICE KAVANAUGH: Thank you.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22           Thank you, counsel.

23           General Stone.

24

25

1 ORAL ARGUMENT OF JUDD E. STONE, II

2 ON BEHALF OF THE RESPONDENT

3 MR. STONE: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 No one disputes the importance of the  
6 war powers or that USERRA advances  
7 constitutional ends. Sovereign immunity never  
8 limits the ends that Congress may pursue, only  
9 the means that Congress may use in achieving  
10 them. Neither precedent nor history show that  
11 the states authorized Congress to use the means  
12 of subjecting states to private damages actions  
13 by delegating the ends of -- of raising an Army  
14 to Congress.

15 Torres's contrary argument rests on  
16 two premises: first, that the Constitution  
17 delegates a plenary and exclusive war power to  
18 Congress and, second, that the erection of state  
19 sovereign immunity impermissibly frustrates the  
20 exercise of those war powers.

21 That's the argument this Court  
22 embraced in *Union Gas* and rejected in *Seminole*  
23 *Tribe*. There, this Court affirmed that, even  
24 though it had described the Indian Commerce  
25 Clause as plenary, exclusive, Congress could not

1 use that clause to expose nonconsenting suits to  
2 damages actions. This Court cannot agree with  
3 Torres without rejecting Seminole Tribe and the  
4 various cases relying on it.

5 But even if this Court wrote on a  
6 blank slate, Torres lacks compelling evidence of  
7 a Plan of the Convention waiver. He cites  
8 nothing in founding-era debates that supports  
9 this incredible result, provides no examples of  
10 analogous founding-era suits against states, and  
11 he points to no attempt by Congress to expose  
12 states to such damages actions for over 200  
13 years following the founding.

14 There is no evidence that the founding  
15 generation saw the power to expose states to  
16 private lawsuits as inextricably intertwined  
17 with warfare or that the states intended to be  
18 sued without their consent by giving Congress  
19 the power to raise an Army. Without such  
20 compelling evidence, Torres cannot prevail under  
21 the Plan of the Convention.

22 Now, unless the Court would like to  
23 direct me otherwise, I wanted to begin by  
24 speaking directly to one of Justice Alito's  
25 concerns regarding what my friend on the other

1 side was seeking, essentially, sort of Torres's  
2 theory of relief.

3 CHIEF JUSTICE ROBERTS: Well, maybe --  
4 maybe, if you don't mind, I'd like to direct you  
5 to some of the statements you just made.

6 Nothing in the Plan of Convention that  
7 is applicable here that supports the result on  
8 the other side? Yes, there was no law like  
9 USERRA with respect to the obligations that  
10 could be enforced against the state, but it does  
11 seem to me that their strongest argument is what  
12 they have in the Federalist Papers, in the very  
13 reason that the Convention was -- was called.

14 MR. STONE: So --

15 CHIEF JUSTICE ROBERTS: Do you  
16 disagree with that?

17 MR. STONE: -- I agree that is their  
18 strongest point, Your Honor, although,  
19 obviously, I disagree about whether or not  
20 that's sufficient or anywhere near required for  
21 a Plan of Convention waiver, in part because of  
22 a couple of precepts this Court has recognized,  
23 and then I'll give you a historical example that  
24 I think explains it.

25 For one, this Court has described



1 sovereignty as having many aspects, so, for  
2 example, the power to -- to enter into a treaty,  
3 to declare war, power to coin money, to pursue  
4 criminal charges against individuals. There are  
5 many aspects of sovereignty.

6           This Court has also described states  
7 as residual sovereigns, which is to say they  
8 keep whatever they haven't given away. This was  
9 certainly the understanding of the founders in  
10 the Federalist papers and certainly a sort of  
11 basic precept of state sovereignty to begin  
12 with.

13           So the first and relevant question  
14 isn't whether or not states have specifically  
15 withheld an aspect of sovereignty but what  
16 they've given away.

17           Now this isn't the war powers exactly,  
18 but I think perhaps the next-door example is the  
19 Treaty Clause. Undeniable that in Article I,  
20 Section 10, the power to engage in treaties or  
21 in confederations is taken away from the states  
22 entirely. That is an important sovereign power  
23 that -- that plays in issues of war and peace.

24           Nonetheless, in *Alden v. Maine*, this  
25 Court looked at the Eleventh Amendment and

1 specifically at the rejected Gallatin proposal  
2 for the Eleventh Amendment, which would have  
3 exposed states to damages actions or to private  
4 suits arising under treaties, saw that rejection  
5 and understood that to mean that states as of  
6 the founding retained their immunity for  
7 treaty-based actions.

8           So, to the extent that that's correct  
9 -- and I don't understand anyone here calling  
10 for overruling or undermining Alden -- then it  
11 must mean at a minimum that by exiling some  
12 sovereign power, such as the power to engage in  
13 treaties, the states have not necessarily exiled  
14 their sovereign prerogative not to be sued --

15           CHIEF JUSTICE ROBERTS: Well -- well,  
16 so you're --

17           MR. STONE: -- for exercises related  
18 to that power.

19           CHIEF JUSTICE ROBERTS: -- there are  
20 two parts to that sentence. I understand the  
21 first but perhaps not the second.

22           But are you saying that the states did  
23 retain some war powers --

24           MR. STONE: Your Honor, I'm saying --

25           CHIEF JUSTICE ROBERTS: -- that they

1 could then rely on as opposed to those of the  
2 federal government?

3 MR. STONE: I'm saying that they --  
4 they gave away certain parts of sovereignty,  
5 including the ability to raise Armies, to  
6 declare war, et cetera, and that this Court  
7 should, consistent with those being vested in  
8 Congress and to the extent that they've been  
9 taken away in Article I, Section 10, should  
10 recognize those aspects of sovereignty have been  
11 taken away.

12 JUSTICE KAVANAUGH: That's not an  
13 answer to the question, did --

14 MR. STONE: Well, I -- I'm saying that  
15 --

16 JUSTICE KAVANAUGH: -- states retain  
17 any war powers.

18 MR. STONE: -- at minimum, the states  
19 have retained their prerogative not to be sued,  
20 which isn't conventionally considered a war  
21 power in some sense, in part because there isn't  
22 this inextricable intertwining between the two,  
23 or --

24 CHIEF JUSTICE ROBERTS: Well, then  
25 that challenges Congress's judgment, I guess,

1 that the law that is at issue here was  
2 essential, was the representation of the  
3 government's representative to the ability to  
4 raise Armies, right?

5 MR. STONE: To some extent, but I  
6 don't think so, Your Honor, precisely because  
7 the removal -- the fact that the states did not  
8 confer on Congress the -- the means of exposing  
9 states to private damages actions doesn't depend  
10 on a balancing test with Congress.

11 This Court's prior abrogation -- prior  
12 abrogation precedents and PennEast and Katz  
13 don't rely on a sort of balancing between  
14 Congress believed this is a very important  
15 exercise of power or a very important clause  
16 and, therefore, that overrides state immunity.

17 So we don't -- our arguments don't  
18 rely on whether or not the war powers are  
19 important or even foundational to the United  
20 States. No doubt they do.

21 And no doubt that -- that the Congress  
22 believes that something like USERRA is, in fact,  
23 important to maintaining an Army. It just turns  
24 out this Court doesn't balance away state  
25 sovereign immunity as sort of one constitutional

1 value --

2 JUSTICE KAVANAUGH: Can --

3 MR. STONE: -- amongst many.

4 JUSTICE KAVANAUGH: -- can I ask a --  
5 go ahead.

6 CHIEF JUSTICE ROBERTS: No.

7 JUSTICE KAVANAUGH: No? A case -- a  
8 question about our precedent and maybe picking  
9 up on Justice Kagan's questions to your friends  
10 on the other side.

11 Looking at our precedent as a whole in  
12 this area, which points, arguably, in some  
13 different directions, but I think one of the  
14 strong arguments on the other side -- I want to  
15 give you a chance to respond -- is, well, if  
16 you're going to allow suits against the states  
17 in bankruptcy, if you're going to allow eminent  
18 domain suits, you're going to allow suits under  
19 the Family -- Family and Medical Leave Act,  
20 you're going to allow Title VII suits against  
21 the states, it would be bizarre not to allow  
22 suits in the war powers area, where the national  
23 interest is at its apex as compared to those  
24 other areas. So that to me is a strong argument  
25 for them given our precedent, and I want you to

1 be able to respond to that.

2 MR. STONE: Certainly, Your Honor, and  
3 I understand the intuition behind it, of course,  
4 that war powers are big, important exercises or  
5 fundamental exercises of power.

6 I think the reason why that feels  
7 strange is precisely because you're having the  
8 intuition that more important things should be  
9 able to abrogate or dispense with sovereign  
10 immunity as opposed to less important ones.

11 JUSTICE KAVANAUGH: Well, I think  
12 they're all important, but they're more national  
13 so that the constitutional text itself makes  
14 very clear that these powers are given to  
15 Congress -- and Article I, Section 10, which is  
16 very important, explicitly, in case there was  
17 any mistake, divests the states, and even  
18 Article II, where the Commander in Chief power,  
19 Commander in Chief of the Armed Forces,  
20 including of the militia when called into  
21 service, so that the Article II displaces the  
22 state control over the -- over the militia,  
23 which was -- you know, that -- talk about taking  
24 away sovereignty. So, you know -- so it's not  
25 just important. It's the national/state balance

1       there.

2                   MR. STONE:  Certainly, Your Honor.  I  
3       want to speak specifically to the -- to the  
4       powers you -- you just cited and then to speak  
5       about the Indian Commerce Clause and the treaty  
6       power to sort of make the point.

7                   Regarding Katz and regarding there  
8       being sort of a uniquely federal interest there,  
9       there's a uniquely federal interest that this  
10      Court described when it was recalling Katz and  
11      Allen v. Cooper that sort of cited that there  
12      were these disparate state discharge orders and  
13      that, ultimately, individuals were being kept --  
14      kept in debtors prisons as a consequence.

15                  And it looked at the Bankruptcy Act of  
16      1800 and the potential for habeas relief there  
17      and sort of concluded by that ongoing history,  
18      contemporaneous with Chisholm, that the states  
19      had planned for federal courts to have a unique  
20      role to solve this problem among states, so --  
21      so unique that, in fact, that clause itself  
22      disposed with any opportunity, any -- any  
23      sovereign immunity defense.

24                  Of course, this Court also described  
25      that as a "good for one clause only" holding, in

1 part because it was recognizing that this Court  
2 had held, not just stated but held in Seminole  
3 Tribe that all other Article I, Section 8 powers  
4 wouldn't yield that result.

5 JUSTICE KAGAN: But, since then, I  
6 mean, since that statement that that's a "good  
7 for one" holding, it -- it seems to have been  
8 proved wrong, right? Because PennEast comes  
9 along and says, no, it's not a "good for one"  
10 holding and PennEast -- I think the world after  
11 PennEast, you might think makes -- you know, it  
12 makes Seminole Tribe look like a very different  
13 decision.

14 MR. STONE: I understand that  
15 intuition as well, Justice Kagan. I think part  
16 of what's doing work here is clause -- the "good  
17 for one clause only" holding. The eminent  
18 domain power as identified is not a clause, of  
19 course. It is a kind of sovereign power this  
20 Court identified in its precedents had been  
21 routinely assumed to belong to all sovereigns.

22 This Court turned to its precedents  
23 and saw that that not only belonged to all  
24 sovereigns, it clearly belonged to the United  
25 States and could be exercised against state



1 land, and the sort of subsidiary questions for  
2 this Court to decide were based on the history  
3 of delegation.

4 JUSTICE KAGAN: Just, I guess, taking  
5 a subset of Justice Kavanaugh's question and  
6 just focusing it on the eminent domain power, I  
7 mean, in what world could it be a sensible  
8 result to say states can be sued on the basis of  
9 the eminent domain clause but not on the basis  
10 of war powers?

11 MR. STONE: I think it's a creature of  
12 the Plan of the Convention test which goes  
13 specifically granularly to whether or not the  
14 states understood that this kind of judicial  
15 process would be worked against them.

16 JUSTICE KAGAN: Well, weren't war  
17 powers kind of the Plan of the Convention? I  
18 mean, what was this all about except to ensure  
19 that war powers were held by the federal  
20 government and not by any states?

21 That was -- you know, I -- I -- I  
22 understand that you don't want to be ranking  
23 clauses in order of importance, but I think we  
24 can say that in terms of the foundational  
25 commitments of the Constitution, that was pretty

1 much the premiere one.

2 MR. STONE: And no doubt that's true,  
3 Your Honor, that at minimum they're incredibly  
4 important and we can search the historical  
5 document and find as much about that.

6 But there are other powers that are,  
7 of course, important to exercising war too, for  
8 example, the ability to borrow and spend money,  
9 the ability to regulate commerce. These are  
10 things that the founders had historical evidence  
11 and historical experience with, and,  
12 nonetheless, this Court has previously said that  
13 these sort of commercial sounding powers  
14 nonetheless leave state sovereign immunity in  
15 tact.

16 So it might well be the case that if  
17 this Court wanted to say, well, powers being  
18 used towards war or towards the ends of war just  
19 have to be judged on some different model, then  
20 that would require this Court at least to sort  
21 of say, well, this isn't a Plan of the  
22 Convention question, at least not in the  
23 granularity that it looked to specifically in  
24 Katz and specifically in PennEast.

25 But there's something special about

1 the sort of important nature of the war powers  
2 that must yield a different result.

3 JUSTICE BARRETT: Well, maybe there  
4 is, and, you know, Justice Breyer was asking  
5 your friend on the other side -- asking Mr.  
6 Michel about what kinds of sovereignty may have  
7 been retained.

8 And, you know, another way to think  
9 about the questions that Justice Kavanaugh and  
10 Justice Kagan have been asking you is, if the  
11 states gave up all of this, you know, with  
12 respect to war powers and such a crucial aspect  
13 of the Convention, does it make sense to think,  
14 oh, but they retained sovereign immunity? I  
15 mean, that -- that seems kind of like small  
16 potatoes when you think about everything else  
17 they relinquished in this area.

18 MR. STONE: No, Your Honor, in part  
19 because I think, as this Court's recognized  
20 describing Chisolm time and again, the founding  
21 generation jealously guarded their sovereign  
22 immunity. They didn't think that was a sort of  
23 small potatoes afterthought aspect to  
24 sovereignty. And so, to talk about the Plan of  
25 the Convention dispensing with particular

1 aspects of sovereignty, the treaty power, the  
2 power to declare war, et cetera, the fact that  
3 the states broadly believed they retained their  
4 sovereign immunity I think requires some showing  
5 that specifically, in a given context, the  
6 states had exposed themselves to -- to private  
7 suits, essentially had agreed not to raise that.

8           This Court has found that in  
9 specific historical contexts like the Bankruptcy  
10 Clause and like eminent domain. It has said,  
11 even though dealing with the treaty power, which  
12 is something that's sort of on a first-order  
13 foreign relations issue, despite the treaty  
14 power being prohibited to states in Article I,  
15 Section 10, nonetheless, state sovereign  
16 immunity remains intact to treaty-based claims.

17           So I don't think the sort of wholesale  
18 treatment of sovereign in gross is consistent  
19 with how the Court has looked at sovereign  
20 immunity or sovereignty vis-à-vis the states.

21           JUSTICE BREYER: Well --

22           JUSTICE BARRETT: What about thwarting  
23 power? I mean, I think one of the strong  
24 arguments on the other side is one that Justice  
25 Kavanaugh was pressing Mr. Michel about, which

1 is that, you know, this -- post-Vietnam, states  
2 were expressing their policy disagreement with  
3 United States foreign policy and the United  
4 States' engagement in the Vietnam War by  
5 discriminating against veterans upon their  
6 return home.

7           One of the problems in PennEast was  
8 that New Jersey, by refusing -- by -- by -- by  
9 refusing to cooperate in the policy decision  
10 that the United States had made with respect to  
11 national gas pipelines, was thwarting federal  
12 policy.

13           And isn't it all the more serious here  
14 to have the states have the potential to  
15 thwart -- I mean, let's -- let's imagine that  
16 states decide -- let's say we get involved in  
17 Ukraine and states say that we shouldn't be, and  
18 so they use discrimination against veterans  
19 returning home to express their disapproval of  
20 our engagement.

21           MR. STONE: Your Honor, and -- and I  
22 don't want to generalize too much without  
23 speaking specifically to your example. It's, of  
24 course, the case that whenever states exert  
25 their -- their sovereign immunity against acts

1 of Congress, it's going to frustrate them. It  
2 will sometimes frustrate them in little ways and  
3 sometimes in large ways. That's a consequence  
4 of immunity in any context.

5 Now, to your specific example,  
6 Congress has several tools remaining, the most  
7 important of which that hasn't been really  
8 adequately discussed so far is that, of course,  
9 the United States is entitled to bring suit,  
10 Congress has specifically given them a cause of  
11 action against the states under USERRA to pursue  
12 remedies in -- in federal court against  
13 aggrieved servicemembers --

14 JUSTICE KAGAN: One of the things that  
15 PennEast said, the -- the -- the Court said  
16 there, that it would be counterintuitive to  
17 allow the United States to sue but not private  
18 parties. So why isn't the same true here?

19 MR. STONE: In part because that was  
20 discussing, I believe, the specific history of  
21 del- -- the fact that there was a robust history  
22 of delegating the power to condemn,  
23 specifically, the power to exercise eminent  
24 domain. There was a robust history of that  
25 before and after the founding, and there was an

1 agreement that the United States had the power  
2 to exercise eminent domain against state lands.  
3 And so the only question left was whether or not  
4 that power, as exercised and delegated by the  
5 United States, sort of lost some of its  
6 character when being put into individual hands.

7           This Court determined it wasn't, in  
8 part because the power of sovereign -- of  
9 eminent domain really was the power to condemn.  
10 It was a judicial power. It was a power that  
11 had an inextricably intertwined judicial  
12 characteristic with which there is no sort of  
13 war historical analogue where there's this  
14 robustly delegated power, this robustly  
15 delegated cause of action. And if it can be  
16 used and can be delegated, surely, it must be  
17 the same in the context of the United States and  
18 of individuals.

19           The United States, because it has a  
20 distinct Plan of the Convention waiver for its  
21 benefit when suing individual states, can  
22 always, up to and including on Mr. Torres's  
23 behalf, sue Texas and sort of pursue  
24 specifically the interests that they had.

25           This is a point that this Court made

1 in Alden, that, of course, the United States  
2 will sometimes come to this Court and express on  
3 behalf of the Solicitor General a belief that  
4 state sovereign immunity has to be dispensed  
5 with and yet will not have a tradition of  
6 actually pursuing these actions themselves.

7 This is something that could be easily  
8 solved by the U.S. And, also, to the extent  
9 that the DOJ doesn't want to make this a  
10 priority, Congress, through Spending Clause  
11 legislation or other mechanisms compliant with  
12 other Spending Clause restrictions, can induce  
13 the states simply to waive their immunity  
14 because they -- Congress could absorb them  
15 before --

16 JUSTICE KAVANAUGH: You're -- you're  
17 telling Congress how -- how to wage war  
18 successfully. But, you know, Congress and the  
19 president make that judgment about how to wage  
20 war successfully.

21 You agree that the power to wage war  
22 is -- has to be the power to wage war  
23 successfully, correct?

24 MR. STONE: In one sense and not the  
25 other, Your Honor. Of course --



1 JUSTICE KAVANAUGH: In what -- in what  
2 sense is it not the power to wage war  
3 successfully?

4 MR. STONE: It might be more  
5 expedient, for example, for Congress to delegate  
6 the power to make appropriations for the Armed  
7 Services to a single individual in the Senate,  
8 but it wouldn't be allowed to do that consistent  
9 with Article I, Section 7.

10 JUSTICE KAVANAUGH: And -- and then  
11 you agree that the power to wage war  
12 successfully depends on personnel?

13 MR. STONE: No doubt.

14 JUSTICE KAVANAUGH: Okay. And  
15 personnel today is volunteer, and a significant  
16 percentage are Guard and Reserve.

17 MR. STONE: Of course.

18 JUSTICE KAVANAUGH: And those people  
19 need protection from their jobs -- for their  
20 jobs.

21 MR. STONE: Absolutely, Your Honor.

22 JUSTICE KAVANAUGH: And a lot of them  
23 are state employees.

24 MR. STONE: Yes, Your Honor, though I  
25 might point out that Texas, by my best numbers,

1 has approximately 35,000 employees -- state  
2 employees who are veterans for the state. The  
3 United States Government, from what I  
4 understand, has about 950,000. And, of course,  
5 to the extent that the United States believes  
6 that this is a vital part of defending -- sort  
7 of keeping a ready military, it doesn't expose  
8 itself to remotely the same kinds of actions.

9 JUSTICE KAVANAUGH: Right, but the  
10 concern underlying -- as Justice Barrett was  
11 saying and I mentioned earlier, the concern  
12 underlying this is state hostility to the United  
13 States' foreign policy or national security --  
14 security objectives and to carry that out by  
15 hampering the war effort or preparation for war.

16 I mean, we have to be thinking about  
17 the next 50 years. We don't know what's going  
18 to be happening over the next 50 years. We  
19 don't know what's going to be happening over the  
20 next 50 days in terms of national security and  
21 personnel. And so I think it's important to  
22 recognize that a significant component of the  
23 power to wage war successfully is having  
24 personnel who are willing to sign up, and  
25 they're not going to be willing to sign up.

1           I mean, that's a practical argument.  
2     You can just say that's irrelevant if you want,  
3     but it's an important overlay of what's going on  
4     here. It's not -- the Plan of the Convention is  
5     relevant today, is what I'm getting at.

6           MR. STONE: I -- I don't at all think  
7     that's irrelevant, Justice Kavanaugh. What I  
8     would point out, though, is to extent that  
9     you're drawing inferences about how core some of  
10    these remedies or actions are, you should look  
11    to the United States' actual practice, which is  
12    to say the United States over the course of  
13    calendar year 2020 -- or 2020 and 2021, I  
14    believe, filed more briefs in this Court urging  
15    this Court to deny review than it took up cases  
16    under USERRA, which -- this is a very sparing  
17    occurrence for the federal government, who has  
18    orders of magnitude more individuals, more  
19    veterans employed before it. And that's not to  
20    say that the original delegation by Congress  
21    isn't important, but it's a little inconsistent  
22    to describe this as sort of ultimately vital to  
23    the national war effort, but then we see it very  
24    infrequently.

25           Also, you know, equally hard to

1 explain is the fact that for the federal  
2 government, who, again, orders of magnitude more  
3 than even Texas, a very large state, to the  
4 extent that there's an aggrieved serviceman,  
5 they have an administrative right of review  
6 which can be judicially reviewed in the Federal  
7 Circuit on sort of APA deferential grounds.

8 Texas, on the other hand, is treated  
9 like a private party. That's actually  
10 denominated in the statute, that Texas and all  
11 those states are private parties, to which Texas  
12 is exposed to not only explicitly the full suite  
13 of equitable and sort of other powers, including  
14 expressly the contempt power, but also Texas is  
15 exposed to punitive damages as such. And it is  
16 hard to imagine a conception of state sovereign  
17 immunity that can be more offended by anything  
18 than a private cause of action by Congress and  
19 designed to punish a state as a state.

20 JUSTICE BREYER: Well, I -- you've  
21 given a good answer, but I want you to answer  
22 more, and I'll focus it. I'll start with the  
23 assumption, which you don't have to answer.

24 This has the potential of being a  
25 pretty important case for the structure of the

1 United States of America. The war power is not  
2 copyright, and it is not the Indian Commerce  
3 Clause. It is, and, you know, as Lincoln said,  
4 will this nation long endure? We hope it is  
5 never necessary, but maybe that question will  
6 come up, okay? You see why I think it's very  
7 important?

8 Okay. Now there are three arguments  
9 that have been brought up, and I'd like to hear  
10 if you have something to add. The first is the  
11 Plan of the Convention. As you've read  
12 biographies of Washington and the founders, you  
13 know perfectly well that they were terribly  
14 upset at the way the states were behaving in  
15 respect to the Continental Army and thought that  
16 that was causing the United States basically to  
17 lose almost, and they were at a convention --  
18 and if I put the matter in a comical way,  
19 because it's not meant totally comical -- in the  
20 play, they say -- George the Third says:  
21 They'll be back. Wait and see. They'll come  
22 crawling back to me.

23 And that was in the framers' mind,  
24 though not the music. And now we look at the  
25 text, and, my goodness, Article -- six sections

1 in -- in -- in Article VIII, another in -- in  
2 Article X, another in -- in section -- you know,  
3 clause -- the second, the president's part. My  
4 goodness, that suggests that was their frame of  
5 mind. If you want to say something about that,  
6 that's one.

7 Two, is this theoretical? I lived  
8 through Vietnam. I saw what was going on. I  
9 hope we never have it again. But, my goodness,  
10 the blue states might well have, although the  
11 President of the United States and the Congress  
12 thought the only way to deal with this is we get  
13 as few conscripts as possible, as many  
14 volunteers as possible, and the states, blue,  
15 would have said: No, we're going to do  
16 everything in our power to prevent you from  
17 getting those volunteers, including not giving  
18 them their jobs back. Could that have happened?  
19 Yeah. Did it happen? I'm not sure. Maybe.  
20 And we could have another, okay?

21 And you say: Oh, bring the  
22 government, bring the lawsuit. Against how many  
23 people were there in Vietnam in the Armies?  
24 They'd be suing until the next thousand years.

25 And the third, you look at Federalist

1 32, and two of the three pieces of evidence that  
2 Hamilton says, "were it granted in one instance  
3 an authority to the union and in another  
4 prohibited the states from exercising the like  
5 authority." I can't say it's explicit, but  
6 those three parts of the Constitution I  
7 mentioned sounded -- and then the second thing  
8 -- the third thing, where it granted an  
9 authority to the union to which a similar  
10 authority in the states would be absolutely and  
11 totally contradictory and republican -- and  
12 repugnant.

13 Well, that's Hamilton. And you've  
14 heard the evidence that that's what this case  
15 is, okay?

16 Now I've simply summarized the three  
17 arguments you have been hearing this morning,  
18 and you've answered them pretty well, and I want  
19 to give you the chance to answer them further if  
20 you wish.

21 MR. STONE: Thank you, Justice Breyer.  
22 Let me start with the first. So, as I  
23 understand the thrust of your first -- your  
24 first inquiry, you're pointing out that there  
25 are many, many powers vested in the federal

1 Constitution that are -- that touch on war and  
2 that, clearly, in the historical documents,  
3 those are very important, historically speaking,  
4 powers. That's no doubt the case.

5           Unfortunately, to the extent that this  
6 Court were -- were intending to give Mr. Torres  
7 sort of the full measure of what he's asking  
8 for, this Court has to think about its previous  
9 statements in cases like Alden and in Seminole  
10 Tribe.

11           Of course, stare decisis is a  
12 practical -- a sort of practical consideration  
13 and a practical doctrine, but this Court has  
14 said, and as recently as *Allen v. Cooper*  
15 repeated that no Article I, Section 8 power sort  
16 of dispenses with state sovereign immunity.

17           To say that all of the powers that are  
18 reasonably described as war powers suddenly  
19 actually had no immunity to resist in the first  
20 place would be to, at best, minimize Seminole  
21 Tribe to virtually nothing.

22           It surely occurred to this Court when  
23 it propounded that statement in *Seminole Tribe*  
24 and reconfirmed it in *Alden* that all of the  
25 powers in Article I, Section 8, including a



1 number of powers that had a direct basis on war,  
2 including the Army clause, the Navy clause, the  
3 enclave clause and so on.

4 So, at minimum, to the extent this  
5 Court were inclined to say something along the  
6 lines of this critical nature, this very -- this  
7 foundational nature of these powers means they  
8 are treated differently, it has to be prepared  
9 to disregard decades of precedent in sovereign  
10 immunity.

11 Two, if I understood your next  
12 question -- your next question correctly  
13 regarding --

14 JUSTICE BREYER: Vietnam.

15 MR. STONE: I'm sorry?

16 JUSTICE BREYER: Vietnam as an  
17 example.

18 MR. STONE: Right, regarding sort of  
19 the --

20 JUSTICE BREYER: What they might mean.

21 MR. STONE: -- the sort of practical  
22 possibility of states engaged in sort of  
23 deliberate political obstruction on ideological  
24 grounds.

25 That strikes me as the sort of thing

1 that to which -- to the extent of to which a  
2 court is going to be effective at all, which, of  
3 course, we're all talking about a  
4 circumstance to which these must be problems  
5 amenable to a court or this is all sort of  
6 unnecessary because all sovereign immunity  
7 dispenses with is whether or not a court can  
8 sue.

9 One would think the United States  
10 would sue California or -- or any other sort of  
11 obstreperous state and that, in fact, they would  
12 sue in sort of -- in the nature of class relief  
13 or equitable relief, prohibiting California  
14 and/or -- you know, and/or any of its officers  
15 from engaging in that flatly illegal policy, one  
16 would think that that either would be effective,  
17 or if it weren't, but if it weren't effective,  
18 then the court would face a constitutional  
19 crisis because a state is sort of deliberately  
20 disobeying federal court orders.

21 So I think there's nothing left for  
22 the courts to do at that point. It would be a  
23 matter for an executive branch.

24 I'm not quite sure that I'm perfectly  
25 following the third question regarding --

1 JUSTICE BREYER: It was Hamilton.

2 MR. STONE: -- regarding the extent of  
3 Hamilton's statements, except as to point out  
4 that -- that no doubt, for example, in the  
5 Indian commerce context, that power certainly  
6 had shades of war and peace. It would be  
7 utterly unsurprising to have described to the  
8 founders that the power to govern relations with  
9 the Indian tribes would be the power, in fact,  
10 to -- to engage in policies and to prevent  
11 battles with Indian tribes, prevent the loss of  
12 life and otherwise settle these through --  
13 through treaty agreements, and, nonetheless,  
14 this Court has held that neither that clause nor  
15 the Treaty Clause can be used to expose states  
16 to private damages actions.

17 I mean, taking -- taking things at  
18 sort of one level of generality, it's, of  
19 course, the case that the federal Constitution  
20 provides the federal government with profound  
21 powers relating to war and peace. It's just  
22 this Court has observed many times before that  
23 sometimes those powers don't come with state  
24 sovereign immunity because that's a separate  
25 aspect of sovereignty.

1                   And so the fact that the states have,  
2                   indeed, given up great powers related to war and  
3                   peace, large aspects of their sovereignty, does  
4                   not mean they've given up all of it. Otherwise,  
5                   the concept of calling states residual  
6                   sovereigns just sort of doesn't have any -- any  
7                   further purpose.

8                   JUSTICE BREYER: Thank you.

9                   MR. STONE: If there are no further  
10                  questions, I'd save the balance of my time.

11                  JUSTICE GORSUCH: A small question.

12                  CHIEF JUSTICE ROBERTS: And --

13                  JUSTICE GORSUCH: Go on, please.

14                  CHIEF JUSTICE ROBERTS: Go ahead.

15                  JUSTICE GORSUCH: A small question.

16                  Did you preserve the state law immunity argument  
17                  as an adequate and independent state law ground?  
18                  The government -- federal government says you  
19                  did not, and you didn't really respond to that  
20                  in your brief.

21                  MR. STONE: Yes, Your Honor, we did  
22                  preserve it. The quote on which the federal  
23                  government and Mr. Torres rely was speaking  
24                  specifically as to federal law immunity. There  
25                  are a number of places in that lower court brief

1 where the state specifically, I believe, cites  
2 Alden and describes about the distinct power  
3 that a sovereign has in its own courts as  
4 independent from a federal law immunity.

5 So we certainly raised it for purposes  
6 of what would be considered preservation under  
7 Texas law. It was considered raised before the  
8 Texas Supreme Court also. To the extent that  
9 this Court's looking about whether or not it's  
10 been waived, it was raised in the briefs below.

11 CHIEF JUSTICE ROBERTS: Go ahead.  
12 Justice Thomas, any questions?

13 JUSTICE THOMAS: No questions,  
14 Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Breyer?

17 Justice Alito?

18 Justice Sotomayor?

19 JUSTICE SOTOMAYOR: Counsel, I -- I  
20 can't take much from the lack of cases or  
21 evidence of Congress doing something until a  
22 need arises because I can't see Congress  
23 prophylactically passing rules if it doesn't see  
24 they're necessary until they become necessary.

25 And, really, the Vietnam War is what

1 made this statute necessary because it's the  
2 first time we see a state potentially taking  
3 action that's going to directly affect the  
4 military's power.

5 But do you discount the 1830s history,  
6 where, as did Justice Gorsuch, with respect to  
7 the habeas power? And, there, courts were  
8 releasing federal military officers from state  
9 custody because they were needed for the war  
10 efforts at the time, and the courts and the  
11 states had absolutely no hesitation in saying  
12 that Congressional need superseded the states'  
13 need to -- to hold a prisoner in custody.

14 That was an individual suit, not for  
15 money, I grant you, but you didn't need money  
16 there because all you needed was the person to  
17 be released.

18 So I guess what I'm asking is you  
19 concede that the states knew that if they  
20 impeded the war effort they would be sued by the  
21 federal government at least. I know that the  
22 first opportunity an individual had to sue in  
23 the 1830s for his own release, the courts gave  
24 him that power, the individual, to sue the state  
25 in state court.

1           So what is the next step missing with  
2     respect to the Plan of the Convention that we  
3     need some further proof that there was a belief  
4     that there wasn't a power to sue the states for  
5     individual damages? The federal government  
6     could. Why can't the individual?

7           MR. STONE: Well, Your Honor, just to  
8     make sure I'm -- I'm keeping myself clear, what  
9     I've conceded is that, of course, there's a  
10    separate Plan of the Convention waiver for any  
11    kind of lawsuit by the federal government  
12    against any state. So that applies in and out  
13    of the war context regardless.

14           Our position would be that suits in  
15    the nature of habeas corpus simply don't  
16    implicate whether or not states believe they  
17    were -- they gave up their sovereign immunity,  
18    because, going back to Blackstone, sovereigns  
19    have never thought themselves having the power  
20    to erect a state sovereign immunity defense in  
21    habeas, neither in English practice nor in  
22    American practice. So those habeas cases are  
23    interesting for purposes of the discussion of  
24    sort of state and federal power, perhaps  
25    supremacy issues in other contexts, but the fact

1 that those state habeas cases were permitted  
2 tells us nothing about whether or not the states  
3 believed they could raise such a -- a sovereign  
4 immunity defense, because no state believed it  
5 had a sovereign immunity defense to a habeas  
6 action.

7 What's missing here is some sort of  
8 exercise by Congress or a historical practice  
9 that would be an -- an analogue where, pursuant  
10 to the exercise of a war power or something  
11 related to war, Congress or in English practice  
12 had delegated to individuals the ability to  
13 bring lawsuits against nonconsenting states for  
14 something thematically related to war. You  
15 know, so, for example, an individual happened to  
16 miss their employment while they'd been  
17 conscripted or something like that.

18 If Mr. Torres had presented that, that  
19 would be powerful evidence that there was some  
20 association between the exercise of war powers  
21 and these private damages actions and powerful  
22 evidence for a Plan of the Convention waiver.  
23 And that's just not here.

24 JUSTICE SOTOMAYOR: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Kagan



1 -- oh, I'm sorry, Justice Alito?

2 JUSTICE ALITO: I went out of turn.

3 Mr. Stone, could -- General Stone,  
4 could you comment on how far you think the  
5 argument would go if we agree with Petitioners?  
6 If states could not assert sovereign immunity  
7 with respect to any claim that is supported --  
8 that is necessary and proper to raise and --  
9 raise Armies, how far would that go?

10 MR. STONE: Much further than Union  
11 Gas, Your Honor. So, at a minimum, you'd have  
12 virtually every power that could be associated  
13 with the exercise of war, which, as a basic  
14 historical matter, includes the power to tax,  
15 borrow, spend, the power to -- to be able to  
16 raise money, the ability to -- to restrict  
17 commerce in order to direct that individuals may  
18 be sanctioned or to mandate the production of  
19 certain materiel. Of course, it would go  
20 through virtually all of Article I, Section 8's  
21 war powers as such, which my friend on the other  
22 side summarizes I believe eight of those powers,  
23 and then for perhaps any other powers so long as  
24 in -- being used in an ancillary sense to either  
25 wage war or to make peace.

1           Said differently, it would require  
2 essentially the complete abrogation or the  
3 complete sort of disregard of Seminole Tribe and  
4 every case from it. And it certainly would take  
5 the commentary in PennEast and Katz that these  
6 are sort of narrow, specific exceptions to a  
7 broad rule of sovereignty and it would render  
8 those flatly inaccurate.

9           CHIEF JUSTICE ROBERTS: Justice Kagan?  
10           Justice Gorsuch? No?  
11           Justice Kavanaugh?  
12           Justice Barrett?  
13           Thank you, counsel.

14           Rebuttal, Mr. Tutt?

15           REBUTTAL ARGUMENT OF ANDREW T. TUTT

16                   ON BEHALF OF THE PETITIONER

17           MR. TUTT: Thank you, Mr. Chief  
18 Justice. Just a few points.

19           Texas opened by saying that it's a  
20 means/ends distinction, that that's what's at  
21 stake, that the powers may be great, but the  
22 means can be limited. But, if you go to the  
23 Federalist Number 23 by Alexander Hamilton, he  
24 addresses this directly, and he says that the  
25 means ought to be proportioned to the end.

1 "These powers ought to exist without limitation,  
2 because it is impossible to foresee or to define  
3 the extent and variety of national exigencies  
4 and the correspondent extent and variety of the  
5 means which may be necessary to satisfy them."

6 "There can be no limitation of that  
7 authority, which is to provide for the defense  
8 and protection of the community, in any manner  
9 essential to its efficacy; that is, in any  
10 manner essential to the formation, direction, or  
11 support of the national forces."

12 This is all in one essay of the  
13 Federalist Papers.

14 The purpose of sovereign immunity is  
15 to protect liberty and the local autonomy of the  
16 states, their democratic accountability. But,  
17 in the area of war, it is only by vesting the  
18 war powers exclusively in the federal government  
19 that liberty can be protected in the way that the  
20 Constitution intends.

21 The Constitution did not intend to  
22 protect an abstract sovereign immunity of the  
23 states when it would cost the liberty of  
24 individual citizens. The war powers do not  
25 favor a peacetime draft over the encouragement

1 of volunteers to put their bodies and their  
2 lives on the line in our military.

3 I want to -- I think that Justice  
4 Kagan is absolutely right that after PennEast, I  
5 think that the analysis is different. A  
6 uniquely national power where suits against the  
7 states are incidental to its exercise is exactly  
8 the kind of power that the Court has held  
9 entails a sovereign immunity waiver. This is  
10 not going to be limitless.

11 Texas's argument is a bit puzzling  
12 because they say that there will be a -- a flood  
13 of suits and the federal government will create  
14 all kinds of causes of action against the  
15 states. And yet, on the other hand, Texas  
16 points out that no states have ever been  
17 authorized and that states were -- these suits  
18 were authorized only very late in the republic  
19 because of the special solicitude the government  
20 already provides to the states because it  
21 understands their importance in the federal  
22 system.

23 Captain Torres went to war, and when  
24 he came home, he brought a piece of the war with  
25 him, and if he had been a member of the local

1 sheriff's department or a U.S. marshal or worked  
2 for any other employer, he would have been able  
3 to sue to vindicate his rights. But, because he  
4 worked for Texas, he had no cause of action.  
5 The war powers do not -- do not countenance that  
6 result. It's not right. We're asking this  
7 Court to make it right. I urge you to reverse.

8 Thank you, Your Honor.

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

11 (Whereupon, at 11:42 a.m., the case  
12 was submitted.)

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## Official - Subject to Final Review

<b>1</b>	77:1,9 104:15 108:2 above-entitled [1] 1:13 abrogate [1] 77:9 abrogation [15] 5:16 6:3,12,13 11: 7 37:21,22 42:2,18 43:11 44:6 45: 6 75:11,12 105:2 absolute [1] 26:20 absolutely [6] 27:6 36:4 88:21 94: 10 101:11 107:4 absorb [1] 87:14 abstract [1] 106:22 accept [1] 51:25 accepting [2] 7:16,20 accomplish [1] 7:2 according [1] 55:2 account [1] 56:17 accountability [2] 40:6 106:16 achieving [1] 69:9 acknowledged [2] 5:19 27:19 Act [3] 61:13 76:19 78:15 action [12] 5:2 7:3 27:12 41:23 45: 10 85:11 86:15 91:18 101:3 103:6 107:14 108:4 actions [20] 7:14,18 8:19 9:7 10:6 44:18 46:13 59:20,20 69:12 70:2, 12 73:3,7 75:9 87:6 89:8 90:10 98: 16 103:21 acts [1] 84:25 actual [2] 46:21 90:11 actually [10] 7:22 12:21 13:19 39: 13 45:25 51:10 61:22 87:6 91:9 95:19 add [1] 92:10 additional [2] 3:22 25:21 address [3] 44:20 62:17,20 addresses [2] 63:11 105:24 addressing [1] 44:12 adequate [1] 99:17 adequately [1] 85:8 adjudication [1] 31:5 administrative [2] 49:19 91:5 adopt [4] 48:4,5 61:9,11 adopted [2] 41:16 60:16 adoption [1] 66:17 advances [2] 41:5 69:6 affect [4] 58:2,11,20 101:3 affirmed [1] 69:23 afterthought [1] 82:23 aggrieved [2] 85:13 91:4 ago [1] 33:23 agree [10] 44:22 55:8 57:11,25 59: 4 70:2 71:17 87:21 88:11 104:5 agreed [1] 83:7 agreement [1] 86:1 agreements [1] 98:13 agrees [3] 45:15 59:8,21 ahead [5] 13:3 67:7 76:5 99:14 100:11 alcoholic [1] 25:11 Alden [6] 72:24 73:10 87:1 95:9,24 100:2 Alexander [1] 105:23	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>	<b>9</b>	<b>A</b>
10 [10] 15:17 16:6 36:3 54:11 55:18 57:2 72:20 74:9 77:15 83:15 10:00 [2] 1:15 3:2 105 [1] 2:14 109 [1] 47:10 11:42 [1] 108:11 13 [1] 56:9 16 [1] 47:8 1800 [1] 78:16 1830s [2] 101:5,23 1833 [1] 8:17 1942 [1] 51:19 1974 [4] 8:10 9:4 36:18,23 1980 [1] 25:10	2 [1] 67:14 20 [1] 67:9 20-603 [1] 3:6 200 [3] 31:11 63:8 70:12 2004 [1] 47:8 2015 [2] 47:12,12 2020 [3] 47:9 90:13,13 2021 [1] 90:13 2022 [1] 1:11 20th [1] 4:10 23 [2] 20:16 105:23 29 [1] 1:11	3 [2] 2:4 55:18 32 [7] 50:12,13 54:3,10 56:11,14 94:1 35,000 [1] 89:1	40 [2] 2:8 67:9 41 [1] 20:17	50 [4] 15:13 89:17,18,20	60 [1] 67:9 69 [1] 2:11	7 [1] 88:9	8 [4] 40:4 79:3 95:15,25 8's [1] 104:20 800,000 [1] 67:14 81 [2] 53:23 56:11	950,000 [1] 89:4	a.m [3] 1:15 3:2 108:11 ability [14] 3:19 14:5 16:7 17:7 27: 20 28:3,5 62:9 74:5 75:3 81:8,9 103:12 104:16 able [9] 17:9 21:5 48:18 68:2,15	
alienation [1] 54:4 alike [1] 47:23 ALITO [13] 16:12 18:4,6,17 19:6, 22 33:16 47:5 61:3 62:6 100:17 104:1,2 Alito's [3] 21:13,15 70:24 Allen [7] 5:10,13,16,16,18 78:11 95:14 allow [9] 11:8 21:8 37:9 76:16,17, 18,20,21 85:17 allowed [1] 88:8 allowing [3] 48:5 62:1,23 alluded [3] 21:13 30:21 67:5 almost [2] 16:9 92:17 already [1] 107:20 although [7] 28:25 44:23 57:22 59: 12 65:12 71:18 93:10 ambassadors [1] 16:8 amenable [1] 97:5 Amendment [16] 6:11 42:22 45:3, 7 52:12 53:9 55:25 56:3 59:7 60:2, 9,15 61:10 65:7 72:25 73:2 America [1] 92:1 American [1] 102:22 amicus [5] 1:22 2:7 40:23 47:6 68: 4 among [4] 3:20 36:22 41:3 78:20 amongst [1] 76:3 analogous [1] 70:10 analogue [2] 86:13 103:9 analyses [1] 43:2 analysis [7] 25:2 28:22 58:11,21 59:2 60:7 107:5 analytically [2] 43:22,24 analyzing [1] 44:1 ancillary [2] 8:1 104:24 and/or [2] 97:14,14 ANDREW [5] 1:18 2:3,13 3:9 105: 15 another [8] 29:24 55:16 56:12 82: 8 93:1,2,20 94:3 answer [12] 13:6 18:18 22:5,17 38: 23 43:15 44:10 74:13 91:21,21,23 94:19 answered [1] 94:18 answering [2] 21:24 62:19 answers [1] 17:1 anybody [1] 44:14 APA [1] 91:7 apex [1] 76:23 Apologies [1] 23:8 apologize [1] 28:9 apparent [2] 4:11 21:2 apparently [1] 21:3 APPEARANCES [1] 1:17 appeared [1] 58:8 appears [1] 8:8 applicable [1] 71:7 applies [2] 10:19 102:12 apply [3] 33:21 65:19 66:8 appointment [1] 55:1 appreciate [1] 17:2	<b>10</b>	<b>11</b>	<b>12</b>	<b>13</b>	<b>14</b>	<b>15</b>	<b>16</b>	<b>17</b>	<b>18</b>	<b>19</b>
apprentice [1] 24:7 appropriate [2] 22:21,22 appropriations [1] 88:6 approximately [1] 89:1 area [13] 37:10 41:15,22 44:8 45: 25 46:10 50:11 57:21 66:5 76:12, 22 82:17 106:17 areas [3] 54:3,24 76:24 aren't [5] 20:9 32:1,1 43:16 45:10 arguably [1] 76:12 argue [1] 62:14 arguing [1] 63:3 argument [40] 1:14 2:2,5,9,12 3:5, 9 18:6 24:17 26:17,22 27:7 37:19, 24 38:12,14,22 39:2,14,19,24 40: 22 57:14,24 58:3 61:21 62:1,9,22 65:5 69:1,15,21 71:11 76:24 90:1 99:16 104:5 105:15 107:11 arguments [5] 75:17 76:14 83:24 92:8 94:17 arises [1] 100:22 arising [1] 73:4 Armed [3] 24:10 77:19 88:6 Armies [31] 3:14 18:13 24:3,13,17, 20 25:5,22 26:25 41:21 43:8 46: 10 53:13 54:17,22 55:21 60:9,18 61:18 62:24 63:6 64:5,8,15 65:17 66:20 67:3 74:5 75:4 93:23 104:9 arming [1] 26:9 Army [18] 3:24 4:15 5:5 18:15 26:3, 12 27:3,20 51:20 62:3,10 68:2,5 69:13 70:19 75:23 92:15 96:2 Article [27] 6:12 15:17 16:6 35:14 36:2 37:21 40:4 54:10,21 55:18 57:1 61:14,15 72:19 74:9 77:15, 18,21 79:3 83:14 88:9 92:25 93:1, 2 95:15,25 104:20 articulate [1] 42:8 aspect [5] 43:7 72:15 82:12,23 98: 25 aspects [5] 72:1,5 74:10 83:1 99:3 assert [5] 16:3 18:7 27:17 28:3 104:6 asserted [2] 19:2,8 asserting [1] 50:20 assertions [1] 39:10 asserts [1] 64:7 Assistant [1] 1:20 associated [1] 104:12 association [1] 103:20 assume [5] 20:20 22:15 26:14,17 39:16 assumed [1] 79:21 assuming [1] 56:16 assumption [1] 91:23 attempt [1] 70:11 attorneys' [1] 62:13 attribute [1] 44:4 attributes [3] 12:20 45:8 51:16 Austin [1] 1:24 authorities [1] 27:25 authority [23] 4:5 10:21,24 12:19										

## Official - Subject to Final Review

<p>13:13,14,15,15 14:12 16:17 25:15, 16 29:23 30:11 55:2 57:7 60:1,2 94:3,5,9,10 106:7</p> <p><b>authorize</b> [7] 3:19 8:9 13:21 18:22 19:12 21:19 22:7</p> <p><b>authorized</b> [6] 8:2,17 32:23 69:11 107:17,18</p> <p><b>authorizes</b> [5] 18:8 28:18 46:12 58:3,4</p> <p><b>autonomy</b> [1] 106:15</p> <p><b>aware</b> [2] 33:14 59:18</p> <p><b>away</b> [12] 6:4 11:9 23:22 42:4 72:8, 16,21 74:4,9,11 75:24 77:24</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>back</b> [13] 8:12 21:15 33:19 37:14 39:12,12,15 53:25 54:9 92:21,22 93:18 102:18</p> <p><b>balance</b> [4] 64:1 75:24 77:25 99:10</p> <p><b>balancing</b> [2] 75:10,13</p> <p><b>bank</b> [1] 30:22</p> <p><b>bankruptcy</b> [13] 6:14,21 7:4,4 8:6 29:9 30:22 44:11,18 56:12 76:17 78:15 83:9</p> <p><b>barren</b> [1] 25:17</p> <p><b>BARRETT</b> [29] 6:17,20 7:17 15:15 16:11,13 22:5,11,14,17,24 23:1,3 24:16 25:3,7 30:21 37:12,13 38:18,21 39:11 44:9,22 68:21 82:3 83:22 89:10 105:12</p> <p><b>based</b> [1] 80:2</p> <p><b>basic</b> [2] 72:11 104:13</p> <p><b>basically</b> [3] 33:24 37:3 92:16</p> <p><b>basis</b> [8] 4:25 26:21 29:22 48:10 59:12 80:8,9 96:1</p> <p><b>battlefield</b> [1] 24:5</p> <p><b>battles</b> [1] 98:11</p> <p><b>became</b> [1] 4:11</p> <p><b>become</b> [1] 100:24</p> <p><b>becomes</b> [1] 30:19</p> <p><b>begin</b> [2] 70:23 72:11</p> <p><b>beginning</b> [1] 7:2</p> <p><b>behalf</b> [12] 1:18,25 2:4,11,14 3:10 32:24 49:17 69:2 86:23 87:3 105:16</p> <p><b>behaving</b> [1] 92:14</p> <p><b>behind</b> [1] 77:3</p> <p><b>belief</b> [2] 87:3 102:3</p> <p><b>believe</b> [8] 8:10 16:1 39:23 85:20 90:14 100:1 102:16 104:22</p> <p><b>believed</b> [5] 4:5 75:14 83:3 103:3, 4</p> <p><b>believes</b> [2] 75:22 89:5</p> <p><b>belong</b> [1] 79:21</p> <p><b>belonged</b> [2] 79:23,24</p> <p><b>below</b> [1] 100:10</p> <p><b>bench</b> [1] 20:20</p> <p><b>beneficiary</b> [1] 32:18</p> <p><b>benefit</b> [1] 86:21</p> <p><b>best</b> [5] 17:5 35:12 42:12 88:25 95:20</p> <p><b>better</b> [3] 7:24 47:22 53:15</p>	<p><b>between</b> [15] 5:22 14:18 37:16 38:8 42:2 44:24 46:19 56:10 58:8 59:25 60:8,13 74:22 75:13 103:20</p> <p><b>beverages</b> [1] 25:11</p> <p><b>beyond</b> [2] 25:4 35:13</p> <p><b>big</b> [2] 23:17 77:4</p> <p><b>biggest</b> [1] 34:11</p> <p><b>biographies</b> [1] 92:12</p> <p><b>bit</b> [4] 8:21 11:15 46:18 107:11</p> <p><b>Bitzer</b> [3] 11:9 45:5 56:2</p> <p><b>bizarre</b> [1] 76:21</p> <p><b>Blackstone</b> [1] 102:18</p> <p><b>blank</b> [1] 70:6</p> <p><b>block</b> [1] 11:16</p> <p><b>blue</b> [2] 93:10,14</p> <p><b>bodies</b> [1] 107:1</p> <p><b>borrow</b> [2] 81:8 104:15</p> <p><b>both</b> [12] 6:15,15,20 11:17 32:9 41:11 43:25 55:11,24 56:3 60:10,12</p> <p><b>bound</b> [1] 45:11</p> <p><b>boundary</b> [1] 20:4</p> <p><b>bounds</b> [1] 14:13</p> <p><b>Bowles</b> [2] 52:11 65:23</p> <p><b>branch</b> [2] 17:9 97:23</p> <p><b>branches</b> [3] 9:8 17:4 63:1</p> <p><b>breach</b> [1] 57:15</p> <p><b>breadth</b> [1] 21:23</p> <p><b>Breyer</b> [30] 33:3,4,11 50:12,25 51:4,12,18,25 52:1,15,17,23 53:1 54:2,19 55:9,15 58:6 61:2 82:4 83:21 91:20 94:21 96:14,16,20 98:1 99:8 100:16</p> <p><b>brief</b> [5] 45:22 47:6,16 99:20,25</p> <p><b>briefing</b> [1] 31:10</p> <p><b>briefs</b> [6] 37:25 39:4,15 68:4 90:14 100:10</p> <p><b>bring</b> [12] 45:19,21 47:2 48:19 49:12,16,21 61:24 85:9 93:21,22 103:13</p> <p><b>broad</b> [7] 21:19 29:22 46:9 50:8 61:16 63:20 105:7</p> <p><b>broader</b> [6] 24:20 39:9 62:14,15 63:21,21</p> <p><b>broadly</b> [3] 25:3 63:23 83:3</p> <p><b>brochure</b> [1] 68:5</p> <p><b>brought</b> [8] 12:23 17:13,20 33:5 47:1,8 92:9 107:24</p> <p><b>bucket</b> [1] 38:23</p> <p><b>buckets</b> [4] 5:24 6:2 37:15,17</p> <p><b>build</b> [1] 22:11</p> <p><b>bullet</b> [1] 24:5</p> <p><b>bureaucrat</b> [1] 17:11</p> <p><b>business</b> [1] 55:6</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>calendar</b> [1] 90:13</p> <p><b>California</b> [3] 51:19 97:10,13</p> <p><b>call</b> [1] 46:2</p> <p><b>called</b> [2] 71:13 77:20</p> <p><b>calling</b> [2] 73:9 99:5</p> <p><b>came</b> [6] 1:13 36:18,21 50:1,2 107:24</p> <p><b>cannot</b> [5] 14:8 15:13 36:16 70:2,</p>	<p>20</p> <p><b>canvassed</b> [1] 31:10</p> <p><b>capacity</b> [1] 8:18</p> <p><b>Captain</b> [1] 107:23</p> <p><b>captioned</b> [1] 32:19</p> <p><b>carries</b> [1] 30:10</p> <p><b>carry</b> [1] 89:14</p> <p><b>Case</b> [61] 3:6 10:10,20 11:7,10 16:1,21 17:12 18:12 19:4 20:4,4,5,14, 23 21:6 22:1 25:10,10,19 29:9 30:22 33:12,14 35:22 37:21,21 38:5 39:7,14 43:4 48:1,18 49:22 50:1,2 52:9,11,24 59:1,5,7,11,12 62:23 64:4 65:5,23 67:7 68:4 76:7 77:16 81:16 84:24 91:25 94:14 95:4 98:19 105:4 108:10,11</p> <p><b>cases</b> [30] 7:23,25 12:5 17:14 21:18 29:5 35:1 38:6 43:11 44:1,7 45:4,4,16 46:1,4 47:1,7 48:16 50:6 52:11 55:23 58:9 65:20 70:4 90:15 95:9 100:20 102:22 103:1</p> <p><b>categories</b> [2] 54:12 56:13</p> <p><b>category</b> [1] 8:13</p> <p><b>cause</b> [7] 5:2 27:12 41:23 85:10 86:15 91:18 108:4</p> <p><b>causes</b> [2] 45:10 107:14</p> <p><b>causing</b> [1] 92:16</p> <p><b>central</b> [3] 7:7 18:12 24:9</p> <p><b>Century</b> [1] 4:10</p> <p><b>certain</b> [2] 74:4 104:19</p> <p><b>certainly</b> [8] 45:2 72:9,10 77:2 78:2 98:5 100:5 105:4</p> <p><b>cessation</b> [1] 10:20</p> <p><b>cetera</b> [3] 54:23 74:6 83:2</p> <p><b>challenges</b> [1] 74:25</p> <p><b>chance</b> [3] 62:17 76:15 94:19</p> <p><b>change</b> [1] 48:12</p> <p><b>changes</b> [1] 59:1</p> <p><b>channel</b> [2] 58:19,21</p> <p><b>character</b> [1] 86:6</p> <p><b>characteristic</b> [1] 86:12</p> <p><b>characterization</b> [1] 42:25</p> <p><b>charges</b> [1] 72:4</p> <p><b>charter</b> [1] 66:4</p> <p><b>CHIEF</b> [43] 3:3,11 5:9 23:5,9,10,11 28:7,10,16 33:2,16 35:23 37:11 40:18,21,25 41:25 42:11 56:22,24 61:1 66:9 68:20 69:3 71:3,15 73:15,19,25 74:24 76:6 77:18,19 99:12,14 100:11,14,15 103:25 105:9, 17 108:9</p> <p><b>Chisholm</b> [1] 78:18</p> <p><b>Chisolm</b> [1] 82:20</p> <p><b>CHRISTOPHER</b> [3] 1:20 2:6 40:22</p> <p><b>Circuit</b> [1] 91:7</p> <p><b>circumstance</b> [1] 97:4</p> <p><b>cited</b> [2] 78:4,11</p> <p><b>cites</b> [2] 70:7 100:1</p> <p><b>citizens</b> [1] 106:24</p> <p><b>civilian</b> [2] 4:18 67:16</p> <p><b>claim</b> [5] 47:21 50:1,2 64:14 104:7</p>	<p><b>claims</b> [2] 47:17 83:16</p> <p><b>clarity</b> [1] 42:21</p> <p><b>class</b> [1] 97:12</p> <p><b>Clause</b> [51] 10:12,12,17 13:11 14:15 15:6,7,8 18:15 26:3,6 30:1 36:9,12 38:6,9 39:24 53:4 54:18 55:18 56:12 57:5,8,24 60:18 64:6,8, 16 66:20 67:3 69:25 70:1 72:19 75:15 78:5,21,25 79:16,17,18 80:9 83:10 87:10,12 92:3 93:3 96:2,2, 3 98:14,15</p> <p><b>clauses</b> [6] 3:24 53:9,14 54:20 55:5 80:23</p> <p><b>clear</b> [7] 6:3 10:16 11:24 20:12 27:8 77:14 102:8</p> <p><b>clearly</b> [5] 42:9 43:13,14 79:24 95:2</p> <p><b>close</b> [1] 30:19</p> <p><b>co-counsel</b> [1] 17:13</p> <p><b>Coast</b> [1] 21:10</p> <p><b>coercion</b> [1] 51:15</p> <p><b>coin</b> [1] 72:3</p> <p><b>Coinage</b> [4] 30:1 57:5,8,23</p> <p><b>coining</b> [1] 40:1</p> <p><b>combat</b> [1] 41:8</p> <p><b>come</b> [10] 16:22 24:8 38:13 51:17 63:25 65:11 87:2 92:6,21 98:23</p> <p><b>comes</b> [2] 60:6 79:8</p> <p><b>comical</b> [2] 92:18,19</p> <p><b>coming</b> [1] 61:19</p> <p><b>commandeering</b> [6] 29:3 51:14 52:3,3,5,6</p> <p><b>Commander</b> [2] 77:18,19</p> <p><b>comment</b> [1] 104:4</p> <p><b>commentary</b> [1] 105:5</p> <p><b>Commerce</b> [28] 10:11,12,17,25 12:11,14 13:11 14:15 15:7 26:23 36:9,12 38:3,5,7,9,9 39:24,25 53:4, 6 69:24 78:5 81:9 92:2 98:5 104:17</p> <p><b>commercial</b> [1] 81:13</p> <p><b>commitments</b> [2] 61:10 80:25</p> <p><b>common</b> [2] 44:23 60:8</p> <p><b>commonalities</b> [1] 44:6</p> <p><b>commonality</b> [1] 43:1</p> <p><b>community</b> [1] 106:8</p> <p><b>compared</b> [1] 76:23</p> <p><b>comparison</b> [1] 40:16</p> <p><b>compelling</b> [2] 70:6,20</p> <p><b>compensation</b> [4] 32:6 33:9 58:9, 14</p> <p><b>complaints</b> [1] 17:22</p> <p><b>complete</b> [7] 8:1 9:24 12:1 35:6, 16 105:2,3</p> <p><b>compliant</b> [1] 87:11</p> <p><b>comply</b> [1] 48:22</p> <p><b>component</b> [2] 4:17 89:22</p> <p><b>components</b> [1] 50:24</p> <p><b>compromise</b> [1] 58:23</p> <p><b>concede</b> [1] 101:19</p> <p><b>conceded</b> [2] 32:13 102:9</p> <p><b>concept</b> [1] 99:5</p>
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## Official - Subject to Final Review

<p><b>conception</b> <sup>[1]</sup> 91:16  <b>concern</b> <sup>[2]</sup> 89:10,11  <b>concerns</b> <sup>[1]</sup> 70:25  <b>concluded</b> <sup>[2]</sup> 45:4 78:17  <b>conclusion</b> <sup>[1]</sup> 46:4  <b>concurrent</b> <sup>[4]</sup> 15:9 26:21,24 30:12  <b>condemn</b> <sup>[2]</sup> 85:22 86:9  <b>condemnation</b> <sup>[4]</sup> 7:3,14,18 44:18  <b>condition</b> <sup>[1]</sup> 30:4  <b>conduct</b> <sup>[3]</sup> 16:7 31:15 62:11  <b>confederations</b> <sup>[1]</sup> 72:21  <b>confer</b> <sup>[1]</sup> 75:8  <b>conferred</b> <sup>[2]</sup> 10:3 40:3  <b>confirm</b> <sup>[1]</sup> 44:7  <b>confused</b> <sup>[2]</sup> 13:17 20:8  <b>Congress</b> <sup>[73]</sup> 3:13,17 4:23 8:9 13:12,18 14:2 15:1,4 17:18,25 18:8,21 19:8,11 21:2 22:7,9 29:18,23 38:8 43:12,13 46:9,14 48:3 50:7 54:22 55:3 57:14 58:19,21,25 61:14,23 62:25 64:7,9,10,18,19,20,21,22 69:8,9,11,14,18,25 70:11,18 74:8 75:8,10,14,21 77:15 85:1,6,10 87:10,14,17,18 88:5 90:20 91:18 93:11 100:21,22 103:8,11  <b>Congress's</b> <sup>[4]</sup> 46:8 50:11 63:11 74:25  <b>Congressional</b> <sup>[1]</sup> 101:12  <b>conjunction</b> <sup>[1]</sup> 53:22  <b>connection</b> <sup>[1]</sup> 30:19  <b>conscripted</b> <sup>[1]</sup> 103:17  <b>Conscription</b> <sup>[1]</sup> 63:7  <b>conscripts</b> <sup>[1]</sup> 93:13  <b>consensually</b> <sup>[1]</sup> 46:1  <b>consent</b> <sup>[1]</sup> 70:18  <b>consents</b> <sup>[1]</sup> 27:15  <b>consequence</b> <sup>[4]</sup> 42:6,7 78:14 85:3  <b>consequences</b> <sup>[2]</sup> 48:24 62:16  <b>consider</b> <sup>[4]</sup> 37:24 38:14 49:24 50:3  <b>considerable</b> <sup>[1]</sup> 14:12  <b>consideration</b> <sup>[1]</sup> 95:12  <b>considered</b> <sup>[5]</sup> 49:15 55:23 74:20 100:6,7  <b>considering</b> <sup>[2]</sup> 11:7 67:22  <b>consistent</b> <sup>[4]</sup> 16:24 74:7 83:18 88:8  <b>Constitution</b> <sup>[33]</sup> 3:13,16 4:3 8:15 9:13,18,20 10:23 14:14,22 15:3 20:15 27:22,23 28:2 31:6 36:14 38:2 41:16 42:17 60:11,24 66:1,3,18 67:1 69:16 80:25 94:6 95:1 98:19 106:20,21  <b>Constitution's</b> <sup>[1]</sup> 3:25  <b>constitutional</b> <sup>[9]</sup> 27:10,13 41:4 44:2 48:12 69:7 75:25 77:13 97:18  <b>contemplate</b> <sup>[1]</sup> 27:24  <b>contemplated</b> <sup>[3]</sup> 8:14 27:22 29:6</p>	<p><b>contemporaneous</b> <sup>[2]</sup> 9:12 78:18  <b>contempt</b> <sup>[1]</sup> 91:14  <b>content</b> <sup>[1]</sup> 9:24  <b>context</b> <sup>[10]</sup> 5:12 8:7 11:8 19:3 28:4 83:5 85:4 86:17 98:5 102:13  <b>contexts</b> <sup>[2]</sup> 83:9 102:25  <b>Continental</b> <sup>[1]</sup> 92:15  <b>continue</b> <sup>[2]</sup> 56:16 60:23  <b>contradictory</b> <sup>[1]</sup> 94:11  <b>contrary</b> <sup>[1]</sup> 69:15  <b>contrast</b> <sup>[1]</sup> 8:8  <b>control</b> <sup>[4]</sup> 13:20 15:5 26:20 77:22  <b>controversies</b> <sup>[1]</sup> 31:5  <b>Convention</b> <sup>[45]</sup> 5:17 6:6,16 9:13 11:10 28:24 38:14,22,25 39:14,19,24 42:5,15 43:3,4,19 44:7,15 45:18 50:15 54:6 56:8,19 57:19,21 59:2,23 70:7,21 71:6,13,21 80:12,17 81:22 82:13,25 86:20 90:4 92:11,17 102:2,10 103:22  <b>conventionally</b> <sup>[1]</sup> 74:20  <b>convince</b> <sup>[1]</sup> 4:20  <b>Cooper</b> <sup>[2]</sup> 78:11 95:14  <b>cooperate</b> <sup>[1]</sup> 84:9  <b>copyright</b> <sup>[2]</sup> 39:25 92:2  <b>core</b> <sup>[4]</sup> 5:4 22:1 24:12 90:9  <b>corpus</b> <sup>[5]</sup> 8:18,21,25 9:4 102:15  <b>correct</b> <sup>[9]</sup> 13:11 22:8 26:25 27:1 38:16 47:13,14 73:8 87:23  <b>correctly</b> <sup>[1]</sup> 96:12  <b>correspondent</b> <sup>[1]</sup> 106:4  <b>cost</b> <sup>[1]</sup> 106:23  <b>couldn't</b> <sup>[5]</sup> 19:24 29:23 51:23 61:23,24  <b>Counsel</b> <sup>[11]</sup> 5:9 9:14 12:24 26:1 28:17 40:19 57:1 68:22 100:19 105:13 108:10  <b>count</b> <sup>[1]</sup> 32:12  <b>countenance</b> <sup>[1]</sup> 108:5  <b>counterfeiting</b> <sup>[1]</sup> 40:2  <b>counterintuitive</b> <sup>[1]</sup> 85:16  <b>country</b> <sup>[1]</sup> 50:6  <b>couple</b> <sup>[6]</sup> 28:15 37:20 44:21 52:8 62:18 71:22  <b>course</b> <sup>[23]</sup> 10:10 45:9 48:12 51:4 53:1 55:16 60:5 77:3 78:24 79:19 81:7 84:24 85:8 87:1,25 88:17 89:4 90:12 95:11 97:3 98:19 102:9 104:19  <b>COURT</b> <sup>[119]</sup> 1:1,14 3:12 5:25 6:1,3 7:12 10:16 11:24 12:5,16,18 13:25 15:8,25 17:19 18:11,13 19:5 21:14,18,21 24:11 25:8,15 28:20,21,22 29:3,5,7 30:23 31:13 35:10,15 41:1,18 42:1,9,16,19,22 43:23 44:1 45:4 46:9,14 47:9 48:13 50:10 51:15 52:10 53:23 55:23 56:1,9,16 58:4,12,20,22,23,25 59:10,18 63:10,12 64:14,16 65:19,23 66:2 69:4,21,23 70:2,5,22 71:22,25 72:6,25 74:6 75:24 78:10,24 79:1,20,</p>	<p>22 80:2 81:12,17,20 83:8,19 85:12,15 86:7,25 87:2 90:14,15 95:6,8,13,22 96:5 97:2,5,7,18,20 98:14,22 99:25 100:8 101:25 107:8 108:7  <b>Court's</b> <sup>[8]</sup> 5:8 6:8 44:6,25 45:3 75:11 82:19 100:9  <b>courts</b> <sup>[9]</sup> 28:19 29:8,12 78:19 97:22 100:3 101:7,10,23  <b>crawling</b> <sup>[1]</sup> 92:22  <b>create</b> <sup>[3]</sup> 4:15 63:22 107:13  <b>created</b> <sup>[2]</sup> 4:4,16  <b>creating</b> <sup>[1]</sup> 29:8  <b>creature</b> <sup>[1]</sup> 80:11  <b>criminal</b> <sup>[1]</sup> 72:4  <b>crisis</b> <sup>[1]</sup> 97:19  <b>criteria</b> <sup>[1]</sup> 50:18  <b>critical</b> <sup>[1]</sup> 96:6  <b>crucial</b> <sup>[2]</sup> 4:9 82:12  <b>curiae</b> <sup>[3]</sup> 1:22 2:7 40:23  <b>current</b> <sup>[1]</sup> 61:20  <b>custody</b> <sup>[2]</sup> 101:9,13</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> <sup>[3]</sup> 1:10,18,21  <b>dam</b> <sup>[1]</sup> 34:1  <b>damage</b> <sup>[1]</sup> 58:12  <b>damages</b> <sup>[27]</sup> 9:7 31:20 32:1,1,5,7,17,24 33:9 58:5,9 59:4,4,10,15,19 62:12 64:12 69:12 70:2,12 73:3 75:9 91:15 98:16 102:5 103:21  <b>days</b> <sup>[1]</sup> 89:20  <b>deal</b> <sup>[3]</sup> 21:9 68:9 93:12  <b>dealing</b> <sup>[1]</sup> 83:11  <b>dealt</b> <sup>[2]</sup> 10:11 15:3  <b>debates</b> <sup>[1]</sup> 70:8  <b>debtors</b> <sup>[1]</sup> 78:14  <b>decades</b> <sup>[1]</sup> 96:9  <b>decide</b> <sup>[2]</sup> 80:2 84:16  <b>decided</b> <sup>[2]</sup> 12:5 58:25  <b>decides</b> <sup>[1]</sup> 25:19  <b>deciding</b> <sup>[1]</sup> 67:8  <b>decision</b> <sup>[4]</sup> 5:10 17:16 79:13 84:9  <b>decisions</b> <sup>[2]</sup> 7:23 50:11  <b>decisis</b> <sup>[1]</sup> 95:11  <b>declare</b> <sup>[4]</sup> 25:20 72:3 74:6 83:2  <b>deemed</b> <sup>[1]</sup> 9:7  <b>Defend</b> <sup>[5]</sup> 65:1,2,14 66:16 68:16  <b>defending</b> <sup>[2]</sup> 20:9 89:6  <b>defense</b> <sup>[9]</sup> 3:18 4:7 19:10 38:1 78:23 102:20 103:4,5 106:7  <b>defer</b> <sup>[1]</sup> 64:20  <b>deferential</b> <sup>[1]</sup> 91:7  <b>define</b> <sup>[2]</sup> 16:9 106:2  <b>degree</b> <sup>[1]</sup> 20:3  <b>del</b> <sup>[1]</sup> 85:21  <b>delay</b> <sup>[1]</sup> 31:17  <b>delegate</b> <sup>[1]</sup> 88:5  <b>delegated</b> <sup>[6]</sup> 6:25 86:4,14,15,16 103:12  <b>delegates</b> <sup>[1]</sup> 69:17  <b>delegating</b> <sup>[2]</sup> 69:13 85:22</p>	<p><b>delegation</b> <sup>[3]</sup> 33:6 80:3 90:20  <b>deliberate</b> <sup>[1]</sup> 96:23  <b>deliberately</b> <sup>[1]</sup> 97:19  <b>democratic</b> <sup>[2]</sup> 40:5 106:16  <b>denominated</b> <sup>[1]</sup> 91:10  <b>deny</b> <sup>[1]</sup> 90:15  <b>DEPARTMENT</b> <sup>[10]</sup> 1:6,21 3:6 17:14,17,23 46:1 47:7,9 108:1  <b>departure</b> <sup>[1]</sup> 50:7  <b>depend</b> <sup>[2]</sup> 60:5 75:9  <b>depends</b> <sup>[1]</sup> 88:12  <b>deploy</b> <sup>[1]</sup> 68:15  <b>deployed</b> <sup>[1]</sup> 67:25  <b>describe</b> <sup>[1]</sup> 90:22  <b>described</b> <sup>[8]</sup> 43:23 69:24 71:25 72:6 78:10,24 95:18 98:7  <b>describes</b> <sup>[1]</sup> 100:2  <b>describing</b> <sup>[1]</sup> 82:20  <b>designed</b> <sup>[1]</sup> 91:19  <b>despite</b> <sup>[1]</sup> 83:13  <b>destroyed</b> <sup>[1]</sup> 33:7  <b>determine</b> <sup>[1]</sup> 43:18  <b>determined</b> <sup>[3]</sup> 17:5 50:8 86:7  <b>deterrent</b> <sup>[1]</sup> 48:20  <b>development</b> <sup>[1]</sup> 36:11  <b>dictated</b> <sup>[2]</sup> 65:25 66:2  <b>difference</b> <sup>[8]</sup> 11:21 28:18 37:16 40:10,13 58:7,8 59:25  <b>different</b> <sup>[23]</sup> 3:25 8:22 9:25 10:3 13:16 16:20 35:17,18 36:13 40:8 41:15 42:13 45:10 50:2 53:10 59:5,6,13 76:13 79:12 81:19 82:2 107:5  <b>differentiates</b> <sup>[1]</sup> 55:21  <b>differently</b> <sup>[5]</sup> 38:13 65:19 66:3 96:8 105:1  <b>difficult</b> <sup>[4]</sup> 20:4,5 21:25 22:1  <b>diplomacy</b> <sup>[2]</sup> 16:7,16  <b>direct</b> <sup>[5]</sup> 22:3 70:23 71:4 96:1 104:17  <b>directed</b> <sup>[1]</sup> 30:5  <b>direction</b> <sup>[1]</sup> 106:10  <b>directions</b> <sup>[1]</sup> 76:13  <b>directly</b> <sup>[6]</sup> 22:3 41:5 54:1 70:24 101:3 105:24  <b>disagree</b> <sup>[3]</sup> 46:24 71:16,19  <b>disagreed</b> <sup>[1]</sup> 29:15  <b>disagreement</b> <sup>[1]</sup> 84:2  <b>disapproval</b> <sup>[1]</sup> 84:19  <b>discharge</b> <sup>[1]</sup> 78:12  <b>discipline</b> <sup>[3]</sup> 26:15 27:4 55:3  <b>disciplines</b> <sup>[1]</sup> 27:5  <b>disciplining</b> <sup>[2]</sup> 26:9,13  <b>discount</b> <sup>[1]</sup> 101:5  <b>discretion</b> <sup>[1]</sup> 17:10  <b>discriminated</b> <sup>[1]</sup> 4:24  <b>discriminating</b> <sup>[1]</sup> 84:5  <b>discrimination</b> <sup>[7]</sup> 16:20 21:6 41:9 48:7 59:11,13 84:18  <b>discussed</b> <sup>[1]</sup> 85:8  <b>discusses</b> <sup>[1]</sup> 50:13  <b>discussing</b> <sup>[1]</sup> 85:20</p>
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## Official - Subject to Final Review

<p><b>discussion</b> <sup>[3]</sup> 34:14,15 102:23  <b>disobeying</b> <sup>[1]</sup> 97:20  <b>disparate</b> <sup>[1]</sup> 78:12  <b>dispense</b> <sup>[1]</sup> 77:9  <b>dispensed</b> <sup>[1]</sup> 87:4  <b>dispenses</b> <sup>[2]</sup> 95:16 97:7  <b>dispensing</b> <sup>[1]</sup> 82:25  <b>displaces</b> <sup>[1]</sup> 77:21  <b>disposed</b> <sup>[1]</sup> 78:22  <b>disproportionately</b> <sup>[2]</sup> 41:13 49:2  <b>dispute</b> <sup>[8]</sup> 16:15 24:15 27:9,11 42:24 44:15 46:6 48:17  <b>disputes</b> <sup>[2]</sup> 16:21 69:5  <b>disregard</b> <sup>[2]</sup> 96:9 105:3  <b>dissonance</b> <sup>[1]</sup> 46:18  <b>Distilleries</b> <sup>[1]</sup> 25:10  <b>distinct</b> <sup>[3]</sup> 6:5 86:20 100:2  <b>distinction</b> <sup>[11]</sup> 5:21 6:8,10 7:8 14:18,19 35:15 42:2,8,10 105:20  <b>distinctions</b> <sup>[1]</sup> 11:23  <b>distinctive</b> <sup>[1]</sup> 41:22  <b>distributing</b> <sup>[1]</sup> 55:13  <b>district</b> <sup>[2]</sup> 25:13,15  <b>divest</b> <sup>[1]</sup> 12:20  <b>divested</b> <sup>[5]</sup> 10:5,5,24 14:13 45:7  <b>divestiture</b> <sup>[1]</sup> 36:6  <b>divestment</b> <sup>[3]</sup> 10:14 14:5 15:22  <b>divests</b> <sup>[2]</sup> 15:18 77:17  <b>doctrine</b> <sup>[2]</sup> 51:17 95:13  <b>document</b> <sup>[1]</sup> 81:5  <b>documents</b> <sup>[1]</sup> 95:2  <b>doing</b> <sup>[2]</sup> 79:16 100:21  <b>DOJ</b> <sup>[1]</sup> 87:9  <b>domain</b> <sup>[24]</sup> 6:14,21,24 7:3,10,13 11:25 12:1,4 15:4 29:10 33:5,8,13 35:7 44:12 76:18 79:18 80:6,9 83:10 85:24 86:2,9  <b>domestic</b> <sup>[3]</sup> 35:14,17 40:3  <b>done</b> <sup>[3]</sup> 12:13 21:21 51:23  <b>doubt</b> <sup>[8]</sup> 34:5 57:23 75:20,21 81:2 88:13 95:4 98:4  <b>draft</b> <sup>[3]</sup> 41:7 65:20 106:25  <b>drafted</b> <sup>[1]</sup> 65:21  <b>draw</b> <sup>[2]</sup> 20:12 35:15  <b>drawing</b> <sup>[1]</sup> 90:9  <b>drawn</b> <sup>[1]</sup> 49:7  <b>drew</b> <sup>[1]</sup> 42:1  <b>during</b> <sup>[2]</sup> 41:9 48:11</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> <sup>[2]</sup> 59:19 60:5  <b>earlier</b> <sup>[5]</sup> 36:18 42:25 60:10 62:20 89:11  <b>early</b> <sup>[1]</sup> 29:15  <b>easily</b> <sup>[1]</sup> 87:7  <b>effect</b> <sup>[2]</sup> 44:2 48:21  <b>effective</b> <sup>[4]</sup> 18:3 97:2,16,17  <b>effectual</b> <sup>[1]</sup> 9:9  <b>efficacy</b> <sup>[1]</sup> 106:9  <b>effort</b> <sup>[3]</sup> 89:15 90:23 101:20  <b>efforts</b> <sup>[2]</sup> 41:18 101:10  <b>eight</b> <sup>[1]</sup> 104:22</p>	<p><b>either</b> <sup>[4]</sup> 39:15 51:6 97:16 104:24  <b>Eleventh</b> <sup>[2]</sup> 72:25 73:2  <b>emanating</b> <sup>[1]</sup> 61:12  <b>embraced</b> <sup>[1]</sup> 69:22  <b>eminent</b> <sup>[23]</sup> 6:14,21,24 7:2,10,13 11:25 12:1,3 29:10 33:5,8,13 35:7 44:11 76:17 79:17 80:6,9 83:10 85:23 86:2,9  <b>emphasis</b> <sup>[1]</sup> 22:22  <b>emphasizing</b> <sup>[1]</sup> 18:19  <b>employed</b> <sup>[1]</sup> 90:19  <b>employee</b> <sup>[1]</sup> 26:16  <b>employees</b> <sup>[4]</sup> 49:1 88:23 89:1,2  <b>employer</b> <sup>[7]</sup> 17:21 24:8 46:2 47:23 67:24 68:3 108:2  <b>employers</b> <sup>[10]</sup> 27:14 41:12,13,14, 24 48:16,21,22 49:1 67:16  <b>employment</b> <sup>[2]</sup> 41:6 103:16  <b>en</b> <sup>[1]</sup> 10:6  <b>enacted</b> <sup>[2]</sup> 63:2 64:23  <b>enamored</b> <sup>[1]</sup> 56:25  <b>enclave</b> <sup>[1]</sup> 96:3  <b>encourage</b> <sup>[2]</sup> 17:18 20:17  <b>encouragement</b> <sup>[1]</sup> 106:25  <b>end</b> <sup>[1]</sup> 105:25  <b>endanger</b> <sup>[1]</sup> 10:8  <b>ends</b> <sup>[5]</sup> 54:23 69:7,8,13 81:18  <b>endure</b> <sup>[1]</sup> 92:4  <b>enforced</b> <sup>[2]</sup> 41:24 71:10  <b>enforcement</b> <sup>[3]</sup> 46:7,11,13  <b>engage</b> <sup>[5]</sup> 10:6 16:16 72:20 73:12 98:10  <b>engaged</b> <sup>[1]</sup> 96:22  <b>engagement</b> <sup>[2]</sup> 84:4,20  <b>engaging</b> <sup>[1]</sup> 97:15  <b>English</b> <sup>[2]</sup> 102:21 103:11  <b>enough</b> <sup>[1]</sup> 21:3  <b>ensure</b> <sup>[3]</sup> 3:15 4:21 80:18  <b>ensuring</b> <sup>[1]</sup> 60:22  <b>entails</b> <sup>[1]</sup> 107:9  <b>enter</b> <sup>[3]</sup> 36:16 57:3 72:2  <b>entertain</b> <sup>[1]</sup> 32:16  <b>entire</b> <sup>[1]</sup> 18:25  <b>entirely</b> <sup>[2]</sup> 10:13 72:22  <b>entitle</b> <sup>[1]</sup> 52:13  <b>entitled</b> <sup>[3]</sup> 33:8 46:15 85:9  <b>enumerated</b> <sup>[2]</sup> 36:14 63:12  <b>equally</b> <sup>[2]</sup> 21:7 90:25  <b>equitable</b> <sup>[2]</sup> 91:13 97:13  <b>equivalent</b> <sup>[1]</sup> 36:8  <b>erect</b> <sup>[1]</sup> 102:20  <b>erection</b> <sup>[1]</sup> 69:18  <b>especially</b> <sup>[1]</sup> 41:10  <b>ESQ</b> <sup>[4]</sup> 2:3,6,10,13  <b>ESQUIRE</b> <sup>[1]</sup> 1:18  <b>essay</b> <sup>[2]</sup> 56:13 106:12  <b>essays</b> <sup>[1]</sup> 20:18  <b>essential</b> <sup>[9]</sup> 21:1,4,7 25:23 36:5 41:4 75:2 106:9,10  <b>essentially</b> <sup>[4]</sup> 11:17 71:1 83:7 105:2  <b>established</b> <sup>[1]</sup> 19:9</p>	<p><b>establishment</b> <sup>[1]</sup> 19:23  <b>et</b> <sup>[3]</sup> 54:22 74:6 83:2  <b>even</b> <sup>[18]</sup> 7:16,19 9:22 16:5 24:11 27:14,18 29:12 43:13 45:1,8 66:1 69:23 70:5 75:19 77:17 83:11 91:3  <b>everybody</b> <sup>[2]</sup> 45:15 59:8  <b>everyone</b> <sup>[2]</sup> 47:22 59:21  <b>everything</b> <sup>[4]</sup> 10:15 29:10 82:16 93:16  <b>evidence</b> <sup>[18]</sup> 6:25 9:12 15:22 42:13 43:5 55:10,17 57:17,18 70:6, 14,20 81:10 94:1,14 100:21 103:19,22  <b>exact</b> <sup>[7]</sup> 29:23 32:16,17,18 49:5 57:6 66:16  <b>exactly</b> <sup>[5]</sup> 9:11 42:10 54:16 72:17 107:7  <b>example</b> <sup>[19]</sup> 19:7 30:1 31:18 32:4 45:3 46:2,12 62:6 63:12 71:23 72:2,18 81:8 84:23 85:5 88:5 96:17 98:4 103:15  <b>examples</b> <sup>[1]</sup> 70:9  <b>except</b> <sup>[2]</sup> 80:18 98:3  <b>exception</b> <sup>[1]</sup> 43:18  <b>exceptions</b> <sup>[2]</sup> 55:24 105:6  <b>exclusive</b> <sup>[7]</sup> 10:22 12:11,11,17 35:18 69:17,25  <b>exclusively</b> <sup>[3]</sup> 27:3 55:6 106:18  <b>exclusivity</b> <sup>[10]</sup> 11:25 12:8,22 13:23,24 14:23 18:19 34:23 35:6 36:12  <b>executive</b> <sup>[2]</sup> 17:9 97:23  <b>exemplary</b> <sup>[1]</sup> 37:7  <b>exercise</b> <sup>[30]</sup> 5:3,4 9:9 13:19 14:24 16:16 17:9 18:15 22:1,21,22 23:13,14,15 24:12 27:10 35:7 36:15 52:14 57:7 63:11 69:20 75:15 85:23 86:2 103:8,10,20 104:13 107:7  <b>exercised</b> <sup>[7]</sup> 7:14 14:3 15:1 31:9 40:14 79:25 86:4  <b>exercises</b> <sup>[5]</sup> 40:14 67:25 73:17 77:4,5  <b>exercising</b> <sup>[3]</sup> 50:8 81:7 94:4  <b>exert</b> <sup>[1]</sup> 84:24  <b>exigencies</b> <sup>[1]</sup> 106:3  <b>exigency</b> <sup>[1]</sup> 61:20  <b>exiled</b> <sup>[1]</sup> 73:13  <b>exiling</b> <sup>[1]</sup> 73:11  <b>exist</b> <sup>[3]</sup> 14:20 53:5 106:1  <b>existential</b> <sup>[1]</sup> 68:17  <b>exists</b> <sup>[1]</sup> 57:8  <b>expected</b> <sup>[1]</sup> 11:20  <b>expedient</b> <sup>[1]</sup> 88:5  <b>experience</b> <sup>[1]</sup> 81:11  <b>explain</b> <sup>[4]</sup> 5:23 46:3 66:13 91:1  <b>explained</b> <sup>[2]</sup> 45:22 56:7  <b>explaining</b> <sup>[1]</sup> 56:11  <b>explains</b> <sup>[1]</sup> 71:24  <b>explicit</b> <sup>[2]</sup> 10:14 94:5  <b>explicitly</b> <sup>[4]</sup> 6:1 15:18 77:16 91:</p>	<p>12  <b>expose</b> <sup>[6]</sup> 53:2 70:1,11,15 89:7 98:15  <b>exposed</b> <sup>[4]</sup> 73:3 83:6 91:12,15  <b>exposing</b> <sup>[1]</sup> 75:8  <b>express</b> <sup>[5]</sup> 37:4 41:3 42:1 84:19 87:2  <b>expressing</b> <sup>[1]</sup> 84:2  <b>expressly</b> <sup>[3]</sup> 55:19 56:4 91:14  <b>extended</b> <sup>[1]</sup> 41:7  <b>extending</b> <sup>[1]</sup> 63:23  <b>extent</b> <sup>[16]</sup> 20:6,13 73:8 74:8 75:5 87:8 89:5 90:8 91:4 95:5 96:4 97:1 98:2 100:8 106:3,4  <b>extraordinary</b> <sup>[1]</sup> 34:12  <b>extremely</b> <sup>[2]</sup> 15:21 34:22</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>face</b> <sup>[3]</sup> 48:9,23 97:18  <b>fact</b> <sup>[20]</sup> 8:6 18:1,25 29:18 49:6 51:18 56:2 58:18,24 68:3 75:7,22 78:21 83:2 85:21 91:1 97:11 98:9 99:1 102:25  <b>facts</b> <sup>[3]</sup> 21:21 39:18,20  <b>failing</b> <sup>[3]</sup> 19:13,13 47:4  <b>failure</b> <sup>[1]</sup> 60:20  <b>FAIR</b> <sup>[3]</sup> 24:12 63:13 66:7  <b>fall</b> <sup>[1]</sup> 51:21  <b>falls</b> <sup>[2]</sup> 56:12 64:15  <b>familiar</b> <sup>[1]</sup> 46:11  <b>Family</b> <sup>[2]</sup> 76:19,19  <b>far</b> <sup>[4]</sup> 61:18 85:8 104:4,9  <b>favor</b> <sup>[2]</sup> 65:12 106:25  <b>fed</b> <sup>[1]</sup> 55:6  <b>federal</b> <sup>[65]</sup> 4:4,6 6:18 10:13,23 12:2,3 14:23 24:24 26:14 27:4,5 28:5, 22 29:8,11 30:11 34:23 35:8 36:24 40:7 41:17,20 46:20,21 49:14, 16,23 50:5 54:14 56:4 60:14,22 61:24 62:10 65:12,25 66:15 68:18 74:2 78:8,9,19 80:19 84:11 85:12 90:17 91:1,6 94:25 97:20 98:19, 20 99:18,22,24 100:4 101:8,21 102:5,11,24 106:18 107:13,21  <b>federalism</b> <sup>[5]</sup> 62:16 63:24 65:8, 18 66:7  <b>Federalist</b> <sup>[13]</sup> 20:16,17 50:13 53:23 54:3 56:10,11,14 71:12 72:10 93:25 105:23 106:13  <b>feels</b> <sup>[1]</sup> 77:6  <b>fees</b> <sup>[1]</sup> 62:13  <b>few</b> <sup>[4]</sup> 55:24 57:12 93:13 105:18  <b>fighting</b> <sup>[2]</sup> 4:14 22:8  <b>figure</b> <sup>[2]</sup> 11:14 49:5  <b>filed</b> <sup>[4]</sup> 47:10,11,12 90:14  <b>final</b> <sup>[1]</sup> 31:17  <b>find</b> <sup>[2]</sup> 56:20 81:5  <b>fire</b> <sup>[1]</sup> 24:8  <b>firefighting</b> <sup>[1]</sup> 49:9  <b>First</b> <sup>[23]</sup> 3:23 5:6 7:9 8:8 9:6 11:6 24:25 48:4 53:9 65:10 66:18 67:20 68:18 69:16 72:13 73:21 92:10 94:22,23,24 95:19 101:2,22</p>
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## Official - Subject to Final Review

<p><b>first-order</b> <sup>[1]</sup> 83:12  <b>fits</b> <sup>[1]</sup> 57:13  <b>Fitzpatrick</b> <sup>[2]</sup> 45:5 56:1  <b>five</b> <sup>[1]</sup> 17:19  <b>flatly</b> <sup>[2]</sup> 97:15 105:8  <b>flood</b> <sup>[1]</sup> 107:12  <b>focus</b> <sup>[2]</sup> 35:5 91:22  <b>focusing</b> <sup>[1]</sup> 80:6  <b>followed</b> <sup>[2]</sup> 13:6 36:13  <b>following</b> <sup>[2]</sup> 70:13 97:25  <b>follows</b> <sup>[1]</sup> 67:12  <b>Footnote</b> <sup>[1]</sup> 56:9  <b>force</b> <sup>[2]</sup> 4:14,21  <b>Forces</b> <sup>[6]</sup> 24:10 41:2,11 68:16 77:19 106:11  <b>foreign</b> <sup>[5]</sup> 16:8 37:5 83:13 84:3 89:13  <b>foresee</b> <sup>[2]</sup> 47:25 106:2  <b>forever</b> <sup>[1]</sup> 48:14  <b>form</b> <sup>[1]</sup> 26:15  <b>formation</b> <sup>[1]</sup> 106:10  <b>forms</b> <sup>[1]</sup> 21:6  <b>found</b> <sup>[4]</sup> 6:13,15 46:25 83:8  <b>foundation</b> <sup>[1]</sup> 53:24  <b>foundational</b> <sup>[3]</sup> 75:19 80:24 96:7  <b>founders</b> <sup>[5]</sup> 42:16 72:9 81:10 92:12 98:8  <b>founding</b> <sup>[7]</sup> 11:18 31:3 70:13,14 73:6 82:20 85:25  <b>founding-era</b> <sup>[2]</sup> 70:8,10  <b>Fourteenth</b> <sup>[11]</sup> 6:11 42:22 45:3,7 55:25 56:3 59:7 60:1,8,15 61:10  <b>frame</b> <sup>[1]</sup> 93:4  <b>framers'</b> <sup>[1]</sup> 92:23  <b>framework</b> <sup>[2]</sup> 56:6 57:13  <b>free</b> <sup>[1]</sup> 38:7  <b>frequently</b> <sup>[1]</sup> 51:20  <b>friend</b> <sup>[4]</sup> 45:23 70:25 82:5 104:21  <b>friends</b> <sup>[2]</sup> 59:9 76:9  <b>frustrate</b> <sup>[2]</sup> 85:1,2  <b>frustrates</b> <sup>[1]</sup> 69:19  <b>fulfill</b> <sup>[2]</sup> 3:17 5:6  <b>full</b> <sup>[3]</sup> 15:5 91:12 95:7  <b>fully</b> <sup>[3]</sup> 41:24 55:13 57:22  <b>function</b> <sup>[2]</sup> 3:18 4:7  <b>fundamental</b> <sup>[8]</sup> 28:1 30:5 40:5,10,12 43:6 44:4 77:5  <b>fundamentally</b> <sup>[2]</sup> 3:25 35:18  <b>further</b> <sup>[7]</sup> 8:13 18:14 94:19 99:7,9 102:3 104:10</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>Gallatin</b> <sup>[1]</sup> 73:1  <b>Gas</b> <sup>[3]</sup> 69:22 84:11 104:11  <b>gave</b> <sup>[12]</sup> 3:13 16:5,6,7,9 27:25 28:2 39:21 74:4 82:11 101:23 102:17  <b>General</b> <sup>[5]</sup> 1:21,24 68:23 87:3 104:3  <b>generality</b> <sup>[1]</sup> 98:18  <b>generalize</b> <sup>[1]</sup> 84:22  <b>generation</b> <sup>[2]</sup> 70:15 82:21  <b>geographic</b> <sup>[1]</sup> 14:13  <b>George</b> <sup>[1]</sup> 92:20</p>	<p><b>getting</b> <sup>[3]</sup> 28:25 90:5 93:17  <b>give</b> <sup>[18]</sup> 9:23 11:3,4,22,23 13:12 17:1,7 19:6 23:22 31:18 32:4 45:17 54:21 71:23 76:15 94:19 95:6  <b>given</b> <sup>[12]</sup> 27:24 28:1 42:4 72:8,16 76:25 77:14 83:5 85:10 91:21 99:2,4  <b>gives</b> <sup>[1]</sup> 68:5  <b>giving</b> <sup>[11]</sup> 15:23 23:20 26:19 33:20 38:8 43:6 54:23 57:20 61:16 70:18 93:17  <b>global</b> <sup>[2]</sup> 4:12,19  <b>good-faith</b> <sup>[1]</sup> 48:17  <b>goodness</b> <sup>[3]</sup> 92:25 93:4,9  <b>GORSUCH</b> <sup>[35]</sup> 8:3,5,20,24 9:3,11 12:24 13:2,5 14:7,9 20:7,19,23,25 21:16 35:24 61:6,7 63:3,9,14,17,20 64:9,18 65:1,3,6,9 99:11,13,15 101:6 105:10  <b>Gorsuch's</b> <sup>[1]</sup> 67:12  <b>gotten</b> <sup>[1]</sup> 33:24  <b>govern</b> <sup>[2]</sup> 43:14 98:8  <b>government</b> <sup>[42]</sup> 14:24 17:5 27:5 28:5 29:19 35:8 36:24 46:22,25 47:20 49:15,16,21,24 50:5 52:10 54:15 56:4 60:14 61:24 62:10 63:2 66:1,15 68:14,18 74:2 80:20 89:3 90:17 91:2 93:22 98:20 99:18,18,23 101:21 102:5,11 106:18 107:13,19  <b>government's</b> <sup>[6]</sup> 4:6 24:24 26:2 52:14 65:12 75:3  <b>governor's</b> <sup>[1]</sup> 52:6  <b>grant</b> <sup>[5]</sup> 3:15 30:10,11 60:1 101:15  <b>granted</b> <sup>[7]</sup> 14:22 15:6,7 54:14 60:10 94:2,8  <b>grants</b> <sup>[2]</sup> 4:1 56:3  <b>granularity</b> <sup>[1]</sup> 81:23  <b>granularly</b> <sup>[1]</sup> 80:13  <b>great</b> <sup>[4]</sup> 21:19 68:9 99:2 105:21  <b>greater</b> <sup>[1]</sup> 63:24  <b>gross</b> <sup>[1]</sup> 83:18  <b>ground</b> <sup>[1]</sup> 99:17  <b>grounds</b> <sup>[2]</sup> 91:7 96:24  <b>guarantees</b> <sup>[1]</sup> 17:6  <b>Guard</b> <sup>[4]</sup> 41:11 49:2 67:15 88:16  <b>guarded</b> <sup>[1]</sup> 82:21  <b>Guardsmen</b> <sup>[1]</sup> 68:11  <b>guess</b> <sup>[11]</sup> 14:7,9 20:7 26:2 34:17 43:10 46:17 62:4 74:25 80:4 101:18</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>habeas</b> <sup>[11]</sup> 8:18,20,24 9:3 78:16 101:7 102:15,21,22 103:1,5  <b>Hamilton</b> <sup>[11]</sup> 25:9 50:13 52:18 53:19 56:6,25 57:25 94:2,13 98:1 105:23  <b>Hamilton's</b> <sup>[5]</sup> 53:22 54:7 56:13,17 98:3  <b>Hamiltonian</b> <sup>[1]</sup> 57:13  <b>hampering</b> <sup>[1]</sup> 89:15</p>	<p><b>Hand</b> <sup>[6]</sup> 25:13 46:21 54:15,16 91:8 107:15  <b>hands</b> <sup>[2]</sup> 51:22 86:6  <b>Hans</b> <sup>[1]</sup> 53:25  <b>happen</b> <sup>[2]</sup> 52:7 93:19  <b>happened</b> <sup>[4]</sup> 33:25 51:20 93:18 103:15  <b>happening</b> <sup>[3]</sup> 54:17 89:18,19  <b>happens</b> <sup>[2]</sup> 65:6,8  <b>happily</b> <sup>[1]</sup> 48:9  <b>hard</b> <sup>[2]</sup> 90:25 91:16  <b>harder</b> <sup>[1]</sup> 68:10  <b>head</b> <sup>[1]</sup> 63:25  <b>hear</b> <sup>[3]</sup> 3:5 53:16 92:9  <b>heard</b> <sup>[1]</sup> 94:14  <b>hearing</b> <sup>[1]</sup> 94:17  <b>heart</b> <sup>[1]</sup> 65:15  <b>heartland</b> <sup>[1]</sup> 20:9  <b>heavily</b> <sup>[1]</sup> 7:18  <b>held</b> <sup>[9]</sup> 15:9 24:11,12 65:24 79:2,2 80:19 98:14 107:8  <b>hesitate</b> <sup>[1]</sup> 24:5  <b>hesitation</b> <sup>[2]</sup> 4:23 101:11  <b>highway</b> <sup>[3]</sup> 19:9,23 21:12  <b>highways</b> <sup>[5]</sup> 19:10,13 21:9 62:7 64:11  <b>historical</b> <sup>[9]</sup> 71:23 81:4,10,11 83:9 86:13 95:2 103:8 104:14  <b>historically</b> <sup>[2]</sup> 4:2 95:3  <b>history</b> <sup>[11]</sup> 8:7 18:25 40:13 60:6 69:10 78:17 80:2 85:20,21,24 101:5  <b>Hmm</b> <sup>[1]</sup> 55:3  <b>hold</b> <sup>[1]</sup> 101:13  <b>holding</b> <sup>[6]</sup> 21:20 39:9 78:25 79:7,10,17  <b>home</b> <sup>[5]</sup> 24:8 61:19 84:6,19 107:24  <b>Honor</b> <sup>[48]</sup> 5:13 6:2,19 7:19 8:11 9:2 14:19 15:21 18:10,24 20:1,11,22,24 22:19 23:2,4,18 25:6 27:1 29:4 30:2 31:2 32:3,8,14 33:10,15 34:10 36:5,20 39:3 40:20 71:18 73:24 75:6 77:2 78:2 81:3 82:18 84:21 87:25 88:21,24 99:21 102:7 104:11 108:8  <b>hope</b> <sup>[4]</sup> 53:20 67:12 92:4 93:9  <b>hostility</b> <sup>[1]</sup> 89:12  <b>house</b> <sup>[1]</sup> 52:5  <b>houses</b> <sup>[1]</sup> 51:21  <b>hypothetical</b> <sup>[2]</sup> 21:24 65:13</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>identified</b> <sup>[2]</sup> 79:18,20  <b>ideological</b> <sup>[1]</sup> 96:23  <b>Il</b> <sup>[7]</sup> 1:24 2:10 41:7 61:15 69:1 77:18,21  <b>illegal</b> <sup>[1]</sup> 97:15  <b>imagine</b> <sup>[2]</sup> 84:15 91:16  <b>immense</b> <sup>[1]</sup> 4:14  <b>immunity</b> <sup>[62]</sup> 5:15 6:4 16:2 18:7 26:19 27:18 28:3 31:19 40:4 41:14 42:3,3,15 45:6 50:21 51:13,14,14 52:24 53:24 54:5,8 56:17,19 57:15 59:16,22 66:24 69:7,19 73:6 75:16,25 77:10 78:23 81:14 82:14,22 83:4,16,20 84:25 85:4 87:4,13 91:17 95:16,19 96:10 97:6 98:24 99:16,24 100:4 102:17,20 103:4,5 104:6 106:14,22 107:9  <b>impact</b> <sup>[2]</sup> 34:16 63:24  <b>impair</b> <sup>[1]</sup> 62:9  <b>impeded</b> <sup>[1]</sup> 101:20  <b>impermissibly</b> <sup>[1]</sup> 69:19  <b>implicate</b> <sup>[1]</sup> 102:16  <b>implicit</b> <sup>[2]</sup> 27:18 61:12  <b>implying</b> <sup>[1]</sup> 60:2  <b>importance</b> <sup>[5]</sup> 35:6 46:19 69:5 80:23 107:21  <b>important</b> <sup>[39]</sup> 6:9 12:25 15:17,21 25:24 30:3 31:4 32:15 36:3 41:10 46:8 47:20 48:19,20 49:13 53:19 54:11 67:18 72:22 75:14,15,19,23 77:4,8,10,12,16,25 81:4,7 82:1 85:7 89:21 90:3,21 91:25 92:7 95:3  <b>imposed</b> <sup>[1]</sup> 41:19  <b>impossible</b> <sup>[1]</sup> 106:2  <b>inaccurate</b> <sup>[1]</sup> 105:8  <b>incentive</b> <sup>[1]</sup> 68:7  <b>incident</b> <sup>[1]</sup> 35:19  <b>incidental</b> <sup>[2]</sup> 34:15 107:7  <b>incidents</b> <sup>[1]</sup> 30:6  <b>inclined</b> <sup>[1]</sup> 96:5  <b>include</b> <sup>[1]</sup> 46:15  <b>includes</b> <sup>[1]</sup> 104:14  <b>including</b> <sup>[16]</sup> 3:19,23 26:23 27:11 41:13 48:21 59:8,10 61:17 74:5 77:20 86:22 91:13 93:17 95:25 96:2  <b>unconditional</b> <sup>[1]</sup> 30:9  <b>inconsistent</b> <sup>[1]</sup> 90:21  <b>incredible</b> <sup>[1]</sup> 70:9  <b>incredibly</b> <sup>[1]</sup> 81:3  <b>indeed</b> <sup>[1]</sup> 99:2  <b>independent</b> <sup>[2]</sup> 99:17 100:4  <b>Indian</b> <sup>[21]</sup> 10:11,12,17,22,25,25 12:10,14,22 13:11,20 14:15 36:8,11 53:3 69:24 78:5 92:2 98:5,9,11  <b>Indians</b> <sup>[1]</sup> 26:23  <b>indicate</b> <sup>[1]</sup> 60:12  <b>indispensable</b> <sup>[2]</sup> 5:6 24:25  <b>individual</b> <sup>[13]</sup> 21:5 33:5 48:15 86:6,21 88:7 101:14,22,24 102:5,6 103:15 106:24  <b>individuals</b> <sup>[10]</sup> 19:12 24:4 48:20 62:12 72:4 78:13 86:18 90:18 103:12 104:17  <b>induce</b> <sup>[1]</sup> 87:12  <b>inextricable</b> <sup>[1]</sup> 74:22  <b>inextricably</b> <sup>[7]</sup> 6:22 7:11 30:23 31:1 44:17 70:16 86:11  <b>inferences</b> <sup>[1]</sup> 90:9  <b>infrequently</b> <sup>[1]</sup> 90:24  <b>infringed</b> <sup>[1]</sup> 51:6  <b>inherently</b> <sup>[1]</sup> 45:11</p>
--	---	---

## Official - Subject to Final Review

<p><b>injured</b> <sup>[1]</sup> 24:9  <b>injuries</b> <sup>[1]</sup> 5:1  <b>injury</b> <sup>[1]</sup> 4:22  <b>inquiries</b> <sup>[1]</sup> 42:13  <b>inquiry</b> <sup>[3]</sup> 15:25 42:22 94:24  <b>instance</b> <sup>[2]</sup> 31:22 94:2  <b>instead</b> <sup>[1]</sup> 4:16  <b>intact</b> <sup>[1]</sup> 83:16  <b>intellectual</b> <sup>[1]</sup> 40:1  <b>intend</b> <sup>[1]</sup> 106:21  <b>intended</b> <sup>[1]</sup> 70:17  <b>intending</b> <sup>[1]</sup> 95:6  <b>intends</b> <sup>[1]</sup> 106:20  <b>interaction</b> <sup>[1]</sup> 56:10  <b>interactions</b> <sup>[1]</sup> 13:25  <b>intercourse</b> <sup>[1]</sup> 14:1  <b>interest</b> <sup>[3]</sup> 76:23 78:8,9  <b>interesting</b> <sup>[2]</sup> 62:6 102:23  <b>interests</b> <sup>[1]</sup> 86:24  <b>interfere</b> <sup>[6]</sup> 4:6 10:6 15:24 16:3 27:19 28:4  <b>interferes</b> <sup>[1]</sup> 27:18  <b>internal</b> <sup>[1]</sup> 19:17  <b>international</b> <sup>[2]</sup> 30:6 35:19  <b>Interstate</b> <sup>[7]</sup> 15:7 19:9,23 21:12 22:12 62:7 64:11  <b>intertwined</b> <sup>[7]</sup> 6:22 7:11 30:24 31:1 44:17 70:16 86:11  <b>intertwining</b> <sup>[1]</sup> 74:22  <b>intuition</b> <sup>[3]</sup> 77:3,8 79:15  <b>inure</b> <sup>[1]</sup> 32:17  <b>invaded</b> <sup>[1]</sup> 51:19  <b>invasions</b> <sup>[1]</sup> 21:10  <b>invitation</b> <sup>[2]</sup> 45:22 47:16  <b>invoke</b> <sup>[2]</sup> 49:22,23  <b>involve</b> <sup>[1]</sup> 29:12  <b>involved</b> <sup>[3]</sup> 32:2 53:11 84:16  <b>involves</b> <sup>[1]</sup> 58:12  <b>involving</b> <sup>[1]</sup> 31:14  <b>irrelevant</b> <sup>[2]</sup> 90:2,7  <b>isn't</b> <sup>[13]</sup> 7:7 18:4 29:2 43:14 44:17 72:14,17 74:20,21 81:21 84:13 85:18 90:21  <b>issue</b> <sup>[6]</sup> 37:8 50:14 59:4,6 75:1 83:13  <b>issues</b> <sup>[2]</sup> 72:23 102:25  <b>itself</b> <sup>[9]</sup> 8:15 36:15 55:12 57:19 66:16,24 77:13 78:21 89:8</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>Japanese</b> <sup>[1]</sup> 51:22  <b>jealously</b> <sup>[1]</sup> 82:21  <b>Jersey</b> <sup>[1]</sup> 84:8  <b>job</b> <sup>[2]</sup> 24:7 67:23  <b>jobs</b> <sup>[6]</sup> 4:18 67:17 68:17 88:19,20 93:18  <b>join</b> <sup>[4]</sup> 4:20 49:11 67:22 68:7  <b>JUDD</b> <sup>[3]</sup> 1:24 2:10 69:1  <b>Judge</b> <sup>[2]</sup> 25:12,13  <b>judged</b> <sup>[1]</sup> 81:19  <b>judges</b> <sup>[1]</sup> 29:1  <b>judgment</b> <sup>[7]</sup> 46:8,9 50:10 58:19 62:25 74:25 87:19</p>	<p><b>judicial</b> <sup>[9]</sup> 6:23 7:11,21 30:24 31:10 44:13 80:14 86:10,11  <b>judicially</b> <sup>[1]</sup> 91:6  <b>jurisdiction</b> <sup>[1]</sup> 26:24  <b>jurisprudence</b> <sup>[2]</sup> 36:12 53:25  <b>Justice</b> <sup>[253]</sup> 1:21 3:3,3,12 5:9,20 6:17,20 7:17 8:3,5,20,24 9:3,11,23 10:9 11:12 12:9,24,25 13:2,4,5,7 14:7,9 15:15,16 16:11,12,13 18:4,6,17 19:6,22 20:7,19,23,25 21:12,15,16 22:5,11,14,17,24 23:1,3,5,9,10,11,16,19,22 24:1,16 25:3,7,12 26:1 28:6,7,10,13,15,16 29:2,14 30:14,17,21 31:12,25 32:4,11 33:1,2,2,4,11,16,16,17,18,19 34:17,20 35:23,23,25 36:1,7,17,25 37:11,11,13,14 38:18,21,23 39:11 40:18,21 41:1,25 42:11,25 43:10 44:9,22 45:19 46:17,24 47:5,7,9,24 48:2,25 49:14 50:12,25 51:4,12,18,25 52:1,15,17,23 53:1 54:2,19 55:9,15 56:2,22,22,24 57:10 58:2,5,6,16 59:24 60:25 61:1,1,3,4,5,6,7 62:5,5 63:3,9,14,17,20 64:9,18 65:1,3,6,9 66:9,9,11,19 67:4,12 68:19,20,20 69:4 70:24 71:3,15 73:15,19,25 74:12,16,24 76:2,4,6,7,9 77:11 79:5,15 80:4,5,16 82:3,4,9,10 83:21,22,24 85:14 87:16 88:1,10,14,18,22 89:9,10 90:7 91:20 94:21 96:14,16,20 98:1 99:8,11,12,13,14,15 100:11,12,13,14,15,15,17,18,19 101:6 103:24,25,25 104:1,2 105:9,9,10,11,12,18 107:3 108:9  <b>justified</b> <sup>[1]</sup> 19:24</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>KAGAN</b> <sup>[24]</sup> 5:20 9:23 10:9 11:12 28:6 33:18,19 34:17,20 43:10 45:19 46:17,24 49:14 61:5 79:5,15 80:4,16 82:10 85:14 103:25 105:9 107:4  <b>Kagan's</b> <sup>[4]</sup> 37:15 38:23 42:25 76:9  <b>Katz</b> <sup>[10]</sup> 5:11 31:22 44:11,24 56:9 75:12 78:7,10 81:24 105:5  <b>KAVANAUGH</b> <sup>[39]</sup> 12:9,25 13:4,7 15:16 23:16,19,22 24:1 35:25 36:1,7,17,25 47:24 48:2,25 66:10,11,19 67:4 68:19 74:12,16 76:2,4,7 77:11 82:9 83:25 87:16 88:1,10,14,18,22 89:9 90:7 105:11  <b>Kavanaugh's</b> <sup>[1]</sup> 80:5  <b>keep</b> <sup>[3]</sup> 4:17 67:23 72:8  <b>keeping</b> <sup>[2]</sup> 89:7 102:8  <b>keeps</b> <sup>[1]</sup> 17:17  <b>Kentucky</b> <sup>[1]</sup> 25:10  <b>kept</b> <sup>[2]</sup> 78:13,14  <b>kind</b> <sup>[10]</sup> 16:16 38:7 46:15 67:6 79:19 80:14,17 82:15 102:11 107:8  <b>kinds</b> <sup>[6]</sup> 43:17 45:9 52:7 82:6 89:8 107:14</p>	<p style="text-align: center;"><b>L</b></p> <hr/> <p><b>Labor</b> <sup>[4]</sup> 17:15,17,23 46:2  <b>lack</b> <sup>[1]</sup> 100:20  <b>lacks</b> <sup>[1]</sup> 70:6  <b>land</b> <sup>[1]</sup> 80:1  <b>lands</b> <sup>[1]</sup> 86:2  <b>language</b> <sup>[2]</sup> 6:23 10:18  <b>large</b> <sup>[5]</sup> 14:14 41:16 85:3 91:3 99:3  <b>larger</b> <sup>[1]</sup> 47:16  <b>last</b> <sup>[2]</sup> 17:19 36:1  <b>late</b> <sup>[1]</sup> 107:18  <b>later</b> <sup>[2]</sup> 50:18 62:19  <b>Laughter</b> <sup>[1]</sup> 23:7  <b>law</b> <sup>[12]</sup> 10:23 37:4 63:15 65:20 67:6 71:8 75:1 99:16,17,24 100:4,7  <b>Lawler</b> <sup>[1]</sup> 17:13  <b>lawsuit</b> <sup>[6]</sup> 18:8 49:16 50:21 65:11 93:22 102:11  <b>lawsuits</b> <sup>[5]</sup> 3:19 47:10 62:23 70:16 103:13  <b>LE</b> <sup>[1]</sup> 1:3  <b>Learned</b> <sup>[1]</sup> 25:12  <b>least</b> <sup>[6]</sup> 52:24 53:20 64:4 81:20,22 101:21  <b>leave</b> <sup>[3]</sup> 67:24 76:19 81:14  <b>led</b> <sup>[1]</sup> 48:3  <b>left</b> <sup>[2]</sup> 86:3 97:21  <b>legislation</b> <sup>[1]</sup> 87:11  <b>less</b> <sup>[1]</sup> 77:10  <b>lesser</b> <sup>[1]</sup> 66:8  <b>level</b> <sup>[1]</sup> 98:18  <b>liberty</b> <sup>[3]</sup> 106:15,19,23  <b>lies</b> <sup>[2]</sup> 64:2,4  <b>lieu</b> <sup>[1]</sup> 13:13  <b>life</b> <sup>[1]</sup> 98:12  <b>light</b> <sup>[1]</sup> 4:9  <b>likely</b> <sup>[1]</sup> 49:11  <b>limit</b> <sup>[1]</sup> 19:16  <b>limitation</b> <sup>[8]</sup> 19:2,16,18,19 34:13 41:20 106:1,6  <b>limited</b> <sup>[5]</sup> 5:12,14,15 21:20 105:22  <b>limiting</b> <sup>[1]</sup> 24:16  <b>limitless</b> <sup>[1]</sup> 107:10  <b>limits</b> <sup>[4]</sup> 25:18 61:8 62:5 69:8  <b>Lincoln</b> <sup>[1]</sup> 92:3  <b>line</b> <sup>[2]</sup> 20:13 107:2  <b>lines</b> <sup>[1]</sup> 96:6  <b>linkage</b> <sup>[1]</sup> 61:20  <b>links</b> <sup>[1]</sup> 54:1  <b>list</b> <sup>[4]</sup> 51:10 53:14 54:1,12  <b>listed</b> <sup>[1]</sup> 55:5  <b>lists</b> <sup>[2]</sup> 50:17 68:6  <b>litigant</b> <sup>[1]</sup> 64:7  <b>litigate</b> <sup>[1]</sup> 50:6  <b>litigation</b> <sup>[5]</sup> 7:5,6 45:11 47:2,21  <b>little</b> <sup>[8]</sup> 8:21 9:23 11:15 13:17 46:18 47:10 85:2 90:21  <b>lived</b> <sup>[1]</sup> 93:7  <b>lives</b> <sup>[1]</sup> 107:2  <b>local</b> <sup>[4]</sup> 13:14,20 106:15 107:25</p>	<p><b>located</b> <sup>[2]</sup> 25:20,21  <b>long</b> <sup>[8]</sup> 7:13 8:7 15:9 27:15 32:18 46:14 92:4 104:23  <b>look</b> <sup>[9]</sup> 15:11,12 17:19 47:17 59:11 79:12 90:10 92:24 93:25  <b>looked</b> <sup>[6]</sup> 39:15 42:19 72:25 78:15 81:23 83:19  <b>looking</b> <sup>[10]</sup> 11:18 42:16 43:16,17,21 51:7 57:1 67:7 76:11 100:9  <b>looks</b> <sup>[1]</sup> 43:3  <b>lose</b> <sup>[3]</sup> 51:5,23 92:17  <b>loss</b> <sup>[1]</sup> 98:11  <b>lost</b> <sup>[3]</sup> 23:6 52:9 86:5  <b>lot</b> <sup>[12]</sup> 13:12 20:20 29:17 33:25 34:1 43:21 45:25 53:8 57:17 59:11 60:8 88:22  <b>Louisiana</b> <sup>[1]</sup> 54:1  <b>low-stakes</b> <sup>[1]</sup> 32:22  <b>lower</b> <sup>[1]</sup> 99:25</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>made</b> <sup>[17]</sup> 6:3 11:24 12:2 21:3 37:18 38:12,23 39:1,8,9,13 58:19 63:2 71:5 84:10 86:25 101:1  <b>Madisonian</b> <sup>[1]</sup> 58:22  <b>magnitude</b> <sup>[2]</sup> 90:18 91:2  <b>Maine</b> <sup>[1]</sup> 72:24  <b>maintain</b> <sup>[5]</sup> 19:13 26:13 41:21 43:9 50:16  <b>maintaining</b> <sup>[2]</sup> 26:7 75:23  <b>majority</b> <sup>[1]</sup> 34:5  <b>mandate</b> <sup>[1]</sup> 104:18  <b>manner</b> <sup>[2]</sup> 106:8,10  <b>many</b> <sup>[13]</sup> 21:20 39:6 47:17 53:7 58:24 72:1,5 76:3 93:13,22 94:25,25 98:22  <b>March</b> <sup>[1]</sup> 1:11  <b>marshal</b> <sup>[1]</sup> 108:1  <b>martial</b> <sup>[1]</sup> 31:14  <b>massive</b> <sup>[1]</sup> 4:15  <b>materiel</b> <sup>[1]</sup> 104:19  <b>matter</b> <sup>[11]</sup> 1:13 11:2,4 34:24 40:8 53:5 68:1,9 92:18 97:23 104:14  <b>mattered</b> <sup>[1]</sup> 11:1  <b>matters</b> <sup>[1]</sup> 31:17  <b>mean</b> <sup>[42]</sup> 6:24 9:24 11:13 18:17 19:11 21:10 22:20 30:20 37:23,25 43:20 44:19 46:18 47:20 49:6 51:3,9 52:18,23 55:4,11 62:5 64:3,19,22 66:23 67:7,11,13 73:5,11 79:6 80:7,18 82:15 83:23 84:15 89:16 90:1 96:20 98:17 99:4  <b>meaning</b> <sup>[1]</sup> 9:12  <b>means</b> <sup>[8]</sup> 54:8 69:9,11 75:8 96:7 105:22,25 106:5  <b>means/ends</b> <sup>[1]</sup> 105:20  <b>meant</b> <sup>[3]</sup> 52:20,24 92:19  <b>measure</b> <sup>[2]</sup> 14:14 95:7  <b>mechanism</b> <sup>[2]</sup> 46:12 49:19  <b>mechanisms</b> <sup>[3]</sup> 46:15 63:5 87:11  <b>Medical</b> <sup>[1]</sup> 76:19  <b>member</b> <sup>[1]</sup> 107:25</p>
--	---	--	---

## Official - Subject to Final Review

<p><b>members</b> <sup>[1]</sup> 67:15  <b>mentioned</b> <sup>[3]</sup> 36:18 89:11 94:7  <b>mentions</b> <sup>[1]</sup> 57:4  <b>merit</b> <sup>[1]</sup> 17:15  <b>merits</b> <sup>[1]</sup> 49:25  <b>MICHEL</b> <sup>[47]</sup> 1:20 2:6 40:21,22,25 41:25 42:11 43:20 44:9,21 45:20, 21 46:23 47:14 48:2 49:4,18 50:23 51:3,9,13,24 52:8,16,22 53:18 55:8,11,16 57:10 58:16 60:4 62:18 63:9,15,19 64:3,13,22 65:2,4,9 66:14,23 67:11 82:6 83:25  <b>might</b> <sup>[9]</sup> 13:14 43:21 53:15 79:11 81:16 88:4,25 93:10 96:20  <b>military</b> <sup>[22]</sup> 4:10,25 31:15 41:2,9, 18 48:8 49:11,13 50:9 57:21 60:21,23 66:15 67:14,18,22 68:8,12 89:7 101:8 107:2  <b>military's</b> <sup>[1]</sup> 101:4  <b>Militia</b> <sup>[11]</sup> 26:5,8,10 27:5,6 54:24 55:1,2 65:21 77:20,22  <b>million</b> <sup>[1]</sup> 67:14  <b>mind</b> <sup>[5]</sup> 51:2,10 71:4 92:23 93:5  <b>minimize</b> <sup>[1]</sup> 95:20  <b>minimum</b> <sup>[5]</sup> 73:11 74:18 81:3 96:4 104:11  <b>ministers</b> <sup>[1]</sup> 16:8  <b>mischaracterize</b> <sup>[1]</sup> 33:22  <b>miss</b> <sup>[1]</sup> 103:16  <b>missing</b> <sup>[2]</sup> 102:1 103:7  <b>mission</b> <sup>[1]</sup> 41:6  <b>mistake</b> <sup>[1]</sup> 77:17  <b>model</b> <sup>[1]</sup> 81:19  <b>modern</b> <sup>[1]</sup> 4:9  <b>moment's</b> <sup>[2]</sup> 4:13,19  <b>money</b> <sup>[16]</sup> 31:20,25 32:1,5,7,24 33:9 40:1 58:4,12 72:3 81:8 101:15,15 104:16  <b>morning</b> <sup>[4]</sup> 3:4,5,23 94:17  <b>most</b> <sup>[7]</sup> 9:11 26:22 41:4,14 53:18 68:17 85:6  <b>motivated</b> <sup>[2]</sup> 7:22 66:17  <b>move</b> <sup>[4]</sup> 15:4 28:11 29:16 31:16  <b>much</b> <sup>[12]</sup> 8:12 30:10 42:24 43:25 47:16 58:7,8 81:1,5 84:22 100:20 104:10  <b>music</b> <sup>[1]</sup> 92:24  <b>must</b> <sup>[6]</sup> 9:19 30:20 73:11 82:2 86:16 97:4  <b>myself</b> <sup>[1]</sup> 102:8</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>namely</b> <sup>[2]</sup> 44:3 53:6  <b>narrow</b> <sup>[1]</sup> 105:6  <b>nation</b> <sup>[9]</sup> 3:16 24:24 25:23 40:9 41:12,22 66:6 68:17 92:4  <b>nation's</b> <sup>[1]</sup> 66:12  <b>national</b> <sup>[18]</sup> 3:18 4:7 5:7 25:1 29:18 38:1 65:17 67:15 68:13 76:22 77:12 84:11 89:13,20 90:23 106:3, 11 107:6  <b>national/state</b> <sup>[1]</sup> 77:25  <b>nationwide</b> <sup>[1]</sup> 25:12</p>	<p><b>nature</b> <sup>[9]</sup> 15:12 26:18 30:7 31:24 82:1 96:6,7 97:12 102:15  <b>Navies</b> <sup>[2]</sup> 53:13 54:22  <b>Navy</b> <sup>[7]</sup> 3:24 24:21 26:13 41:21 43:9 62:10 96:2  <b>near</b> <sup>[1]</sup> 71:20  <b>necessarily</b> <sup>[2]</sup> 7:10 73:13  <b>necessary</b> <sup>[16]</sup> 3:17 9:9 24:3 50:9 61:23 62:1,2,24 63:19 67:6 92:5 100:24,24 101:1 104:8 106:5  <b>necessity</b> <sup>[1]</sup> 61:20  <b>need</b> <sup>[12]</sup> 11:25 18:13 19:10 31:7 61:21 68:15 88:19 100:22 101:12, 13,15 102:3  <b>needed</b> <sup>[2]</sup> 101:9,16  <b>needs</b> <sup>[1]</sup> 68:13  <b>Neither</b> <sup>[3]</sup> 69:10 98:14 102:21  <b>never</b> <sup>[9]</sup> 13:21 36:15 37:9 41:19 67:17 69:7 92:5 93:9 102:19  <b>new</b> <sup>[2]</sup> 60:23 84:8  <b>next</b> <sup>[8]</sup> 28:11 89:17,18,20 93:24 96:11,12 102:1  <b>next-door</b> <sup>[1]</sup> 72:18  <b>nine</b> <sup>[2]</sup> 17:20,24  <b>nonconsenting</b> <sup>[2]</sup> 70:1 103:13  <b>None</b> <sup>[3]</sup> 6:12 11:1 26:24  <b>nonetheless</b> <sup>[6]</sup> 35:22 72:24 81:12,14 83:15 98:13  <b>nor</b> <sup>[3]</sup> 69:10 98:14 102:21  <b>normally</b> <sup>[3]</sup> 13:14 14:11 63:11  <b>note</b> <sup>[1]</sup> 57:16  <b>nothing</b> <sup>[7]</sup> 35:21 59:14 70:8 71:6 95:21 97:21 103:2  <b>notice</b> <sup>[2]</sup> 4:13,19  <b>notion</b> <sup>[2]</sup> 43:25 59:15  <b>Number</b> <sup>[7]</sup> 20:16,17 47:7,20 96:1 99:25 105:23  <b>numbers</b> <sup>[2]</sup> 47:16 88:25</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>object</b> <sup>[1]</sup> 52:13  <b>objectives</b> <sup>[1]</sup> 89:14  <b>objects</b> <sup>[2]</sup> 30:4,8  <b>obligations</b> <sup>[2]</sup> 27:9 71:9  <b>observed</b> <sup>[1]</sup> 98:22  <b>obstreperous</b> <sup>[1]</sup> 97:11  <b>obstruction</b> <sup>[2]</sup> 60:22 96:23  <b>obviously</b> <sup>[6]</sup> 7:6 59:13 60:15 62:25 68:12 71:19  <b>occurred</b> <sup>[1]</sup> 95:22  <b>occurrence</b> <sup>[1]</sup> 90:17  <b>offended</b> <sup>[1]</sup> 91:17  <b>office</b> <sup>[2]</sup> 7:7 52:4  <b>officers</b> <sup>[4]</sup> 8:19 55:1 97:14 101:8  <b>official</b> <sup>[1]</sup> 8:18  <b>Okay</b> <sup>[7]</sup> 23:3 66:19 88:14 92:6,8 93:20 94:15  <b>older</b> <sup>[1]</sup> 45:16  <b>once</b> <sup>[1]</sup> 55:12  <b>One</b> <sup>[46]</sup> 11:23 15:15 16:11,21 17:4 19:7,7 31:13 38:1 41:22,23 48:16 50:13 51:12 54:12,15 55:25 56:12 57:12 58:11,17 63:6 67:20 68:</p>	<p>4,17 69:5 70:24 71:25 75:25 76:13 78:25 79:7,9,17 81:1 83:23,24 84:7 85:14 87:24 93:6 94:2 97:9, 15 98:18 106:12  <b>ones</b> <sup>[1]</sup> 77:10  <b>ongoing</b> <sup>[1]</sup> 78:17  <b>only</b> <sup>[16]</sup> 27:16 43:12 47:11,12 49:10 52:20 69:8 78:25 79:17,23 86:3 91:12 93:12 106:17 107:18  <b>opened</b> <sup>[1]</sup> 105:19  <b>opinion</b> <sup>[3]</sup> 25:15,16 56:1  <b>opportunity</b> <sup>[3]</sup> 17:3 78:22 101:22  <b>opposed</b> <sup>[3]</sup> 58:14 74:1 77:10  <b>opposition</b> <sup>[1]</sup> 37:1  <b>optional</b> <sup>[1]</sup> 29:8  <b>oral</b> <sup>[7]</sup> 1:14 2:2,5,9 3:9 40:22 69:1  <b>order</b> <sup>[4]</sup> 21:9 43:15 80:23 104:17  <b>orders</b> <sup>[4]</sup> 78:12 90:18 91:2 97:20  <b>ordinary</b> <sup>[2]</sup> 35:13,17  <b>organizing</b> <sup>[1]</sup> 26:9  <b>original</b> <sup>[4]</sup> 9:12,19 21:17 90:20  <b>originated</b> <sup>[1]</sup> 41:6  <b>other</b> <sup>[39]</sup> 4:1 15:8 27:14 29:5 45:14 46:20 50:24 51:16 53:9 54:16 55:5,22 57:12,17 59:17,19,20 63:4,5 70:25 71:8 76:10,14,24 79:3 81:6 82:5 83:24 87:11,12,25 91:8, 13 97:10 102:25 104:21,23 107:15 108:2  <b>others</b> <sup>[6]</sup> 26:20 50:22 51:1,2,6,8  <b>otherwise</b> <sup>[5]</sup> 24:4 66:2 70:23 98:12 99:4  <b>ought</b> <sup>[2]</sup> 105:25 106:1  <b>out</b> <sup>[18]</sup> 5:16,18 7:13 11:14 37:25 38:13 47:15 65:11 68:5 75:24 88:25 89:14 90:8 94:24 98:3 102:12 104:2 107:16  <b>outside</b> <sup>[1]</sup> 9:3  <b>over</b> <sup>[14]</sup> 10:25 13:20,23 14:12 26:20 31:11 50:6 70:12 77:22,22 89:18,19 90:12 106:25  <b>overlap</b> <sup>[1]</sup> 44:8  <b>overlay</b> <sup>[1]</sup> 90:3  <b>overrides</b> <sup>[1]</sup> 75:16  <b>override</b> <sup>[4]</sup> 35:10,21 38:17,21  <b>overruling</b> <sup>[1]</sup> 73:10  <b>overseas</b> <sup>[2]</sup> 65:22 68:15  <b>overwhelming</b> <sup>[1]</sup> 43:5  <b>owes</b> <sup>[1]</sup> 50:10  <b>own</b> <sup>[7]</sup> 28:19,25 60:6,7,7 100:3 101:23  <b>owner</b> <sup>[1]</sup> 33:7</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>package</b> <sup>[1]</sup> 68:7  <b>PAGE</b> <sup>[1]</sup> 2:2  <b>palace</b> <sup>[1]</sup> 52:6  <b>Papers</b> <sup>[3]</sup> 71:12 72:10 106:13  <b>paragraph</b> <sup>[2]</sup> 54:9,10  <b>parallel</b> <sup>[1]</sup> 14:17  <b>paramount</b> <sup>[1]</sup> 60:21  <b>Paris</b> <sup>[1]</sup> 8:16  <b>part</b> <sup>[19]</sup> 26:11 27:6 33:12 41:17</p>	<p>43:12 49:2 53:19 62:19,21 68:6 71:21 74:21 79:1,15 82:18 85:19 86:8 89:6 93:3  <b>participate</b> <sup>[4]</sup> 13:22 14:6 15:14 27:2  <b>participating</b> <sup>[1]</sup> 3:4  <b>particular</b> <sup>[9]</sup> 23:25 42:19,21 43:8 48:5 50:10 56:20 66:5 82:25  <b>particularly</b> <sup>[4]</sup> 49:6,12 54:11 60:12  <b>parties</b> <sup>[3]</sup> 7:1 85:18 91:11  <b>partly</b> <sup>[1]</sup> 53:20  <b>parts</b> <sup>[3]</sup> 73:20 74:4 94:6  <b>party</b> <sup>[1]</sup> 91:9  <b>passage</b> <sup>[2]</sup> 53:19,22  <b>passages</b> <sup>[1]</sup> 39:5  <b>passing</b> <sup>[1]</sup> 100:23  <b>patrol</b> <sup>[1]</sup> 19:14  <b>peace</b> <sup>[6]</sup> 8:15 72:23 98:6,21 99:3 104:25  <b>peacetime</b> <sup>[2]</sup> 4:15 106:25  <b>PennEast</b> <sup>[17]</sup> 6:2 7:12 11:24 35:5 42:1,10 44:11,24 75:12 79:8,10, 11 81:24 84:7 85:15 105:5 107:4  <b>PennEast's</b> <sup>[1]</sup> 6:23  <b>penumbra</b> <sup>[2]</sup> 66:21,25  <b>penumbras</b> <sup>[1]</sup> 61:12  <b>people</b> <sup>[9]</sup> 14:12 49:7,8,10 67:14, 16,21 88:18 93:23  <b>percentage</b> <sup>[1]</sup> 88:16  <b>perfectly</b> <sup>[4]</sup> 10:19 35:20 92:13 97:24  <b>perhaps</b> <sup>[8]</sup> 13:16 42:8,9 56:25 72:18 73:21 102:24 104:23  <b>perimeter</b> <sup>[1]</sup> 64:5  <b>period</b> <sup>[2]</sup> 11:19 36:16  <b>peripheral</b> <sup>[1]</sup> 5:3  <b>permit</b> <sup>[5]</sup> 6:13 12:22 13:19 24:3 41:8  <b>permits</b> <sup>[1]</sup> 6:11  <b>permitted</b> <sup>[2]</sup> 12:4 103:1  <b>person</b> <sup>[3]</sup> 33:7 50:22 101:16  <b>personally</b> <sup>[1]</sup> 34:4  <b>personnel</b> <sup>[4]</sup> 88:12,15 89:21,24  <b>persuade</b> <sup>[1]</sup> 17:11  <b>Petitioner</b> <sup>[13]</sup> 1:4,19,23 2:4,8,14 3:10 40:24 45:23 49:8,20,21 105:16  <b>Petitioner's</b> <sup>[1]</sup> 46:6  <b>Petitioners</b> <sup>[1]</sup> 104:5  <b>phase</b> <sup>[1]</sup> 28:11  <b>Philippines</b> <sup>[1]</sup> 51:20  <b>picking</b> <sup>[1]</sup> 76:8  <b>piece</b> <sup>[2]</sup> 55:17 107:24  <b>pieces</b> <sup>[1]</sup> 94:1  <b>pipelines</b> <sup>[1]</sup> 84:11  <b>place</b> <sup>[4]</sup> 48:4 66:18 68:18 95:20  <b>placed</b> <sup>[1]</sup> 34:13  <b>places</b> <sup>[1]</sup> 99:25  <b>plaintiff</b> <sup>[1]</sup> 49:20  <b>Plan</b> <sup>[40]</sup> 5:17 6:5,15 9:13 11:10 28:23 38:14,22,25 39:13,19,23 42:</p>
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## Official - Subject to Final Review

<p>4,15 43:2,4,19 44:6,15 45:17 50:15 54:5 56:8,19 59:1,22 70:7,21 71:6,21 80:12,17 81:21 82:24 86:20 90:4 92:11 102:2,10 103:22</p> <p><b>planned</b> [1] 78:19</p> <p><b>play</b> [2] 37:10 92:20</p> <p><b>plays</b> [2] 40:4 72:23</p> <p><b>please</b> [5] 3:12 13:2 41:1 69:4 99:13</p> <p><b>plenary</b> [3] 12:19 69:17,25</p> <p><b>plumber's</b> [1] 24:7</p> <p><b>point</b> [18] 5:18 8:13 21:11 32:9 37:25 46:6 50:4 51:22 55:20 57:25 63:25 71:18 78:6 86:25 88:25 90:8 97:22 98:3</p> <p><b>pointed</b> [3] 5:16 7:13 47:15</p> <p><b>pointing</b> [1] 94:24</p> <p><b>points</b> [7] 3:22 52:8 68:4 70:11 76:12 105:18 107:16</p> <p><b>police</b> [1] 49:9</p> <p><b>policies</b> [1] 98:10</p> <p><b>policy</b> [8] 37:5 62:8 84:2,3,9,12 89:13 97:15</p> <p><b>political</b> [4] 9:8 17:4 63:1 96:23</p> <p><b>popular</b> [1] 63:7</p> <p><b>posited</b> [1] 62:6</p> <p><b>position</b> [7] 20:10 24:19,19,22 49:25 57:11 102:14</p> <p><b>possibility</b> [1] 96:22</p> <p><b>possible</b> [2] 93:13,14</p> <p><b>post-military</b> [1] 31:15</p> <p><b>post-Vietnam</b> [1] 84:1</p> <p><b>postal</b> [1] 40:2</p> <p><b>potatoes</b> [2] 82:16,23</p> <p><b>potential</b> [4] 21:22 78:16 84:14 91:24</p> <p><b>potentially</b> [1] 101:2</p> <p><b>potholes</b> [2] 62:7 64:11</p> <p><b>power</b> [111] 3:14 4:1 5:5 6:14,14,21,22,24 7:1,6 10:6,13 11:9 12:1,14,16 14:3,21 15:1,24 16:14 18:19 24:13,18 25:1,20 26:11,18 27:4,21 29:19 34:23 35:7,17 38:9 43:8 44:2,12,16,17 52:12 53:4 54:14,21,24 55:22 56:3,5 57:16 60:6,10 63:22 65:17 69:17 70:15,19 72:2,3,20,22 73:12,12,18 74:21 75:15 77:5,18 78:6 79:18,19 80:6 83:1,2,11,14,23 85:22,23 86:1,4,8,9,10,10,14 87:21,22 88:2,6,11 89:23 91:14 92:1 93:16 95:15 98:5,8,9 100:2 101:4,7,24 102:4,19,24 103:10 104:12,14,15 107:6,8</p> <p><b>powerful</b> [4] 15:22 56:15 103:19,21</p> <p><b>powers</b> [107] 3:23 5:4 6:12 7:20,25,25 9:10,25 10:2,8 11:8 15:8,11,13,19 16:6 18:9,23 19:3,17,20,25 20:6,14 21:2,4,18,19,23 22:2,6,9,22 23:14,15 27:10 30:12 31:1,3,8 34:13,14,21 35:14 36:15 37:8 39:25 40:3,13 41:4,20 46:20 50:8 52:</p>	<p>16 54:22 55:13,19,22 56:20 57:9,12,18 60:3 61:13,13,17 62:15 63:12 69:6,20 72:17 73:23 74:17 75:18 76:22 77:4,14 78:4 79:3 80:10,17,19 81:6,13,17 82:1,12 91:13 94:25 95:4,17,18,25 96:1,7 98:21,23 99:2 103:20 104:21,22,23 105:21 106:1,18,24 108:5</p> <p><b>practical</b> [5] 90:1 95:12,12,13 96:21</p> <p><b>practice</b> [6] 46:21 90:11 102:21,22 103:8,11</p> <p><b>precedent</b> [6] 35:11 69:10 76:8,11,25 96:9</p> <p><b>precedents</b> [4] 6:9 75:12 79:20,22</p> <p><b>precept</b> [1] 72:11</p> <p><b>precepts</b> [1] 71:22</p> <p><b>precise</b> [1] 28:4</p> <p><b>precisely</b> [2] 75:6 77:7</p> <p><b>precludes</b> [1] 57:2</p> <p><b>preeminent</b> [2] 3:18 4:7</p> <p><b>preferential</b> [1] 31:23</p> <p><b>preferred</b> [1] 63:6</p> <p><b>premiere</b> [1] 81:1</p> <p><b>premises</b> [1] 69:16</p> <p><b>preparation</b> [1] 89:15</p> <p><b>prepared</b> [1] 96:8</p> <p><b>prerogative</b> [3] 19:18 73:14 74:19</p> <p><b>present</b> [2] 33:7 57:23</p> <p><b>presented</b> [2] 39:18 103:18</p> <p><b>preservation</b> [1] 100:6</p> <p><b>preserve</b> [2] 99:16,22</p> <p><b>preserved</b> [1] 55:3</p> <p><b>preserving</b> [1] 40:5</p> <p><b>president</b> [4] 61:14 63:1 87:19 93:11</p> <p><b>president's</b> [1] 93:3</p> <p><b>pressing</b> [1] 83:25</p> <p><b>pretty</b> [8] 7:18 29:1,1 32:22 62:6 80:25 91:25 94:18</p> <p><b>prevail</b> [2] 48:1 70:20</p> <p><b>prevent</b> [3] 93:16 98:10,11</p> <p><b>previous</b> [1] 95:8</p> <p><b>previously</b> [1] 81:12</p> <p><b>price</b> [1] 65:25</p> <p><b>primarily</b> [1] 9:17</p> <p><b>primary</b> [1] 9:21</p> <p><b>principle</b> [1] 61:8</p> <p><b>principles</b> [2] 65:18 66:7</p> <p><b>Printz</b> [1] 29:4</p> <p><b>prior</b> [2] 75:11,11</p> <p><b>priority</b> [1] 87:10</p> <p><b>prisoner</b> [1] 101:13</p> <p><b>prisons</b> [1] 78:14</p> <p><b>private</b> [22] 7:1 9:7 16:19 31:19 41:15 46:7,13 50:21 62:2,11,12 69:12 70:16 73:3 75:9 83:6 85:17 91:9,11,18 98:16 103:21</p> <p><b>privilege</b> [1] 37:4</p> <p><b>probably</b> [5] 13:8 50:24 64:25 65:11,13</p>	<p><b>problem</b> [4] 47:25 48:3,10 78:20</p> <p><b>problems</b> [3] 48:7 84:7 97:4</p> <p><b>proceedings</b> [9] 6:23 7:5,12,21 30:24 31:14,14 44:13,19</p> <p><b>process</b> [3] 47:3,3 80:15</p> <p><b>produce</b> [1] 54:4</p> <p><b>production</b> [1] 104:18</p> <p><b>profound</b> [1] 98:20</p> <p><b>prohibited</b> [3] 55:7 83:14 94:4</p> <p><b>prohibiting</b> [1] 97:13</p> <p><b>prohibition</b> [1] 25:11</p> <p><b>promised</b> [1] 4:23</p> <p><b>proof</b> [1] 102:3</p> <p><b>proper</b> [6] 18:14 23:13,14,15 25:1 104:8</p> <p><b>property</b> [2] 19:13,14</p> <p><b>property</b> [3] 32:6 40:1 58:15</p> <p><b>prophylactically</b> [1] 100:23</p> <p><b>proportioned</b> [1] 105:25</p> <p><b>proposal</b> [1] 73:1</p> <p><b>propounded</b> [1] 95:23</p> <p><b>prosecuting</b> [1] 46:22</p> <p><b>protect</b> [4] 17:6,8 106:15,22</p> <p><b>protected</b> [1] 106:19</p> <p><b>protecting</b> [2] 5:6 24:25</p> <p><b>protection</b> [3] 16:19 88:19 106:8</p> <p><b>protectionism</b> [1] 38:4</p> <p><b>protections</b> [3] 4:8 41:6 68:6</p> <p><b>protects</b> [1] 17:7</p> <p><b>proved</b> [1] 79:8</p> <p><b>provide</b> [6] 26:8,12 41:21 43:9 60:20 106:7</p> <p><b>provided</b> [2] 3:16 30:3</p> <p><b>provides</b> [5] 42:18,20 70:9 98:20 107:20</p> <p><b>providing</b> [1] 26:7</p> <p><b>province</b> [1] 10:22</p> <p><b>provision</b> [3] 29:24 31:8 48:5</p> <p><b>provisions</b> [1] 66:17</p> <p><b>PUBLIC</b> [3] 1:6 3:7 49:7</p> <p><b>punish</b> [1] 91:19</p> <p><b>punitive</b> [3] 62:12 64:12 91:15</p> <p><b>purely</b> [1] 26:14</p> <p><b>purported</b> [1] 8:9</p> <p><b>purpose</b> [4] 60:21 66:16 99:7 106:14</p> <p><b>purposes</b> [3] 19:11 100:5 102:23</p> <p><b>pursuant</b> [1] 103:9</p> <p><b>pursue</b> [4] 69:8 72:3 85:11 86:23</p> <p><b>pursuing</b> [1] 87:6</p> <p><b>put</b> [5] 18:1 29:17 86:6 92:18 107:1</p> <p><b>puts</b> [2] 35:5,5</p> <p><b>puzzling</b> [1] 107:11</p>	<p>80:5 81:22 86:3 92:5 96:12,12 97:25 99:11,15</p> <p><b>questioning</b> [2] 28:12 58:7</p> <p><b>questions</b> [13] 5:8 28:16 33:3 38:24 50:18 56:23 67:20 76:9 80:1 82:9 99:10 100:12,13</p> <p><b>quick</b> [1] 57:16</p> <p><b>quite</b> [8] 5:12,20 16:20 18:18 30:25 34:3 53:10 97:24</p> <p><b>quote</b> [2] 10:18 99:22</p>
<b>R</b>			
<p><b>raise</b> [38] 3:14 5:5 18:15 24:3,13,17,20 25:4,21 26:12 27:20 41:18,20 43:8 50:9 53:13,13 54:17 55:21 60:9,17 61:17 62:3,10 63:5 64:5,8,15 66:20 67:2 70:19 74:5 75:4 83:7 103:3 104:8,9,16</p> <p><b>raised</b> [3] 100:5,7,10</p> <p><b>raises</b> [1] 27:16</p> <p><b>raising</b> [8] 18:12 26:6 27:2 41:2 46:10 62:24 65:16 69:13</p> <p><b>ranking</b> [1] 80:22</p> <p><b>Rather</b> [4] 4:14 13:9 25:17 51:5</p> <p><b>ratification</b> [1] 40:12</p> <p><b>ratified</b> [2] 9:21 38:2</p> <p><b>reach</b> [5] 18:11 35:13,22 46:4 63:21</p> <p><b>read</b> [15] 4:3 20:15,16,16,20 34:7 39:4,5 53:21 54:8,13,13,20 66:2 92:11</p> <p><b>reading</b> [3] 20:17,18 63:15</p> <p><b>ready</b> [2] 4:18 89:7</p> <p><b>real</b> [6] 5:2 25:17 48:24 50:7 68:1,10</p> <p><b>realistic</b> [1] 47:25</p> <p><b>really</b> [14] 11:21 12:11 13:24 32:12 34:23 43:5 44:12 55:23 65:18 68:1 85:7 86:9 99:19 100:25</p> <p><b>realm</b> [1] 15:24</p> <p><b>reason</b> [6] 3:15 34:11 35:21 38:10 71:13 77:6</p> <p><b>reasonably</b> [1] 95:18</p> <p><b>reasoning</b> [7] 12:6,7 34:16 35:4,11 39:7 45:1</p> <p><b>reasons</b> [5] 11:4 33:20 34:6 38:2 39:21</p> <p><b>REBUTTAL</b> [3] 2:12 105:14,15</p> <p><b>recalling</b> [1] 78:10</p> <p><b>receive</b> [1] 68:7</p> <p><b>recently</b> [2] 24:11 95:14</p> <p><b>recognition</b> [1] 21:22</p> <p><b>recognize</b> [2] 74:10 89:22</p> <p><b>recognized</b> [5] 46:14 57:20 58:24 71:22 82:19</p> <p><b>recognizing</b> [1] 79:1</p> <p><b>reconfirmed</b> [1] 95:24</p> <p><b>recruit</b> [1] 68:11</p> <p><b>recruitment</b> [3] 22:2,4 24:10</p> <p><b>recruits</b> [1] 68:6</p> <p><b>reemploy</b> [1] 36:22</p> <p><b>references</b> [1] 54:9</p> <p><b>referred</b> [1] 56:10</p>			
<b>Q</b>			
<p><b>qualification</b> [4] 10:4 29:20,25 30:4</p> <p><b>question</b> [36] 11:17 16:18 17:2 20:14 21:1,17 23:6 25:17,17 27:16 30:18 31:17 32:22 36:2 37:14,15 43:16 44:10 53:21 59:3 62:20 63:18 65:16 67:13 72:13 74:13 76:8</p>			

## Official - Subject to Final Review

<p> <b>reflected</b> [2] 44:25 45:1  <b>refusing</b> [2] 84:8,9  <b>regarding</b> [7] 70:25 78:7,7 96:13, 18 97:25 98:2  <b>regardless</b> [1] 102:13  <b>regulate</b> [5] 12:15 14:21 15:1 53:5 81:9  <b>regulated</b> [1] 53:7  <b>regulating</b> [1] 12:21  <b>regulatory</b> [2] 30:12 35:17  <b>Rehnquist</b> [1] 56:2  <b>reinstate</b> [1] 16:23  <b>rejected</b> [2] 69:22 73:1  <b>rejecting</b> [1] 70:3  <b>rejection</b> [1] 73:4  <b>related</b> [5] 22:3 73:17 99:2 103:11, 14  <b>relating</b> [1] 98:21  <b>relations</b> [3] 10:21 83:13 98:8  <b>relationship</b> [4] 7:21 14:4 31:4 60:13  <b>release</b> [1] 101:23  <b>released</b> [1] 101:17  <b>releasing</b> [1] 101:8  <b>relevant</b> [6] 28:22,25 36:19 39:5 72:13 90:5  <b>relied</b> [3] 7:17 53:23 56:2  <b>relief</b> [4] 71:2 78:16 97:12,13  <b>relinquished</b> [3] 16:19 44:16 82:17  <b>relinquishing</b> [1] 44:4  <b>rely</b> [7] 5:11 22:9 56:16 74:1 75:13, 18 99:23  <b>relying</b> [9] 9:16,17 26:2,3,3 66:20, 21 67:2 70:4  <b>remaining</b> [1] 85:6  <b>remains</b> [1] 83:16  <b>remedies</b> [2] 85:12 90:10  <b>remedy</b> [2] 46:7 48:19  <b>remote</b> [1] 30:25  <b>remotely</b> [2] 3:4 89:8  <b>removal</b> [1] 75:7  <b>render</b> [2] 66:3 105:7  <b>repeated</b> [1] 95:15  <b>report</b> [1] 17:18  <b>representation</b> [1] 75:2  <b>representative</b> [1] 75:3  <b>representatives</b> [1] 64:24  <b>represented</b> [1] 10:18  <b>republic</b> [1] 107:18  <b>republican</b> [1] 94:11  <b>repugnant</b> [1] 94:12  <b>require</b> [4] 4:14 17:10 81:20 105:1  <b>required</b> [3] 4:12 14:24 71:20  <b>requires</b> [2] 26:18 83:4  <b>reserve</b> [4] 4:16 41:11 55:4 88:16  <b>Reserves</b> [1] 49:3  <b>reserving</b> [1] 54:25  <b>Reservists</b> [2] 67:15 68:11  <b>residual</b> [2] 72:7 99:5  <b>resist</b> [2] 43:25 95:19  <b>resistance</b> [2] 36:21,22 </p>	<p> <b>resolve</b> [2] 45:25 47:21  <b>resolved</b> [1] 47:18  <b>respect</b> [17] 12:12 13:13 18:21 26:25 30:11 36:23 43:7 57:17 63:10 65:16 71:9 82:12 84:10 92:15 101:6 102:2 104:7  <b>respectfully</b> [2] 46:23 47:19  <b>respectively</b> [1] 54:25  <b>respond</b> [4] 4:18 76:15 77:1 99:19  <b>Respondent</b> [4] 1:7,25 2:11 69:2  <b>response</b> [3] 11:15 52:22 60:19  <b>responsibilities</b> [2] 41:5 46:3  <b>responsive</b> [1] 53:20  <b>restrict</b> [1] 104:16  <b>restrictions</b> [1] 87:12  <b>rests</b> [1] 69:15  <b>result</b> [8] 35:22 60:16 70:9 71:7 79:4 80:8 82:2 108:6  <b>resulted</b> [1] 17:23  <b>retain</b> [5] 4:5 16:2 53:12 73:23 74:16  <b>retained</b> [5] 73:6 74:19 82:7,14 83:3  <b>retaliation</b> [1] 26:15  <b>retention</b> [3] 22:2,4 24:10  <b>return</b> [1] 84:6  <b>returning</b> [1] 84:19  <b>reverse</b> [1] 108:7  <b>review</b> [2] 90:15 91:5  <b>reviewed</b> [1] 91:6  <b>Revolutionary</b> [1] 60:19  <b>rid</b> [1] 38:4  <b>rights</b> [9] 5:2 17:6,7 50:16,19 52:19,20 53:12 108:3  <b>risk</b> [1] 4:22  <b>roads</b> [1] 40:2  <b>ROBERTS</b> [32] 3:3 5:9 23:5,9,11 28:7,10 33:2,16 35:23 37:11 40:18,21 41:25 56:22 61:1 66:9 68:20 71:3,15 73:15,19,25 74:24 76:6 99:12,14 100:11,15 103:25 105:9 108:9  <b>robust</b> [2] 85:21,24  <b>robustly</b> [2] 86:14,14  <b>role</b> [4] 37:10 40:5,6 78:20  <b>routinely</b> [1] 79:21  <b>ROY</b> [1] 1:3  <b>rule</b> [2] 35:11 105:7  <b>rules</b> [1] 100:23  <b>ruling</b> [1] 48:13  <b>Rumsfeld</b> [2] 24:12 63:13  <b>running</b> [1] 54:24 </p> <p style="text-align: center;"><b>S</b></p> <p> <b>safely</b> [1] 20:20  <b>SAFETY</b> [2] 1:6 3:7  <b>sale</b> [1] 25:11  <b>same</b> [21] 11:9,17 14:15 15:6,8 29:24 32:16,17,18 36:2 43:16,21 53:8 56:6 57:6 58:1 59:16 67:17 85:18 86:17 89:8  <b>sanctioned</b> [1] 104:18  <b>satisfy</b> [1] 106:5 </p>	<p> <b>save</b> [1] 99:10  <b>saw</b> [5] 20:15 70:15 73:4 79:23 93:8  <b>saying</b> [22] 11:19 13:8 15:10 16:13 19:4,21,22 20:2,2 34:18,25 35:3 39:17 46:19 52:17 73:22,24 74:3, 14 89:11 101:11 105:19  <b>says</b> [15] 27:17 32:15 33:12,24 47:8 50:14 54:25 57:3 64:10,10 79:9 92:20 94:2 99:18 105:24  <b>scale</b> [1] 4:12  <b>scenario</b> [1] 65:13  <b>school</b> [1] 63:15  <b>scope</b> [2] 20:6,13  <b>search</b> [1] 81:4  <b>Second</b> [7] 4:8 33:22 59:3 69:18 73:21 93:3 94:7  <b>Section</b> [17] 15:17 16:6 36:3 40:4 54:11 55:18 57:2 72:20 74:9 77:15 79:3 83:15 88:9 93:2 95:15,25 104:20  <b>sections</b> [1] 92:25  <b>secure</b> [1] 89:13  <b>securities</b> [1] 40:2  <b>security</b> [5] 5:7 25:1 68:13 89:14, 20  <b>see</b> [9] 11:21 14:17,18 90:23 92:6, 21 100:22,23 101:2  <b>seeing</b> [1] 4:4  <b>seeking</b> [1] 71:1  <b>seem</b> [4] 18:20 29:17 44:24 71:11  <b>seemed</b> [2] 5:11 34:22  <b>seems</b> [6] 11:16 26:13 30:25 32:21 79:7 82:15  <b>seize</b> [1] 51:21  <b>Selective</b> [1] 65:20  <b>self-defeating</b> [1] 66:4  <b>Seminole</b> [32] 10:9 11:6 12:7,13 33:21 34:1,2,6,7,12,20,21 35:1,2, 12,21 37:19,24 38:13,16 39:1,5,8, 20 69:22 70:3 79:2,12 95:9,20,23 105:3  <b>Senate</b> [1] 88:7  <b>sense</b> [6] 12:15 74:21 82:13 87:24 88:2 104:24  <b>sensible</b> [1] 80:7  <b>sent</b> [1] 65:22  <b>sentence</b> [2] 9:25 73:20  <b>separate</b> [8] 5:24 6:2 15:13 43:23, 24 44:20 98:24 102:10  <b>serious</b> [2] 48:7 84:13  <b>serve</b> [1] 41:12  <b>service</b> [5] 4:25 26:15 49:7 65:22 77:21  <b>service-connected</b> [1] 5:1  <b>serviceman</b> [1] 91:4  <b>servicemember</b> [1] 46:5  <b>servicemembers</b> [1] 85:13  <b>services</b> [2] 49:10 88:7  <b>set</b> [2] 49:12 56:6  <b>settle</b> [1] 98:12  <b>several</b> [1] 85:6 </p>	<p> <b>SG's</b> [1] 24:18  <b>shades</b> [1] 98:6  <b>shall</b> [1] 57:3  <b>sheriff's</b> [2] 52:4 108:1  <b>shouldn't</b> [2] 52:4 84:17  <b>show</b> [1] 69:10  <b>showing</b> [1] 83:4  <b>side</b> [7] 71:1,8 76:10,14 82:5 83:24 104:22  <b>sign</b> [2] 89:24,25  <b>significant</b> [4] 4:22 30:10 88:15 89:22  <b>similar</b> [7] 14:6 45:12 50:2 57:7 60:2,18 94:9  <b>Similarly</b> [3] 7:4 10:13 60:18  <b>simply</b> [4] 7:15 87:13 94:16 102:15  <b>since</b> [8] 7:1 31:3 32:12 33:25 35:1 47:12 79:5,6  <b>single</b> [2] 35:10 88:7  <b>situation</b> [1] 23:25  <b>six</b> [5] 47:11 53:14 54:20 55:5 92:25  <b>skeptical</b> [2] 64:14,17  <b>skills</b> [1] 49:12  <b>slate</b> [1] 70:6  <b>small</b> [4] 82:15,23 99:11,15  <b>sold</b> [1] 65:25  <b>soldier</b> [1] 47:22  <b>soldiers</b> [8] 4:17,20,21,23 17:10 22:3,4 31:7  <b>soldiers'</b> [1] 47:17  <b>Solicitor</b> [3] 1:20,24 87:3  <b>solicitude</b> [1] 107:19  <b>solve</b> [1] 78:20  <b>solved</b> [1] 87:8  <b>sometimes</b> [5] 47:1 85:2,3 87:2 98:23  <b>somewhat</b> [5] 12:6 43:22,24 57:24 66:8  <b>sorry</b> [4] 23:5 61:13 96:15 104:1  <b>sort</b> [42] 32:6 55:12 60:13 71:1 72:10 75:13,25 78:6,8,11,17 80:1 81:13,20 82:1,22 83:12,17 86:5,12,23 89:6 90:22 91:7,13 95:7,12,15 96:18,21,22,25 97:5,10,12,19 98:18 99:6 102:24 103:7 105:3,6  <b>SOTOMAYOR</b> [6] 26:1 33:17 61:4 100:18,19 103:24  <b>sound</b> [1] 35:20  <b>sounded</b> [1] 94:7  <b>sounding</b> [1] 81:13  <b>sounds</b> [1] 43:3  <b>source</b> [2] 25:14,16  <b>sources</b> [2] 42:13 43:21  <b>sovereign</b> [62] 4:5 5:15 6:4 12:2 16:2,5 18:7 19:18 27:17,25 28:3 31:19 40:4 41:14,23 42:2 45:6 50:21 52:24 53:12,24 54:5,8 56:17, 19 57:15 59:16,22 66:24 69:7,19 72:22 73:12,14 75:25 77:9 78:23 79:19 81:14 82:14,21 83:4,15,18, </p>
--	--	---	---

## Official - Subject to Final Review

<p>19 84:25 86:8 87:4 91:16 95:16  96:9 97:6 98:24 100:3 102:17,20  103:3,5 104:6 106:14,22 107:9  sovereigns <sup>[6]</sup> 15:13 72:7 79:21,  24 99:6 102:18  sovereignty <sup>[30]</sup> 12:21 16:10 19:2  30:6 35:19 42:3 43:7 44:5 45:8 50:  16,20 51:16 52:2,12,19 54:4 72:1,  5,11,15 74:4,10 77:24 82:6,24 83:  1,20 98:25 99:3 105:7  sovereignty-based <sup>[1]</sup> 41:19  sparing <sup>[1]</sup> 90:16  speaking <sup>[7]</sup> 25:4 31:22 34:4 70:  24 84:23 95:3 99:23  special <sup>[3]</sup> 31:7 81:25 107:19  specific <sup>[5]</sup> 5:12 83:9 85:5,20 105:  6  specifically <sup>[13]</sup> 72:14 73:1 78:3  80:13 81:23,24 83:5 84:23 85:10,  23 86:24 99:24 100:1  specification <sup>[1]</sup> 26:11  spend <sup>[2]</sup> 81:8 104:15  Spending <sup>[2]</sup> 87:10,12  spoken <sup>[1]</sup> 43:12  stake <sup>[6]</sup> 24:23 25:22 32:21 66:6,  12 105:21  standing <sup>[1]</sup> 4:15  stare <sup>[1]</sup> 95:11  start <sup>[2]</sup> 91:22 94:22  started <sup>[1]</sup> 10:10  state <sup>[68]</sup> 8:19 12:18 13:14,15 18:  23 19:1 21:6 26:24 28:21 29:11  32:10 41:13,19 48:21 49:1,1,8,9  52:13,19,21 57:3 58:4,12,20,22  59:10,16 60:22 62:8 66:1,24 69:  18 71:10 72:11 75:16,24 77:22 78:  12 79:25 81:14 83:15 86:2 87:4  88:23 89:1,2,12 91:3,16,19,19 95:  16 97:11,19 98:23 99:16,17 100:1  101:2,8,24,25 102:12,20,24 103:1,  4  state's <sup>[1]</sup> 26:19  stated <sup>[2]</sup> 66:25 79:2  statement <sup>[2]</sup> 79:6 95:23  statements <sup>[5]</sup> 34:3 39:8 71:5 95:  9 98:3  STATES <sup>[182]</sup> 1:1,15,22 2:7 3:20 4:  3,11,16 6:25 8:2,10,17 9:8,19 10:  5,14,21,24 11:19 12:3,4,15,19 13:  19,21 14:1,5,11,21 15:18,23 16:1,  15,22 17:21 18:2,7 19:1,12,19 20:  15 21:3 27:2,25 29:6,7,13,15 31:  20 32:9,12,19,24 35:20 36:22 37:  3,4,6,6,9 38:8 40:6,15,23 41:8,17  42:20 43:5 44:3,3,16 45:7,13,14,  14,14,16,24 48:6 50:17 53:12 54:  16,23,25 55:7,19 56:5 57:3,19 59:  17,17,19 60:14,20 61:19 62:2,3,15  64:24 65:22 67:13 68:11 69:11,12  70:10,12,15,17 72:6,14,21 73:3,5,  13,22 74:16,18 75:7,9,20 76:16,21  77:17 78:18,20 79:25 80:8,14,20</p>	<p>82:11 83:3,6,14,20 84:1,3,10,14,  16,17,24 85:9,11,17 86:1,5,17,19,  21 87:1,13 89:3,5 90:12 91:11 92:  1,14,16 93:10,11,14 94:4,10 96:22  97:9 98:15 99:1,5 101:11,19 102:  4,16 103:2,13 104:6 106:16,23  107:7,15,16,17,20  States' <sup>[7]</sup> 5:5 41:3 65:21 84:4 89:  13 90:11 101:12  statistics <sup>[3]</sup> 17:17 47:6,13  statute <sup>[9]</sup> 42:20 48:4,23 49:19 63:  2 64:23 65:2 91:10 101:1  step <sup>[1]</sup> 102:1  still <sup>[3]</sup> 11:14 14:9 52:10  STONE <sup>[40]</sup> 1:24 2:10 68:23 69:1,  3 71:14,17 73:17,24 74:3,14,18  75:5 76:3 77:2 78:2 79:14 80:11  81:2 82:18 84:21 85:19 87:24 88:  4,13,17,21,24 90:6 94:21 96:15,18,  21 98:2 99:9,21 102:7 104:3,3,10  stop <sup>[1]</sup> 41:17  strange <sup>[1]</sup> 77:7  strikes <sup>[1]</sup> 96:25  strong <sup>[5]</sup> 34:22 55:17 76:14,24  83:23  strongest <sup>[2]</sup> 71:11,18  strongly <sup>[2]</sup> 44:25 45:2  structurally <sup>[1]</sup> 4:2  structure <sup>[5]</sup> 4:4,9 9:18 28:2 91:  25  struggling <sup>[1]</sup> 14:17  stuck <sup>[1]</sup> 14:10  studied <sup>[1]</sup> 57:22  suable <sup>[1]</sup> 59:9  subject <sup>[3]</sup> 56:21 62:8,11  subjecting <sup>[1]</sup> 69:12  subjects <sup>[1]</sup> 30:9  submission <sup>[3]</sup> 9:21 22:21 27:23  submit <sup>[2]</sup> 17:18 47:19  submitted <sup>[2]</sup> 108:10,12  subset <sup>[1]</sup> 80:5  subsidiary <sup>[1]</sup> 80:1  successful <sup>[2]</sup> 39:19 46:4  successfully <sup>[8]</sup> 19:1 47:18 87:18,  20,23 88:3,12 89:23  suddenly <sup>[1]</sup> 95:18  sue <sup>[15]</sup> 16:22 19:12 21:5,8 24:4  64:10 85:17 86:23 97:8,10,12 101:  22,24 102:4 108:3  sued <sup>[5]</sup> 70:18 73:14 74:19 80:8  101:20  sufficient <sup>[1]</sup> 71:20  suggest <sup>[1]</sup> 5:11  suggested <sup>[1]</sup> 35:1  suggesting <sup>[1]</sup> 57:8  suggestion <sup>[1]</sup> 58:6  suggests <sup>[1]</sup> 93:4  suing <sup>[3]</sup> 33:8 86:21 93:24  suit <sup>[16]</sup> 18:22 22:7 31:23 32:5 33:  5,13 44:20 49:17,21 58:4,13 59:  12 62:11,11 85:9 101:14  suite <sup>[1]</sup> 91:12</p>	<p>suits <sup>[51]</sup> 3:19 8:2,9,12,14,16 12:4,  22 16:20 17:20,24 28:18 29:9,12  31:20 32:9,10,16,17,23 41:8,15  42:20 45:9,13,14,20,22 46:22 48:  6,19 58:20,21 59:17,18 61:18,24  62:2 70:1,10 73:4 76:16,18,18,20,  22 83:7 102:14 107:6,13,17  summarized <sup>[1]</sup> 94:16  summarizes <sup>[1]</sup> 104:22  superior <sup>[1]</sup> 60:13  superseded <sup>[1]</sup> 101:12  supply <sup>[1]</sup> 68:16  support <sup>[26]</sup> 3:14 5:5 18:15 24:3,  13,17,20 25:4,22 26:12 27:20 41:  21 43:8 50:9 54:17 55:21 56:15  60:9,17 63:5 64:5,8,15 66:20 67:2  106:11  supported <sup>[1]</sup> 104:7  supporting <sup>[10]</sup> 1:23 2:8 18:13 26:  7 27:3 40:24 41:2 46:10 62:24 65:  17  supports <sup>[2]</sup> 70:8 71:7  supremacy <sup>[1]</sup> 102:25  SUPREME <sup>[3]</sup> 1:1,14 100:8  surely <sup>[2]</sup> 86:16 95:22  surprising <sup>[1]</sup> 49:6  surrender <sup>[6]</sup> 42:14 45:17 56:7,18,  21 59:2  survival <sup>[6]</sup> 3:15 24:24 40:9 65:18  66:6,12  suspect <sup>[1]</sup> 53:16  system <sup>[8]</sup> 19:9,24 21:12 22:12 29:  3,7 40:7 107:22  systematic <sup>[1]</sup> 48:10</p> <p style="text-align: center;"><b>T</b></p> <p>table <sup>[1]</sup> 48:14  tact <sup>[1]</sup> 81:15  takings <sup>[1]</sup> 59:5  talked <sup>[1]</sup> 40:11  tangential <sup>[1]</sup> 5:3  task <sup>[2]</sup> 5:6 24:25  tax <sup>[1]</sup> 104:14  tells <sup>[1]</sup> 103:2  tension <sup>[1]</sup> 12:7  Tenth <sup>[2]</sup> 52:12 65:7  terms <sup>[3]</sup> 16:24 80:24 89:20  terribly <sup>[1]</sup> 92:13  test <sup>[3]</sup> 43:3 75:10 80:12  TEXAS <sup>[33]</sup> 1:6,24 3:6 16:22,23 24:  14 27:8,11,11,14,15,15,16 28:19,  25 32:15,19,22 45:16 49:15 59:9  86:23 88:25 91:3,8,10,11,14 100:  7,8 105:19 107:15 108:4  Texas's <sup>[1]</sup> 107:11  text <sup>[13]</sup> 9:18 15:17 20:15 25:21 42:  17 55:12,12 60:11 66:21 67:1,2  77:13 92:25  textual <sup>[4]</sup> 14:5 15:22 55:17 61:9  textually <sup>[3]</sup> 4:1 10:5 28:1  thematically <sup>[1]</sup> 103:14  themselves <sup>[8]</sup> 3:20 13:24 17:8  19:17 61:25 83:6 87:6 102:19</p>	<p>theoretical <sup>[1]</sup> 93:7  theory <sup>[1]</sup> 71:2  There's <sup>[23]</sup> 16:15 18:20 26:21 36:  7 40:10,12,15 43:18 47:5 48:17  49:7,18 57:16 59:14 60:8 61:21,  25 78:9 81:25 86:13 91:4 97:21  102:9  therefore <sup>[1]</sup> 75:16  they'll <sup>[3]</sup> 48:23 92:21,21  they've <sup>[5]</sup> 17:20 67:17 72:16 74:8  99:4  thinking <sup>[4]</sup> 38:24 53:2 67:8 89:16  third <sup>[6]</sup> 12:9,10 92:20 93:25 94:8  97:25  Thomas <sup>[21]</sup> 3:3 28:13,15 29:2,14  30:14,17 31:12,25 32:4,11 33:1  56:23,24 57:10 58:2,16 59:24 60:  25 100:12,13  though <sup>[11]</sup> 14:20,21 29:12 45:8  63:4 66:1 69:24 83:11 88:24 90:8  92:24  thousand <sup>[2]</sup> 17:22 93:24  thread <sup>[1]</sup> 44:23  threats <sup>[1]</sup> 4:19  three <sup>[7]</sup> 11:4 33:20 50:17 92:8 94:  1,6,16  thrust <sup>[1]</sup> 94:23  thwart <sup>[1]</sup> 84:15  thwarting <sup>[2]</sup> 83:22 84:11  tie <sup>[1]</sup> 20:6  tied <sup>[2]</sup> 7:5 44:13  timber <sup>[1]</sup> 65:24  Title <sup>[3]</sup> 46:12 59:7 76:20  today <sup>[10]</sup> 18:11 39:17 41:11 48:10  61:21 62:3 63:6 67:6 88:15 90:5  took <sup>[3]</sup> 15:5 34:25 90:15  tool <sup>[1]</sup> 48:13  tools <sup>[3]</sup> 3:17,21 85:6  TORRES <sup>[11]</sup> 1:3 3:6 16:24 49:22  70:3,6,20 95:6 99:23 103:18 107:  23  Torres's <sup>[4]</sup> 49:17 69:15 71:1 86:  22  tort <sup>[1]</sup> 58:13  total <sup>[2]</sup> 10:20 17:20  totally <sup>[2]</sup> 92:19 94:11  touch <sup>[1]</sup> 95:1  tougher <sup>[1]</sup> 65:5  towards <sup>[2]</sup> 81:18,18  track <sup>[1]</sup> 23:6  tradition <sup>[1]</sup> 87:5  traditional <sup>[1]</sup> 36:23  trained <sup>[1]</sup> 4:17  training <sup>[2]</sup> 55:2 67:25  trajectory <sup>[1]</sup> 36:13  transfer <sup>[1]</sup> 31:23  treated <sup>[3]</sup> 6:1 91:8 96:8  treaties <sup>[3]</sup> 72:20 73:4,13  treatment <sup>[1]</sup> 83:18  treaty <sup>[12]</sup> 8:15,16 36:16 57:4 72:2,  19 78:5 83:1,11,13 98:13,15  treaty-based <sup>[2]</sup> 73:7 83:16</p>
---	--	--	---

## Official - Subject to Final Review

<p><b>tremendous</b> <sup>[1]</sup> 57:18  <b>Tribe</b> <sup>[30]</sup> 10:9 11:6 12:13 33:21  <b>34:</b>1,6,7,12,20,21 <b>35:</b>1,2,12,21 <b>37:</b>  19,25 <b>38:</b>13,16 <b>39:</b>1,5,8,20 <b>69:</b>23  <b>70:</b>3 <b>79:</b>3,12 <b>95:</b>10,21,23 <b>105:</b>3  <b>Tribe's</b> <sup>[2]</sup> 12:7 34:3  <b>tribes</b> <sup>[14]</sup> 10:22,25 12:12,20,22  13:13,20,23 14:3,20,22 15:2 98:9,  11  <b>tried</b> <sup>[1]</sup> 31:7  <b>troops</b> <sup>[2]</sup> 61:21 68:15  <b>true</b> <sup>[6]</sup> 7:6 14:2 53:8 59:16 81:2  85:18  <b>truly</b> <sup>[1]</sup> 63:19  <b>trust</b> <sup>[1]</sup> 14:4  <b>try</b> <sup>[3]</sup> 18:1 39:6 65:14  <b>trying</b> <sup>[3]</sup> 11:14 12:14 38:3  <b>Tuesday</b> <sup>[1]</sup> 1:11  <b>turn</b> <sup>[2]</sup> 4:10 104:2  <b>turned</b> <sup>[1]</sup> 79:22  <b>turns</b> <sup>[1]</sup> 75:23  <b>TUTT</b> <sup>[85]</sup> 1:18 2:3,13 3:8,9,11 5:  13,25 6:18,20 7:9,19 8:4,11,23 9:  1,6,15 10:2 11:3,22 12:10 13:18  14:8,19 15:20 17:1 18:5,10,24 19:  15 20:1,11,22,24 21:14,17 22:10,  13,16,19,25 23:2,4,8,10,13,18,21,  24 24:2,22 25:6,8 27:1 28:9,20 29:  4 30:2,16 31:2,21 32:3,8,14 33:10,  14,19 34:10,19 35:4 36:4,10,20  37:1 38:15,20 39:3,22 40:20 44:  10,23 105:14,15,17  <b>two</b> <sup>[2]</sup> 1:3,22 5:22,24 7:20,24 11:  23 14:18 17:1 42:12 47:11,12 51:  12 54:24 58:12 63:1 69:16 73:20  74:22 93:7 94:1 96:11  <b>typically</b> <sup>[2]</sup> 5:14 21:18</p>	<p><b>understood</b> <sup>[9]</sup> 13:10 17:25 24:18  40:14 42:17 43:6 73:5 80:14 96:  11  <b>undertaken</b> <sup>[1]</sup> 42:23  <b>Unfortunately</b> <sup>[1]</sup> 95:5  <b>Union</b> <sup>[4]</sup> 69:22 94:3,9 104:10  <b>unique</b> <sup>[8]</sup> 3:24 4:1,1,2 7:21 25:23  78:19,21  <b>uniquely</b> <sup>[5]</sup> 31:9 44:13 78:8,9  107:6  <b>unit</b> <sup>[1]</sup> 25:2  <b>UNITED</b> <sup>[54]</sup> 1:1,15,22 2:7 4:11,16  5:4 6:25 9:8 12:19 16:22 17:21 18:  2 19:1 21:3 29:7 32:9,11,19,24 35:  20 37:5,6 40:23 41:3 45:13,16,24  62:3,15 65:22 67:13 68:10 75:19  79:24 84:3,3,10 85:9,17 86:1,5,17,  19 87:1 89:3,5,12 90:11,12 92:1,  16 93:11 97:9  <b>unless</b> <sup>[2]</sup> 8:1 70:22  <b>unnecessary</b> <sup>[1]</sup> 97:6  <b>unpredictable</b> <sup>[2]</sup> 4:19 68:13  <b>unsurprising</b> <sup>[1]</sup> 98:7  <b>until</b> <sup>[3]</sup> 93:24 100:21,24  <b>unusual</b> <sup>[2]</sup> 12:13 60:12  <b>up</b> <sup>[27]</sup> 15:23 16:5,6,7,9 27:25 28:2  36:18,21 39:12 43:6 45:11 51:17  56:6 57:20 67:12 76:9 82:11 86:  22 89:24,25 90:15 92:6,9 99:2,4  102:17  <b>upset</b> <sup>[1]</sup> 92:14  <b>urge</b> <sup>[1]</sup> 108:7  <b>urging</b> <sup>[1]</sup> 90:14  <b>USERRA</b> <sup>[16]</sup> 5:1 16:25 17:6,14,20  27:9,12 28:18 41:5 46:3 68:6 69:6  71:9 75:22 85:11 90:16  <b>USERRA's</b> <sup>[2]</sup> 4:8 41:23  <b>uses</b> <sup>[1]</sup> 26:8  <b>using</b> <sup>[1]</sup> 37:3  <b>utterly</b> <sup>[1]</sup> 98:7</p>	<p><b>vindicate</b> <sup>[1]</sup> 108:3  <b>violation</b> <sup>[1]</sup> 48:18  <b>violations</b> <sup>[1]</sup> 46:25  <b>virtual</b> <sup>[1]</sup> 10:20  <b>virtually</b> <sup>[4]</sup> 10:24 95:21 104:12,20  <b>vis-à-vis</b> <sup>[1]</sup> 83:20  <b>vital</b> <sup>[4]</sup> 3:21 25:22 89:6 90:22  <b>volunteer</b> <sup>[1]</sup> 88:15  <b>volunteers</b> <sup>[3]</sup> 93:14,17 107:1</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wage</b> <sup>[11]</sup> 4:12 28:5 37:7 87:17,19,  21,22 88:2,11 89:23 104:25  <b>Wait</b> <sup>[1]</sup> 92:21  <b>waive</b> <sup>[1]</sup> 87:13  <b>waived</b> <sup>[3]</sup> 31:19 42:4 100:10  <b>waiver</b> <sup>[14]</sup> 5:17 6:5 11:10 26:19  28:23 54:4 59:15,21 70:7 71:21  86:20 102:10 103:22 107:9  <b>waivers</b> <sup>[1]</sup> 6:16  <b>wanted</b> <sup>[3]</sup> 61:25 70:23 81:17  <b>wants</b> <sup>[1]</sup> 27:17  <b>war</b> <sup>[125]</sup> 3:23 4:12 5:4 7:6,25 9:9,  25 10:2,7 15:11,12,19 18:8,19,22,  23 19:2,16,20,24 20:6,13,13 21:1,  4,4,18,19,23 22:2,6,9,22 23:14,15  25:1,20 27:10 28:5 29:19 31:1,3,8  34:13,14,21 37:2,7,8 41:7,10 44:  16,16 46:20 48:11 52:16 54:21 57:  9,17 60:3,16,19 61:12,13 62:11,15  63:22 69:6,17,20 72:3,17,23 73:  23 74:6,17,20 75:18 76:22 77:4  80:10,16,19 81:7,18,18 82:1,12  83:2 84:4 86:13 87:17,20,21,22  88:2,11 89:15,15,23 90:23 92:1  95:1,18 96:1 98:6,21 99:2 100:25  101:9,20 102:13 103:10,11,14,20  104:13,21,25 106:17,18,24 107:23,  24 108:5  <b>war-making</b> <sup>[7]</sup> 13:22 14:6,16 15:  14 16:4,17 27:19  <b>warfare</b> <sup>[1]</sup> 70:17  <b>wars</b> <sup>[1]</sup> 52:7  <b>Washington</b> <sup>[5]</sup> 1:10,18,21 17:11  92:12  <b>Washington's</b> <sup>[1]</sup> 65:24  <b>water</b> <sup>[1]</sup> 34:1  <b>water-related</b> <sup>[1]</sup> 59:20  <b>way</b> <sup>[21]</sup> 7:2,24 8:2 11:9 13:20 14:  6,15 15:12 17:5 26:20 33:19 45:  17 46:5 48:10 53:25 66:8 82:8 92:  14,18 93:12 106:19  <b>Wayfair</b> <sup>[1]</sup> 38:6  <b>ways</b> <sup>[6]</sup> 31:9 44:21 53:7 55:24 85:  2,3  <b>weaker</b> <sup>[1]</sup> 57:24  <b>weight</b> <sup>[1]</sup> 29:17  <b>welcome</b> <sup>[1]</sup> 5:8  <b>West</b> <sup>[1]</sup> 21:10  <b>whatever</b> <sup>[5]</sup> 21:7 25:14,16 51:5  72:8  <b>whenever</b> <sup>[1]</sup> 84:24  <b>Whereupon</b> <sup>[1]</sup> 108:11</p>	<p><b>wherever</b> <sup>[1]</sup> 20:12  <b>whether</b> <sup>[26]</sup> 16:18 20:14 22:8 25:  19,19 28:21,23 39:13 42:19 43:12,  13,18 44:3 48:17 49:15 50:15 67:  22 71:19 72:14 75:18 80:13 86:3  97:7 100:9 102:16 103:2  <b>whole</b> <sup>[4]</sup> 20:18 21:11 54:9 76:11  <b>wholesale</b> <sup>[1]</sup> 83:17  <b>will</b> <sup>[14]</sup> 20:20 24:4 31:7 46:2 53:5,  7 67:21 85:2 87:2,5 92:4,5 107:12,  13  <b>willing</b> <sup>[4]</sup> 4:22 32:16 89:24,25  <b>win</b> <sup>[1]</sup> 51:5  <b>wins</b> <sup>[2]</sup> 49:15 53:6  <b>wise</b> <sup>[1]</sup> 17:16  <b>wish</b> <sup>[1]</sup> 94:20  <b>withheld</b> <sup>[3]</sup> 54:15 60:11 72:15  <b>withholds</b> <sup>[2]</sup> 55:19 56:5  <b>within</b> <sup>[8]</sup> 14:12,20 22:6,25 56:12  57:13 64:8,15  <b>without</b> <sup>[17]</sup> 4:22 7:14 10:4 29:20,  25 30:3 34:14,15 47:21 61:19 66:  14 67:8 70:3,18,19 84:22 106:1  <b>won</b> <sup>[1]</sup> 17:14  <b>wondering</b> <sup>[2]</sup> 61:7 62:4  <b>word</b> <sup>[2]</sup> 43:14 54:7  <b>words</b> <sup>[2]</sup> 26:8 29:21  <b>work</b> <sup>[3]</sup> 41:12 67:16 79:16  <b>worked</b> <sup>[4]</sup> 63:8 80:15 108:1,4  <b>working</b> <sup>[1]</sup> 47:3  <b>World</b> <sup>[7]</sup> 41:7 65:7,8 68:2,10 79:  10 80:7  <b>worth</b> <sup>[2]</sup> 34:3,8  <b>worthwhile</b> <sup>[1]</sup> 17:12  <b>writes</b> <sup>[1]</sup> 52:18  <b>written</b> <sup>[1]</sup> 36:14  <b>wrote</b> <sup>[1]</sup> 70:5</p>
<hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U.S</b> <sup>[2]</sup> 87:8 108:1  <b>Ukraine</b> <sup>[1]</sup> 84:17  <b>ultimate</b> <sup>[2]</sup> 15:25 20:5  <b>ultimately</b> <sup>[10]</sup> 9:17 19:20 25:14,  18,24 29:11 43:2 58:18 78:13 90:  22  <b>unclear</b> <sup>[1]</sup> 15:2  <b>unconditional</b> <sup>[2]</sup> 29:20,25  <b>unconditionally</b> <sup>[1]</sup> 10:4  <b>Undeniable</b> <sup>[1]</sup> 72:19  <b>under</b> <sup>[24]</sup> 18:8,22,23 19:24 29:24  33:6 34:1 42:4 43:18 45:9,15 57:7,  9,15 59:7 60:1,2,23 70:20 73:4 76:  18 85:11 90:16 100:6  <b>underlying</b> <sup>[2]</sup> 89:10,12  <b>undermining</b> <sup>[2]</sup> 41:17 73:10  <b>undersells</b> <sup>[1]</sup> 45:24  <b>understand</b> <sup>[19]</sup> 5:21 8:20 12:3  14:10 18:18 30:9 38:19 39:6 56:  18 61:9,22 63:14 73:9,20 77:3 79:  14 80:22 89:4 94:23  <b>understanding</b> <sup>[3]</sup> 9:19 60:17 72:  9  <b>understands</b> <sup>[2]</sup> 31:6 107:21</p>	<hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>valuable</b> <sup>[1]</sup> 33:6  <b>value</b> <sup>[1]</sup> 76:1  <b>variance</b> <sup>[1]</sup> 10:7  <b>variety</b> <sup>[2]</sup> 106:3,4  <b>various</b> <sup>[1]</sup> 70:4  <b>versus</b> <sup>[11]</sup> 3:6 13:25 24:12 25:9  45:5,16 52:11 53:25 56:1 63:13  65:23  <b>vested</b> <sup>[3]</sup> 29:11 74:7 94:25  <b>vesting</b> <sup>[1]</sup> 106:17  <b>veteran</b> <sup>[2]</sup> 32:25 36:23  <b>veterans</b> <sup>[6]</sup> 21:8 61:19 84:5,18  89:2 90:19  <b>Vietnam</b> <sup>[8]</sup> 41:10 48:11 84:4 93:8,  23 96:14,16 100:25  <b>view</b> <sup>[9]</sup> 13:17 24:23 30:7,8 34:22  37:4 42:7 61:11,16  <b>views</b> <sup>[1]</sup> 26:6  <b>vigorous</b> <sup>[1]</sup> 45:24  <b>VII</b> <sup>[3]</sup> 46:12 59:7 76:20  <b>VIII</b> <sup>[2]</sup> 54:21 93:1</p>		<hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> <sup>[3]</sup> 17:23 47:11 90:13  <b>years</b> <sup>[12]</sup> 17:20 31:11 47:8 58:24  63:8 67:9,9,10 70:13 89:17,18 93:  24  <b>yield</b> <sup>[2]</sup> 79:4 82:2</p>