

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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THE OHIO ADJUTANT GENERAL'S )  
DEPARTMENT, ET AL., )  
  ) Petitioners, )  
  ) v. ) No. 21-1454  
FEDERAL LABOR RELATIONS AUTHORITY, )  
ET AL., )  
  ) Respondents. )  
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DEPARTMENT, ET AL., )

Petitioners, )

v. ) No. 21-1454

FEDERAL LABOR RELATIONS AUTHORITY, )

ET AL., )

Respondents. )

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Washington, D.C.

Monday, January 9, 2023

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

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8 behalf of the Union Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	BENJAMIN M. FLOWERS, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	NICOLE F. REAVES, ESQ.	
7	On behalf of the Federal Respondent	55
8	ORAL ARGUMENT OF:	
9	ANDRES M. GRAJALES, ESQ.	
10	On behalf of the Union Respondent	91
11	REBUTTAL ARGUMENT OF:	
12	BENJAMIN M. FLOWERS, ESQ.	
13	On behalf of the Petitioners	103
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2  
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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-1454, the Ohio Adjutant General's Department versus the Federal Labor Relations Authority.

Mr. Flowers.

ORAL ARGUMENT OF BENJAMIN M. FLOWERS  
ON BEHALF OF THE PETITIONERS

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

The Sixth Circuit and the Federal Labor Relations Authority held that Adjutants General and state guards, when they employ technicians, are federal agencies to which the Authority may issue orders.

That is wrong. The Reform Act defines agencies to include executive departments, government corporations, and independent establishments. Adjutants General and state guards are none of these things. They're neither among nor part of the 15 cabinet-level agencies that qualify as executive departments. They're not government corporations because they're not corporations. And they're not

1 independent establishments because they're not  
2 part of the executive branch.

3           The Authority concedes all of that,  
4 but it claims it can regulate Adjutants General  
5 and state guards anyway because they represent  
6 or act on behalf of the Defense Department,  
7 which is a Reform Act agency, when they employ  
8 technicians.

9           But the Reform Act says that the  
10 Authority can issue orders to agencies. It  
11 gives it no power to issue orders to  
12 non-agencies simply because they serve as the  
13 representatives or agents or designees of an  
14 agency.

15           Indeed, a serious sign of the problem  
16 with the Authority's position is that even now,  
17 40 years after the Reform Act was enacted, no  
18 one can quite give a consensus justification  
19 for the Authority -- for the power the  
20 Authority wields. The Authority's arguments  
21 have continued to evolve while the union and  
22 amici advance novel arguments of their own.

23           If Congress had really given the  
24 Authority this power, if it had really wanted a  
25 federal independent agency with jurisdiction

1 over federal labor relations to issue orders to  
2 state guards, it would not have made the grant  
3 of that power so hard to find.

4 Ultimately, here, there's no reason to  
5 resist the statute's plain meaning.

6 Dual-status technicians are employees of the  
7 Defense Department, and they should enforce  
8 their labor rights through and against that  
9 department.

10 I welcome your questions.

11 JUSTICE THOMAS: Mr. Flowers, who  
12 hires these technicians?

13 MR. FLOWERS: They are hired by the  
14 Adjutant General. They become employees of the  
15 Defense Department under 32 U.S.C. 709.

16 JUSTICE THOMAS: And so under what  
17 authority does the Adjutant General hire the  
18 technicians?

19 MR. FLOWERS: Federal law empowers us  
20 to hire technicians that are then --

21 JUSTICE THOMAS: So it's done through  
22 delegation?

23 MR. FLOWERS: Yes.

24 JUSTICE THOMAS: So they are federal  
25 employees?

1           MR. FLOWERS: They are federal  
2 employees, and let me explain why, because of  
3 that, it makes the most practical sense to  
4 route these disputes through the Defense  
5 Department. So --

6           JUSTICE THOMAS: But isn't the  
7 complaint the -- you have the -- the style of  
8 the -- at least in the petition, it says before  
9 the Federal Labor Relations Authority, U.S.  
10 Department of Defense, Ohio National Guard is  
11 -- is the style.

12           MR. FLOWERS: That is how the case was  
13 captioned, but it was at least treated as a  
14 suit against the state guard, not as against  
15 the Department of Defense.

16           JUSTICE THOMAS: But I thought the  
17 Adjutant General was an -- was an intervenor  
18 respondent.

19           MR. FLOWERS: The Adjutant General  
20 intervened to defend the interests of the state  
21 National Guard, which was the initial party.

22           JUSTICE THOMAS: So this would make --  
23 your argument would make much more sense if we  
24 were talking about the state highway patrol.  
25 Could you explain exactly when a technician is



1 a federal employee and for what purposes and  
2 when a technician is a state employee?

3 MR. FLOWERS: So they are always a  
4 federal employee under 32 U.S.C. 709(e). And  
5 we're not disputing that they have collective  
6 bargaining rights or that we are using these  
7 federal employees. The question here is  
8 whether we are ourselves a federal agency  
9 because they can issue an order to us only if  
10 we are, in fact, an agency. That's what the  
11 statute says.

12 And we are not a federal agency, even  
13 if we are an agent or a designee of the federal  
14 government, because being someone's agent does  
15 not turn you into the principal. It just means  
16 you're acting on behalf of the principal.

17 I do want to, if I can, briefly  
18 address --

19 JUSTICE KAGAN: Could -- could I just  
20 --

21 MR. FLOWERS: Sure.

22 JUSTICE KAGAN: -- a point of  
23 clarification? You -- you just said something  
24 that also appears in your briefs that I was  
25 confused by.

1 MR. FLOWERS: Sure.

2 JUSTICE KAGAN: You -- you said that  
3 you're not disputing that these employees have  
4 collective bargaining rights. What does that  
5 mean to you? Because the idea of collective  
6 bargaining rights is that there's somebody else  
7 on the other side that has to sit down and  
8 collectively bargain with you.

9 So are -- are you saying that, in  
10 fact, there is an obligation on the -- on -- on  
11 the part of the state guard to sit down at a  
12 collective bargaining table?

13 MR. FLOWERS: It should be their  
14 employer, which is the Department of Defense,  
15 who could ask us to serve as the  
16 representative, might be bound by what we enter  
17 into, but it would be forced through and  
18 against them.

19 Let me explain how that makes sense.  
20 If you step back and you ask who's best  
21 positioned to handle all this, the Authority in  
22 the first instance or the Department, the  
23 Department on the front end is the only entity  
24 that can bring all the interests to the table.  
25 So, when they're negotiating or trying to

1 amicably work out a dispute, they, unlike the  
2 Authority, are subject to presidential control,  
3 and so they can ensure that the President's  
4 commander-in-chief powers aren't frustrated.  
5 They have immense influence over the guards and  
6 the Adjutants General.

7           But most important of all, the  
8 technicians are Defense Department employees.  
9 The Defense Department signs their checks. The  
10 Defense Department withholds their dues. The  
11 Defense Department issues myriad regulations  
12 that govern the sort of conduct technicians can  
13 engage in. That's all stuff with respect to  
14 which they may wish to collectively bargain but  
15 the Defense Department's in charge of.

16           JUSTICE KAVANAUGH: But the --

17           MR. FLOWERS: On the back end -- I'm  
18 sorry. When -- yeah.

19           JUSTICE KAVANAUGH: Keep going. I'm  
20 sorry.

21           MR. FLOWERS: I was just going to say,  
22 on the back end, when the Authority actually  
23 issues the order, generally speaking, it's not  
24 possible to -- or I should say, in some cases,  
25 it won't be possible to redress their injuries

1 without the Department's cooperation. In this  
2 very case, we were ordered to restore the union  
3 to dues withholding status.

4 JUSTICE KAVANAUGH: I think you said  
5 that the Department should be involved rather  
6 than the -- but hasn't Congress, in essence,  
7 resolved this by saying that the Secretary  
8 shall designate the Adjutant General referred  
9 to to employ and administer the technicians?

10 In other words, that's Congress  
11 speaking to resolve the issue and say they're  
12 the ones who are going to act on behalf of the  
13 Department. We are federal -- they're federal  
14 employees, you acknowledge, in a federal  
15 agency, you acknowledge, and --

16 MR. FLOWERS: The Defense Department  
17 is, yes.

18 JUSTICE KAVANAUGH: -- and the  
19 Department of Air Force --

20 JUSTICE KAGAN: Which has collective  
21 bargaining rights --

22 MR. FLOWERS: Sure.

23 JUSTICE KAGAN: -- you acknowledge?

24 JUSTICE KAVANAUGH: And they have  
25 collective bargaining rights. And you said DoD

1 should be handling this, but Congress has  
2 spoken to this and said DoD handles this  
3 through this process which is set out in  
4 statute and which, by the way, has been used  
5 since 19 -- from 1971 to 2016 uninterrupted  
6 without any -- any objection, I guess, by -- by  
7 Ohio.

8 MR. FLOWERS: So let me take that in a  
9 few steps. The Defense Department has  
10 certainly said that we employ them, though  
11 they're also employed by the Department of  
12 Defense at the same time. If the idea is that  
13 we're acting on behalf of the Defense  
14 Department, that would mean that we  
15 collectively bargain on behalf of the Defense  
16 Department, and the Defense Department should  
17 be standing here rather than the Ohio Adjutant  
18 General, that that's who their dispute should  
19 be against. And, again, on the back --

20 JUSTICE JACKSON: But you hire and  
21 fire and supervise them. I mean, I guess what  
22 -- what concerns me a little bit is the  
23 suggestion that, you know, while there might be  
24 practical reasons why the statute could have  
25 DoD be the operable agent here, it's not up to

1 us, right? We're not just in the first  
2 instance making policy determinations about how  
3 this thing should be structured.

4 And as Justice Kavanaugh just pointed  
5 out, we have a statute that gives these people,  
6 the dual-service technicians, collective  
7 bargaining rights that in the collective  
8 bargaining world, as Justice Kagan points out,  
9 it means the right to sit across the table from  
10 the people who hire and fire you and bargain  
11 over the terms and conditions of your  
12 employment.

13 So I guess your task in my view is to  
14 establish why it is that Congress would have  
15 intended to carve you out in this situation.

16 MR. FLOWERS: So let me first back up  
17 for a second and explain -- it's important to  
18 emphasize the law we're interpreting here, the  
19 Reform Act, is not about National Guards and  
20 technicians. It's a generally applicable law  
21 for the federal government. And the word --

22 JUSTICE JACKSON: Well, the law we're  
23 interpreting is the FL -- or FSLMRS, right?

24 MR. FLOWERS: That's the Reform Act.

25 JUSTICE JACKSON: Okay.

1 MR. FLOWERS: They're the same thing.

2 JUSTICE JACKSON: All right. Sorry.

3 MR. FLOWERS: Those statutes are  
4 generally applicable. They apply to the whole  
5 federal government. And the word in question  
6 is "agency." So the federal -- the -- the --  
7 the Authority has jurisdiction over us only if  
8 we are an agency. And if -- to be an --

9 JUSTICE JACKSON: But DoD is an  
10 agency, correct?

11 MR. FLOWERS: DoD is an agency --

12 JUSTICE JACKSON: All right.

13 MR. FLOWERS: -- so it can issue  
14 orders for the Department of Defense.

15 JUSTICE JACKSON: And DoD, per the  
16 statute that Justice Kavanaugh points out, has  
17 delegated to your entities the authority to  
18 hire, fire, and act in that capacity over this  
19 group of people who have federal collective  
20 bargaining rights, correct?

21 MR. FLOWERS: Congress has given us  
22 that power, though the Defense Department, we  
23 shouldn't minimize, has immense control over  
24 that.

25 JUSTICE JACKSON: Understood. But why

1 isn't that answering the question?

2 JUSTICE KAGAN: It's not even a DoD  
3 choice. I mean, it's a -- it's an obligation  
4 on DoD to authorize you to be the supervisor of  
5 these employees. This is not a choice on DoD's  
6 part. DoD had to give this authority to you.

7 MR. FLOWERS: That's certainly true,  
8 but it doesn't mean that we are the Department  
9 of Defense. It means we're acting on their  
10 behalf. So the Department of Defense may well  
11 be bound by the contracts we enter into. We  
12 don't take issue with that.

13 The Authority can issue orders to --  
14 to the Department of Defense and, in fact, it  
15 needs to for some of these things to bear out.

16 In the --

17 JUSTICE BARRETT: So this is a  
18 technicality then, kind of, you know, to  
19 Justice Kagan's point. You're just saying, you  
20 know, they sued the wrong person, it should be  
21 DoD here, and you -- you concede that DoD could  
22 order you to go to the collective bargaining  
23 table or order you to comply with an order  
24 issued by the Authority?

25 MR. FLOWERS: I don't think they could



1 order us to. They could wield their influence  
2 over us to strongly --

3 JUSTICE BARRETT: Why can't they order  
4 you to if -- if you're their agent or  
5 representative?

6 MR. FLOWERS: So -- so they could take  
7 away the technicians, they could reduce our  
8 funding, but they couldn't, for example,  
9 replace the Adjutant General. They couldn't  
10 strip -- they couldn't create a new state  
11 National Guard. Those --

12 JUSTICE BARRETT: So you're not really  
13 their agent or representative in the way that  
14 we might otherwise understand principal agency  
15 relationships?

16 MR. FLOWERS: It's not set up by a  
17 contract with those sorts of relationships.  
18 The Department of Defense is also an agency  
19 with limited power granted by Congress, and  
20 they have to act using the power they have,  
21 which is influence rather than control.

22 And the reason that matters if we're  
23 getting, why is it not a technicality, first,  
24 the federal government would be handling these  
25 things rather than us and they're better

1 positioned to do so. So I -- I don't know if I  
2 mentioned this, but the -- for --

3 JUSTICE SOTOMAYOR: Oh, I'm sorry,  
4 you're saying you want to change the law so  
5 that you don't collectively bargain, DoD  
6 collectively bargains?

7 MR. FLOWERS: Well, DoD may be able to  
8 through regulation say, if you want the  
9 technicians, you have to collectively bargain  
10 with them for us. But what they can't do is  
11 change the meaning of "agency" for the Reform  
12 Act, the generally applicable statute, to make  
13 a state entity into a federal agency.

14 JUSTICE SOTOMAYOR: So what do we do  
15 with the savings clause? The savings clause  
16 says that they don't want to save anything that  
17 happened under the executive orders -- it says  
18 you can't change -- we're not changing any  
19 policies, regulations, or practices or  
20 decisions that were issued under those  
21 executive orders. And one of those decisions  
22 very explicitly was the Thompson Field decision  
23 involving the Minnesota -- Mississippi National  
24 Guard.

25 And, there, the Court said -- not the

1 Court -- the -- the agency said very clearly it  
2 rejected these very same arguments you're  
3 making and said you can go into the  
4 administrative process with the National Guard  
5 and they're bound by those decisions.

6 MR. FLOWERS: So two answers.

7 JUSTICE SOTOMAYOR: So how do -- how  
8 doesn't the savings clause just defeat all your  
9 arguments?

10 MR. FLOWERS: Because it doesn't do  
11 the work they would like it to do. What it  
12 says -- what that statute did and what courts  
13 have recognized for decades is it kept the  
14 slate from being wiped clean while the  
15 Authority and the courts interpreted the Reform  
16 Act. So, if something that those regulations  
17 --

18 JUSTICE SOTOMAYOR: No, that was  
19 interpreting what agency and what was a  
20 component of DoD was --

21 MR. FLOWERS: I disagree.

22 JUSTICE SOTOMAYOR: -- and you're  
23 saying that -- I don't see how you could read  
24 it otherwise -- that you are acting as a -- as  
25 an agent of DoD, and so you are a component of

1 DoD. That's what one of the amici argues --

2 MR. FLOWERS: Well --

3 JUSTICE SOTOMAYOR: -- and I want to  
4 find out from the Solicitor General's Office  
5 why they don't think that argument is  
6 compelling.

7 MR. FLOWERS: So I -- I don't think  
8 that argument works. Being an agent does not  
9 make one a component of the principal. It  
10 makes them an agent of the principal. Usually,  
11 it is a non-component that serves as the agent  
12 in all sorts of other contexts.

13 But back to 7135, what it says is that  
14 those regulations, decisions, et cetera,  
15 continue to apply unless they're superseded by  
16 the Reform Act itself, which, here, this is  
17 because we --

18 JUSTICE SOTOMAYOR: But the Reform Act  
19 had the same definition of -- of an agency and  
20 executive department as it did then, so it  
21 wasn't changing anything.

22 MR. FLOWERS: That no -- that none of  
23 those decisions ever interpreted. But, beyond  
24 that, or a decision issued under the Reform  
25 Act, which could be a decision from the

1 Authority or the courts.

2           So the courts are not bound to  
3 continue to adhere to those regulations. If  
4 you look at INS v. FLRA, that's 855 F.2d 1454,  
5 it's a Ninth Circuit case from three decades  
6 ago recognizing that. So 7135 does not do the  
7 work they would like it to do.

8           Ultimately, what they -- I understand  
9 this is a strange arrangement, but what they  
10 have to show is that the state entity is a  
11 federal agency for purposes of the Reform --

12           JUSTICE JACKSON: But why do they have  
13 to show that? I mean, do you -- do you concede  
14 that our task is to ascertain the will of  
15 Congress with respect to what entities it  
16 intended to be covered by the Reform Act?

17           MR. FLOWERS: No, I would not concede  
18 that. I would say the task is to determine  
19 what the word "agency" means in the Reform Act.

20           JUSTICE JACKSON: Only insofar as  
21 Congress used that term, and so we're trying to  
22 figure out what Congress meant when it said  
23 "agencies" in the context of this.

24           MR. FLOWERS: I think we're not asking  
25 about their subjective intents. We're asking

1 about the objective meaning --

2 JUSTICE JACKSON: No, I'm asking  
3 objective. I'm saying surely -- surely you're  
4 not saying that we can just decide whatever we  
5 want about this policy without reference to  
6 what Congress intended.

7 MR. FLOWERS: As long as congressional  
8 intent is interpreted with respect to the  
9 statute, the statute defines --

10 JUSTICE JACKSON: All right. Let  
11 me -- let me give you the statute.

12 MR. FLOWERS: Sure.

13 JUSTICE JACKSON: The statute uses  
14 "agency."

15 MR. FLOWERS: Mm-hmm.

16 JUSTICE JACKSON: And that does  
17 reference or refer to the generic term of  
18 "agency" in, you know, the listed enumerated  
19 departments.

20 But I guess what I don't understand is  
21 why we have to automatically believe that when  
22 Congress included "agency" in the Reform Act,  
23 they were necessarily only incorporating those  
24 listed entities, as opposed to talking about an  
25 agency insofar as it employs, hires, fires, and

1 supervises federal employees.

2           So it uses the term "agency" and I get  
3 that. And we have another section that says  
4 these are the agencies. DoD is on that list.

5           MR. FLOWERS: Mm-hmm.

6           JUSTICE JACKSON: And to the extent  
7 that any of those agencies are entities that  
8 are hiring, firing, and employing federal  
9 employees, we think that that's really what  
10 Congress was caring about for the Reform Act  
11 purpose, for the collective bargaining purpose.

12           So I guess my question is, why  
13 wouldn't any entity that is under the purview  
14 of a listed agency that hires, fires, and  
15 employs, it functions like the agency for the  
16 purpose of employment, be covered by the Act?  
17 And, alternatively, why would Congress intend  
18 to carve you out when you are functioning in  
19 that world?

20           MR. FLOWERS: So I'll take them in  
21 reverse order. Why would they want to function  
22 as a -- carve us out, I think, is because it  
23 does make more practical sense to route these  
24 things through the Defense Department.

25           JUSTICE JACKSON: But they don't say

1 that.

2 MR. FLOWERS: But what they --

3 JUSTICE JACKSON: Wouldn't we expect  
4 to see that in the statute? They've excluded  
5 other things specifically as agencies. So, if  
6 you're right and that was their intent, we  
7 would see the words "but not Adjutant General  
8 or," you know, "National Guard" in this  
9 statute, especially in light of the history  
10 that Justice Sotomayor points out.

11 MR. FLOWERS: No. So I think that an  
12 agency has to justify its power. They have to  
13 point to the statutory clause that gives them  
14 power. Otherwise, they don't have any. So the  
15 presumption starts they don't have it until  
16 they identify it.

17 JUSTICE JACKSON: Right.

18 MR. FLOWERS: They point to the --

19 JUSTICE JACKSON: And the agency is  
20 DoD, and everybody agrees they have this power  
21 over -- over you all in the sense that you are  
22 organizing and hiring and firing.

23 MR. FLOWERS: And there is no other  
24 context that we have found in which the FLRA  
25 interprets entities that act as the agent or



1     designee for any of those departments to be  
2     agencies themselves.

3             If they hire a private contractor and  
4     task them with doing something that they  
5     otherwise would have exclusive power to do,  
6     they don't count. This Court in Maryland v.  
7     United States held that state militias are not  
8     --

9             JUSTICE JACKSON: Well, we're not  
10    looking for agencies in general. We don't care  
11    if you're an agency for other purposes. The  
12    only thing it seems as though the statute cares  
13    about is whether there's an entity that is  
14    hiring, firing, and supervising these employees  
15    because the statute is about their collective  
16    bargaining rights.

17            MR. FLOWERS: Well, respectfully, I  
18    don't know how we get to that interpretation.  
19    The definitions we point to are for purposes of  
20    Title V. The Reform Act is in Title V. And we  
21    don't come within any of those definitions.  
22    And that's why you see the amici and the  
23    Authority insisting that there must be some way  
24    to get there. It must be justified somehow,  
25    but no can settle on --

1 JUSTICE JACKSON: That it's not  
2 agency?

3 JUSTICE KAGAN: Well, we try to make  
4 sense of statutes as a whole.

5 MR. FLOWERS: Mm-hmm.

6 JUSTICE KAGAN: And this statute gives  
7 collective bargaining rights to these  
8 employees, and you acknowledge that.

9 And this statute also says that with  
10 respect to these employees, and this is a kind  
11 of sui generis situation, the federal  
12 government is not acting as their employer.  
13 Instead, the federal government per the statute  
14 has the individual state guards acting super --  
15 acting as their employer, supervising them,  
16 hiring, firing them, and so forth.

17 So then the question becomes, so who's  
18 supposed to be sitting across the collective  
19 bargaining table with them? Because we know  
20 that there's supposed to be a collective  
21 bargaining table, and we know that somebody has  
22 to be sitting on the other end, and we know  
23 that it -- that this statute doesn't really  
24 make sense for DoD to be sitting on the other  
25 end because -- because Congress has told DoD

1 you can't be the employer. You have to make  
2 the state guard the employer.

3 So you put that all together, it  
4 should be the state guard that's sitting across  
5 the table per what Congress said.

6 MR. FLOWERS: So let me -- let me try  
7 to push back on that. It does make more sense  
8 for the Defense Department to be there. For  
9 one thing, they control many issues --

10 JUSTICE KAGAN: I'm not talking  
11 about -- it does not make sense. It's like,  
12 you know, Congress has told you who it wants to  
13 be sitting across the collective bargaining  
14 table, and the way Congress has said that is  
15 Congress has said to DoD: You have to give  
16 over your supervisory and employment authority  
17 to the state guards.

18 MR. FLOWERS: I think the -- I think  
19 the premise is wrong. They do -- we -- we  
20 manage their day-to-day activities, yes, but  
21 the Department of Defense issues regulations  
22 that control most aspects of their work, even  
23 the hours. So the Department of Defense is in  
24 charge of many of the things they do.

25 I don't want to sit down before I say

1 this: The Department of Defense is the one  
2 that withholds the dues. So, for example,  
3 here, we were ordered to withhold dues. We  
4 cannot do that. We don't --

5 JUSTICE KAGAN: But what you're  
6 basically saying to us, your position when you  
7 get right down to it, is the suit was against  
8 the wrong people because -- because everybody  
9 has always understood who the collective  
10 bargaining agent is in the wrong way, and from  
11 now on, collective bargaining as to these  
12 employees has to be done on a nationwide basis  
13 by the Department of Defense, as opposed to  
14 state by state by the individual guards and  
15 Adjutants General.

16 MR. FLOWERS: I don't believe that's  
17 --

18 JUSTICE KAGAN: That's the -- isn't  
19 that?

20 MR. FLOWERS: No.

21 JUSTICE KAGAN: You -- you said  
22 yourself you need a collective bargaining  
23 partner. You're saying that partner needs to  
24 be DoD. So DoD does that on a nationwide  
25 basis, as opposed to the state Guards doing it

1 state by state --

2 MR. FLOWERS: So it's --

3 JUSTICE KAGAN: -- as has been done  
4 for decades.

5 MR. FLOWERS: Respectfully, it's the  
6 last part I disagree with. Even if the Defense  
7 Department is the -- the relevant entity, the  
8 FLRA can still certify regional units to do the  
9 negotiation on a region-by-region basis.

10 And -- and, again, they control many  
11 of the aspects over which disputes might arise  
12 and which they may well wish to collectively  
13 bargain. So it does make more sense that they  
14 -- they collectively bargain with the entities  
15 that the law says are their employers.

16 JUSTICE JACKSON: But that has --

17 CHIEF JUSTICE ROBERTS: It does seem  
18 to me odd -- and I understand that this is --  
19 the state National Guards are unusual entities  
20 in that they have, you know, status under state  
21 authority and, of course, under some  
22 circumstances, under -- under federal, but how  
23 does it actually work?

24 In other words, you recognize that  
25 you're bound by the results of the collective

1 bargaining between the -- that the dual  
2 technicians are permitted to engage in, right?  
3 And you -- I mean, who negotiates that? You  
4 want it to be the Department of Defense, right?

5 MR. FLOWERS: And I think they would  
6 involve all the relevant actors. But, yes,  
7 ultimately.

8 CHIEF JUSTICE ROBERTS: Yeah. But  
9 they're not the ones that do the supervising or  
10 day-to-day management of the dual technicians'  
11 responsibilities, right?

12 MR. FLOWERS: They do set regulations  
13 that basically control the way we can supervise  
14 them on a day-to-day basis. So we do it, but  
15 subject to myriad regulations that govern all  
16 sorts of aspects of their work, including their  
17 hours, I should -- I should note.

18 CHIEF JUSTICE ROBERTS: Well, but it  
19 -- it does seem odd to have one entity doing  
20 the negotiation and another entity doing the  
21 supervision.

22 MR. FLOWERS: But, respectfully, I  
23 think it -- it's not as odd as reading  
24 "agency," the word "agency," in a generally  
25 applicable federal law that's about the federal

1 government to include entities that exist  
2 solely as a matter of state law.

3 JUSTICE KAVANAUGH: But it --

4 MR. FLOWERS: The states --

5 CHIEF JUSTICE ROBERTS: No, I  
6 understand --

7 JUSTICE KAVANAUGH: Keep going.

8 CHIEF JUSTICE ROBERTS: I was just  
9 going to say I understand your -- your -- your  
10 legal argument, but I'm trying to see whether  
11 or not it makes sense may have a lot to do  
12 about how it operates on the ground.

13 MR. FLOWERS: And -- and I think it  
14 does make sense because the Department of  
15 Defense, once they're there, can, A, bring that  
16 military expertise to bear. So, frankly, in  
17 terms of why we care about this, why it's not a  
18 mere practicality, we have much greater trust  
19 in the Department of Defense to work these  
20 disputes out before they even become disputes,  
21 without compromising our military interests,  
22 far more than an independent federal -- federal  
23 agency that's concerned with labor law. But  
24 they -- and they have the tools to do all that  
25 because they have immense control over the

1 technicians, they have immense influence over  
2 us, and, unlike the Authority, they're  
3 subordinate to the President. So --

4 JUSTICE KAVANAUGH: But you hire --  
5 you hire the technicians, correct?

6 MR. FLOWERS: We do.

7 JUSTICE KAVANAUGH: Right. And you  
8 do, I think you said, day-to-day supervision of  
9 them, correct?

10 MR. FLOWERS: That's true.

11 JUSTICE KAVANAUGH: And the oddity of  
12 -- of the case is that you're not a federal  
13 officer, yet federal law requires you to do  
14 that, and you do it.

15 MR. FLOWERS: And I think that's  
16 dispositive. Yes.

17 JUSTICE KAVANAUGH: And you're not  
18 challenging the constitutionality of that, just  
19 -- correct?

20 MR. FLOWERS: Well, we -- we -- no,  
21 not --

22 JUSTICE KAVANAUGH: Of that specific  
23 --

24 MR. FLOWERS: Yes. Yes, that's right.

25 JUSTICE KAVANAUGH: -- role?



1 MR. FLOWERS: But I think that --

2 JUSTICE KAVANAUGH: But then, to go  
3 back to the point about the word "agency," you  
4 agree that DoD, as well as the Department of  
5 Air Force and Army, are agencies, correct?

6 MR. FLOWERS: Correct.

7 JUSTICE KAVANAUGH: Okay. And then  
8 the statute says in this unusual context DoD is  
9 acting through the state Guard to, as you just  
10 said, hire, supervise the people, and that's  
11 the natural -- if we have to make sense of  
12 this, that's the natural person then who would  
13 be sitting across from you at the collective  
14 bargaining table in the first --

15 MR. FLOWERS: That -- that might have  
16 been a better way to write the statute, but I  
17 see no way to get from the fact that we're  
18 their agent to the -- to the conclusion that we  
19 are the Department of Defense. That's not  
20 usually how I prove --

21 JUSTICE KAVANAUGH: Acting on behalf  
22 of the Department of Defense as assigned by  
23 Congress.

24 MR. FLOWERS: Which would mean that  
25 they are bound by the agreement, not us.

1 JUSTICE KAVANAUGH: Right. And then  
2 one other kind of different angle on the -- on  
3 the history of this, this -- am I -- correct me  
4 if I'm wrong, and this -- ultimately, you're  
5 going to say the text controls, and I agree,  
6 but I just still want to know the history,  
7 which was, in the '70s, this was an issue, and  
8 state guards were objecting to their role on  
9 this and tried to get a carveout in Congress,  
10 and that was -- came up in the context of the  
11 military union and the separate legislation,  
12 and it was in the Senate bill but failed in the  
13 House bill and it never made it. The carveout  
14 that would have changed the statute and solved  
15 your concern never made it.

16 MR. FLOWERS: Well, that -- that  
17 solution would have been to a slightly  
18 different problem, which is they wouldn't have  
19 bargaining rights at all.

20 JUSTICE KAVANAUGH: Mm-hmm.

21 MR. FLOWERS: So we -- again, we're  
22 not disputing that they have rights.

23 JUSTICE KAVANAUGH: Right. But that  
24 would have solved your problem.

25 MR. FLOWERS: I -- it would -- yes, if

1 they didn't have rights at all, then they could  
2 not go to the Authority to enforce those  
3 rights.

4 JUSTICE KAVANAUGH: Right.

5 MR. FLOWERS: That's true. But,  
6 ultimately --

7 JUSTICE KAVANAUGH: I -- I agree the  
8 text controls, but that history illuminates  
9 this is not some isolated thing that was  
10 inadvertent, I don't think --

11 MR. FLOWERS: No. I --

12 JUSTICE KAVANAUGH: -- or at least  
13 that Congress didn't pay attention to at some  
14 point.

15 MR. FLOWERS: -- I fully grant that,  
16 but when we're talking about an agency's  
17 exercise of power, they've got to ground it in  
18 the text, as you recognized, and I think, here,  
19 we're talking about penumbras, not the text.

20 JUSTICE SOTOMAYOR: So what instead  
21 you're arguing now is it's a pyrrhic victory,  
22 because they kept collective bargaining rights,  
23 they could have it against Do -- the Department  
24 of the Army, but they can't enforce it against  
25 anybody.

1 MR. FLOWERS: Not -- not pyrrhic in  
2 any way. They can enforce it against the  
3 Department of Defense.

4 JUSTICE SOTOMAYOR: Well, but you're  
5 telling me the Department of Defense can't sue  
6 you for it. That's how you answered Justice  
7 Barrett.

8 MR. FLOWERS: They cannot sue us.

9 JUSTICE SOTOMAYOR: They can just use  
10 other pressures, but they can't have any  
11 enforceable right against you in court?

12 MR. FLOWERS: Right. So, of course,  
13 my first answer is we're stuck with the law  
14 Congress passed, whether or not it makes sense,  
15 but I think that does make sense --

16 JUSTICE SOTOMAYOR: Oh, I agree with  
17 you.

18 MR. FLOWERS: -- but that --

19 JUSTICE SOTOMAYOR: We're stuck -- you  
20 and we are stuck.

21 MR. FLOWERS: Yeah. Yeah.

22 (Laughter.)

23 MR. FLOWERS: But the -- the --

24 JUSTICE SOTOMAYOR: And so I go back  
25 to my original question for however they --

1 else they view the word "agency" or  
2 "department" anywhere else in any other part of  
3 the law, at least with respect to this issue,  
4 they had the Mississippi decision?

5 MR. FLOWERS: So the Mississippi --

6 JUSTICE SOTOMAYOR: And that decision,  
7 basically, the Thompson decision, basically  
8 said you negotiate the collective bargaining  
9 unit, you're acting on behalf of the Department  
10 when you do it, the terms are approved by the  
11 Department, so the Department has said to you  
12 these are -- terms are okay, and if you breach  
13 the agreement, then you have to suffer the  
14 decision of the agency in charge of deciding  
15 whether there was a breach or not. That's as  
16 simple as I see this case.

17 MR. FLOWERS: Sure, but then 7135  
18 says, if that ruling is superseded by the Act,  
19 which this is because it defines --

20 JUSTICE SOTOMAYOR: But the Act didn't  
21 change the definitions.

22 MR. FLOWERS: It does -- it doesn't --  
23 it didn't change the definitions, but that  
24 decision didn't consider the definitions I --

25 JUSTICE SOTOMAYOR: So -- and it

1 didn't change the interpretation of those  
2 definitions.

3 MR. FLOWERS: That I disagree with.  
4 The relevant definitions predate that order.  
5 The order never considered the definitions.  
6 And, in any event, whatever that Assistant  
7 Secretary of Labor thought he was doing, the  
8 statute here plainly says "agency." And even  
9 --

10 JUSTICE SOTOMAYOR: So, if we --

11 MR. FLOWERS: -- even the government  
12 doesn't argue they're bringing --

13 JUSTICE SOTOMAYOR: -- and -- and  
14 you're willing to say there's no legal remedy?

15 MR. FLOWERS: So I --

16 JUSTICE SOTOMAYOR: There's a  
17 political pressure remedy, but there's no legal  
18 remedy for rights that were clearly granted by  
19 Congress and intended by Congress?

20 MR. FLOWERS: I -- I -- I really  
21 dispute that there's no legal remedy because a  
22 remedy against the Department is going to be  
23 effective. They have immense influence over  
24 us.

25 JUSTICE JACKSON: Yes, but it's going

1 to be different. I mean --

2 MR. FLOWERS: But it --

3 JUSTICE JACKSON: -- I -- I appreciate  
4 -- I appreciate that you keep coming back to  
5 the textual it says "agency," but I -- I would  
6 posit that the real question is, what did  
7 Congress intend when it used "agency" in the  
8 statute in that way?

9 MR. FLOWERS: Well, we know what they  
10 intend --

11 JUSTICE JACKSON: And to follow your  
12 line of reasoning, we would have to believe  
13 that Congress intended for dual-status service  
14 workers in this nature to have a different,  
15 weaker form of collective bargaining rights  
16 because, unlike other federal civilian  
17 employees who could sue the people who -- or,  
18 excuse me, who could bargain with the people  
19 who supervise them, they couldn't directly.  
20 They would have to go through -- I understand  
21 it's possible to -- to figure out a way for  
22 them to enforce their rights, but why would  
23 Congress -- given all this history, the  
24 background of the statute, the fact that they  
25 considered it, why would they have wanted

1 dual-service status workers to have a different  
2 kind of collective bargaining right than other  
3 similarly situated employees?

4 MR. FLOWERS: Absolutely. Is it okay  
5 if I answer?

6 CHIEF JUSTICE ROBERTS: You may answer  
7 briefly, yes.

8 MR. FLOWERS: So two -- two quick  
9 answers. First, again, they have to say we're  
10 the agency, and I want to emphasize even the  
11 Authority does not claim that we are an agency.  
12 They are not making that argument. They say  
13 we're the representative of, not that we are.

14 Second, why would they want to do it?  
15 I think it's important to realize that these  
16 technicians serve, even in their civilian  
17 capacity, very important military tasks. And  
18 it's perfectly reasonable for Congress to say,  
19 in that context, we want the Defense Department  
20 involved because they answer to the President  
21 and they have to make sure that whatever is  
22 being done doesn't frustrate his  
23 commander-in-chief powers.

24 And think, in this case, the general  
25 counsel wanted us to go base to base and engage



1 in basically a speaking tour where we would  
2 apologize to the technicians and tell them we  
3 had violated our rights.

4 JUSTICE JACKSON: But haven't you --

5 CHIEF JUSTICE ROBERTS: Thank you.

6 Thank you, counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: Just briefly, could  
9 -- in your delegation of authority, could it  
10 explicitly authorize you to not only administer  
11 but also to serve as the -- well, it would be  
12 more of an imposition that you are also the  
13 defendant in these cases or respondent in these  
14 cases?

15 MR. FLOWERS: Congress could do that,  
16 and it's actually done it in other contexts,  
17 not with respect to the Reform Act. And I do  
18 want to note that --

19 JUSTICE THOMAS: No, no, I'm talking  
20 about the Defense Department in its delegation  
21 to you.

22 MR. FLOWERS: So the statute delegates  
23 to us the power to hire them. I do believe the  
24 Defense Department through regulations could  
25 say, if you want technicians, you have to agree

1 to collectively bargain on our behalf. I don't  
2 think they could give the authority and the  
3 power to issue orders to us, but they could  
4 make us bargain for them.

5 And I -- I do want to briefly  
6 emphasize 709(e), the designation statute, is  
7 not about the Reform Act. That is a general  
8 statute that says we have power over  
9 technicians. So it -- that -- that's not  
10 unique to the Reform Act in any way.

11 CHIEF JUSTICE ROBERTS: Justice Alito?  
12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: I'm going back to  
14 Justice Kagan's venerable rule, if it ain't  
15 broke, don't fix it. And we know that it  
16 hasn't been broken because either under the  
17 executive orders for decades, National Guards  
18 did go through the administrative processes as  
19 the named responding party. They've been doing  
20 so in this context. But I think, most  
21 importantly, under Article I, military matters  
22 are left to the executive, and we should be  
23 doing very little to interfere in that process.

24 And this is a major interference in  
25 you saying to us we are not -- we can be

1 designated as the employer, we can have Adjunct  
2 Generals foisted on us, we can be given  
3 permission, as we have been, to bargain, but we  
4 can't be forced to honor our bargains. That's  
5 basically what you're saying. We can't be  
6 legally forced. That's what you're saying to  
7 us.

8 MR. FLOWERS: We're not -- it's not  
9 that we can't be. It's that Congress hasn't  
10 done it. And so, if it ain't broke, don't fix  
11 it, coming back to --

12 JUSTICE SOTOMAYOR: Yeah, but Congress  
13 hasn't fixed it. Congress has looked at the  
14 state of affairs for I don't know how long, and  
15 even when the National Guards ask Congress not  
16 to let the technicians collectively bargain,  
17 Congress rejected that request.

18 And now you're asking us to permit  
19 labor bargains to threaten national security  
20 because there's no peaceful way to adjudicate  
21 this before an agency.

22 MR. FLOWERS: I think the principle  
23 that Congress is in charge is absolutely right.  
24 But, here, there is no way, I think even the  
25 Authority would concede, to read "agency" to

1 mean us. They have to have this round-about  
2 that's good for one ride and one ride only with  
3 -- when we get to Adjutants General.

4 In terms of that longstanding practice  
5 and why is it -- is it broken or not, it is  
6 broken. Anytime you have an agency --

7 JUSTICE SOTOMAYOR: It's only broken  
8 because you're the first National Guard to say  
9 we won't honor our commitments.

10 MR. FLOWERS: Anytime you have an  
11 agency exercising authority that Congress  
12 hasn't given it, there is a serious problem.  
13 Agencies do not acquire power by adverse  
14 possession. It would be highly dangerous to  
15 say that as long as an agency keeps violating  
16 the law, we'll let it slide. If they do it  
17 once or twice, that's not okay.

18 Here, we're in the position where  
19 they've been violating it repeatedly, and this  
20 Court has not been shy in other cases, whether  
21 it's McGirt or Janus, to correct past  
22 practices that have been going on a long time  
23 but that are contrary to law.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: It's, of course, true

1 that many, many times in the law we ascribe the  
2 actions of principals to agents, and,  
3 conversely, we require the same things of  
4 agents that we do of principals. So that's  
5 true in many contexts where we essentially say  
6 we're going to treat the agent and the  
7 principal as one because the agent is just  
8 exercising the authority of and acting on  
9 behalf of the principal.

10 And the way I see this case is, is  
11 this one of those contexts? And can we  
12 understand the reference to "agency" with  
13 respect to this issue as also a reference to  
14 the agency's agents, who in this case are you  
15 and your fellow Adjutant Generals?

16 And -- and -- and, there, I do -- you  
17 know, trying to make sense of an entire  
18 statute, I think about the -- the fact that  
19 there is an explicit delegation from the --  
20 from -- from D -- an explicit delegation that  
21 Congress wrote requiring DoD to give its power  
22 to you with respect to these employees, and  
23 there is also an explicit provision which you  
24 acknowledge saying that these employees have  
25 employment rights, including the right to sit

1 down and collectively bargain with their  
2 employer.

3 And the question is, who is that  
4 employer? And you say they have to sit down  
5 with DoD. The consequence of your position is  
6 that the employee -- is that the Adjutant  
7 Generals are out of the picture and DoD takes  
8 over.

9 But I guess I'm wondering why, given  
10 that there's been this explicit delegation for  
11 you to supervise and hire and so forth these  
12 employees, why anybody would read the statute  
13 to do that rather than simply to read the  
14 statute as putting you in the shoes of DoD when  
15 it comes to this activity?

16 MR. FLOWERS: So there are certainly  
17 instances where an agent's bound by whatever  
18 order is issued to the principal, but that's  
19 expressly. So, for example, Rule 65 expressly  
20 says agents are bound.

21 I am not aware of any area in the law  
22 where agents by serving as agents become  
23 principals, and that's what they would need to  
24 show, the Authority has to show that to win  
25 this case, because unless we are the Department

1 of Defense, they can't issue the order against  
2 us.

3           They do not even argue that we're the  
4 Department of Defense. And if the argument  
5 here is that we become agencies by serving as  
6 representatives, that is yet a new version of  
7 the argument, which just shows I think that  
8 we're looking for some way to say it must be in  
9 there somewhere when it's not naturally there.

10           So then I get to, why does it make  
11 sense to do it this way? I -- I do want to  
12 emphasize this. Many of the things that the  
13 technicians will want to bargain over are  
14 wholly within the Department of Defense's  
15 control. They withhold the dues.

16           So the order here said we have to  
17 withhold dues. We cannot do that. We don't  
18 issue the checks. We can ask them to do it,  
19 but we can't do it ourselves. They issue  
20 regulations that control all aspects of their  
21 work. They want to bargain over that, nothing  
22 the State Guard can do.

23           And, finally, I think it's really  
24 critical to emphasize the importance of the  
25 President's control over the Department of

1 Defense. The general counsel of the FLRA in  
2 this case, as I started to mention, wanted us  
3 to go base to base and do -- and -- and get up  
4 and explain that we erred, we misinterpreted  
5 the Act, and apologize.

6 I think the Department of Defense  
7 would have been far more likely to say:  
8 Absolutely no way. That would be detrimental  
9 to the chain of command. Here, thankfully, the  
10 ALJ didn't impose that, but the general counsel  
11 asked for it.

12 And I think that shows that that --  
13 the failure to appreciate the sort of  
14 military-specific concerns there shows why it  
15 does make practical sense to channel these  
16 things before the Defense Department.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: Two quick things.

21 MR. FLOWERS: Sure.

22 JUSTICE KAVANAUGH: One, the  
23 collective bargaining agreement here is  
24 approved by DoD, correct?

25 MR. FLOWERS: Right. And, again, we



1 don't dispute that they could be held bound by  
2 it.

3 JUSTICE KAVANAUGH: Right. And the  
4 statute requires that these collective  
5 bargaining agreements be approved by DoD, is  
6 that correct?

7 MR. FLOWERS: I think that's actually  
8 somewhat ambiguous. The head of the agency has  
9 to approve it, so they consider themselves the  
10 head of the agency, which I assume to be the  
11 Department of Sec -- of the Army or Air Force,  
12 which is yet another reason why I think it --

13 JUSTICE KAVANAUGH: But DoD in this  
14 case did approve the --

15 MR. FLOWERS: It approved, yes.

16 JUSTICE KAVANAUGH: -- the relevant  
17 collective bargaining agreement and there is a  
18 statute. I take your point on that.

19 MR. FLOWERS: And --

20 JUSTICE KAVANAUGH: And then second  
21 question was, on your point about agencies  
22 can't acquire authority by adverse possession,  
23 if you go back to the '70s -- I mean, I agree  
24 with that point, obviously, but if you go back  
25 to the '70s in the Thompson Field decision,

1 even if you think that's wrong, what do you do  
2 with the unusual savings clause?

3 I know you've referenced it before,  
4 but that itself is an unusual provision to say,  
5 well, to the extent agencies have done  
6 something, we, Congress, are preserving that  
7 unless superseded by a further regulation or by  
8 the President, et cetera, or by provisions of  
9 this chapter?

10 In other words --

11 MR. FLOWERS: Or a decision issued  
12 under this chapter, which would include a  
13 judicial decision. So, if this Court  
14 interprets the Reform Act in a way that is  
15 inconsistent with the regulations, the law  
16 Congress passed wins. And that's what --  
17 again, I pointed to that INS v. FLRA case.  
18 That's how Judge Wallace in a very thorough  
19 opinion --

20 JUSTICE KAVANAUGH: Yeah, I'm not --  
21 okay. That's an interesting point. I'm not  
22 sure I'm fully sure of that, but I'll let it go  
23 for now, okay?

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: On page 28 of your  
3 opening brief and page 9 of your reply, you  
4 point out there are other contexts in which  
5 states designate officials to administer  
6 federal law. You point to Medicaid. You point  
7 to elections officials.

8 And I want to know if you are just  
9 invoking those as examples for why it would be  
10 odd to consider the Adjutant General to be an  
11 agent or an -- you know, a federal officer or  
12 subcomponent, or are you saying that there  
13 would be implications of our decision that  
14 might pull some of these people who Congress  
15 did not intend to be included in -- in the Act?  
16 You know, are there -- are there other  
17 provisions of federal law that ruling against  
18 you might mess up? I just wasn't --

19 MR. FLOWERS: Sure.

20 JUSTICE BARRETT: -- really clear  
21 whether you were making an argument about this  
22 could really have bad consequences or if you  
23 were just saying this is an example for why the  
24 government's position doesn't make sense.

25 MR. FLOWERS: It -- more why it

1 doesn't make sense. What we use those statutes  
2 for is to show that even when you're designated  
3 to fulfill a role for the federal government  
4 that's completely within the federal  
5 government's control and discretion, you don't  
6 become the federal government itself.

7           As in those contexts, we do point to  
8 the Intergovernmental Personnel Act, where the  
9 federal government actually does have its  
10 employees go work for tribes, local  
11 governments, and so on, where, as far as we can  
12 tell, they would never say the tribes become  
13 entities of -- of the federal government.

14           CHIEF JUSTICE ROBERTS: Justice  
15 Jackson?

16           JUSTICE JACKSON: Yeah. In response  
17 to Justice Kagan, you -- and, again, in  
18 response to Justice Barrett, you keep saying we  
19 aren't DoD. And I guess I don't understand  
20 that. Why aren't you for the purpose of  
21 employing -- for the purpose of this particular  
22 statute? Isn't that the work of the agency  
23 analysis such that the best reading of the  
24 statutory terms is that you are acting as DoD  
25 for the purpose of the statute and are

1       therefore covered by the laws that govern labor  
2       relations in regard to these employees, given  
3       your role as their employer?

4               MR. FLOWERS: I'd -- I'd refer you to  
5       the last couple paragraphs of Judge Tatel's  
6       majority opinion in Sealed Case, and what he  
7       explains there is that the question whether  
8       someone is an entity, is an agency, isn't a  
9       metaphysical inquiry. It depends on statutory  
10      definitions. So they have to find a statute  
11      that makes us part of the Department of  
12      Defense. They can't -- they -- they don't --

13              JUSTICE JACKSON: Yeah, but what  
14      you're doing is you are -- are not taking into  
15      account the common law agency relationship.  
16      So, yes, if we didn't have any kind of  
17      relationship between you and DoD and we were  
18      just asking the question are you an agency, I  
19      agree with you.

20              But I guess Justice Kagan's point was  
21      we have some entity that everybody agrees is an  
22      agency under the statutes, and you are  
23      designated by Congress, are required by  
24      Congress to step into their shoes for the  
25      purpose of administering this statute with

1 respect to labor relations. So, in that  
2 context, why aren't you the agency for the  
3 purpose of this?

4 MR. FLOWERS: So those common law  
5 principles help us and not them, which is why  
6 they don't cite them. A principal is bound by  
7 the actions of its agent. An agent does not  
8 become the principal by serving as the agent.  
9 They need to show that we are part of the  
10 Department of Defense. And acting as the agent  
11 of the Department of Defense doesn't make you  
12 the Department of Defense, just as a military  
13 contractor who works for the Department of  
14 Defense is not part of the Department of  
15 Defense.

16 JUSTICE JACKSON: So you're saying  
17 that --

18 MR. FLOWERS: Indeed, they're --

19 JUSTICE JACKSON: -- so you're saying  
20 that -- I understood that the principal as you  
21 say is bound by the activity of the agent. So,  
22 in this -- in this case, let's say you agreed  
23 that you would collectively bargain on behalf  
24 of DoD and you made certain concessions.

25 Are you saying that DoD would not be

1 bound by those in -- in terms of its  
2 understanding of the labor relationship that  
3 you created?

4 MR. FLOWERS: The Department of  
5 Defense may be bound by what we do.

6 JUSTICE JACKSON: Okay.

7 MR. FLOWERS: But we -- but --

8 JUSTICE JACKSON: What you did in --  
9 across the bargaining table, they would be  
10 bound by it. Those employees couldn't say  
11 there's some other labor thing happening. If  
12 you had made representations at the collective  
13 bargaining table, you would bind DoD, is that  
14 right?

15 MR. FLOWERS: As long as we were  
16 acting as their agent, which they say we are,  
17 yes.

18 JUSTICE JACKSON: Okay. So why -- I'm  
19 sorry, why doesn't that make you then  
20 responsible for sitting across from these  
21 employees in the context of the collective  
22 bargaining relationship as Congress understood  
23 it?

24 MR. FLOWERS: Because that's -- I  
25 guess it might, but the question that we're

1 asking is, are we an agency? That's the only  
2 question in this case. We have to be an  
3 agency, or the Authority does not have the  
4 ability to issue orders to us. That's  
5 conceded. I don't think anyone is disputing  
6 that. And we don't become an agency by being  
7 the agent.

8 And, indeed, every federal employee is  
9 an agent of the federal government. We don't  
10 say they're all agencies.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Ms. Reaves.

14 ORAL ARGUMENT OF NICOLE F. REAVES  
15 ON BEHALF OF THE FEDERAL RESPONDENT

16 MS. REAVES: Mr. Chief Justice, and  
17 may it please the Court:

18 Petitioners are required to comply  
19 with the Act and submit to the FLRA's orders in  
20 cases like this one because of the role they  
21 play in the federal employment system. It is  
22 uncontested that dual-status technicians have  
23 collective bargaining rights because they are  
24 federal civilian employees who are employed by  
25 parts of DoD, a covered agency. And under



1 Section 709(d) of Title 32, Petitioners employ  
2 and administer technicians pursuant to a  
3 designation of federal authority from DoD.

4 Other provisions confirm that role.  
5 For example, Section 2105 of Title V provides  
6 that an Adjutant General appoints technicians  
7 into the federal civil service when he hires  
8 them. Adjutants General thus only hire, fire,  
9 and supervise employees of DoD because they are  
10 acting as if they are part of and on behalf of  
11 that agency.

12 Similarly, as Petitioners seem to  
13 concede in their reply and as multiple  
14 provisions in the Act indicate, the Act  
15 requires compliance by components and entities  
16 that are designated to act on an agency's  
17 behalf. And that is exactly how Petitioners  
18 behave when employing technicians. Petitioners  
19 therefore must both bargain with technicians  
20 and comply with the FLRA's orders.

21 And if accepted, Petitioners'  
22 arguments would upend 50 years of uninterrupted  
23 collective bargaining between technicians and  
24 state Adjutants General. In a late-breaking  
25 argument, Petitioners suggest that they may be

1 required to bargain under the Act so long as  
2 DoD, instead of the FLRA, enforces any order  
3 issued against them.

4 But that would not negate the right  
5 that the Act actually gives to technicians, a  
6 right to bargain with their direct supervisors  
7 subject to the FLRA's enforcement authority.  
8 And it makes no sense to require DoD to  
9 threaten the nuclear option of withholding  
10 federal funding or recognition to state  
11 National Guards to enforce routine FLRA orders.

12 Because Petitioners have decided to  
13 accept the benefits that come with employing  
14 technicians, they must also accept the limited  
15 bargaining obligations that come along with  
16 those benefits.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: As I hear Petitioner,  
19 the argument is that, of course, we are  
20 delegated this authority to hire the  
21 technicians and to supervise them, but that  
22 does not convert us into an agency for the  
23 purposes of the relevant statute.

24 How do you respond to that?

25 MS. REAVES: The term "agency" in the

1 statute includes and requires compliance by  
2 components and entities that are designated to  
3 act on behalf of that agency, and that includes  
4 subcomponents within a federal agency. And  
5 that's a thing that Petitioners are most  
6 analogous to in this -- in this system that  
7 Section 709(d) and Section 709(e) have set  
8 forward.

9           It's hard to imagine how someone can  
10 fully employ federal employees from the  
11 perspective of their being able to hire, fire,  
12 and supervise federal employees' day-to-day --  
13 day-to-day employment activities, without  
14 holding that they are, in fact, acting as a  
15 component of an agency that's required to  
16 bargain.

17           JUSTICE THOMAS: Well, the -- there's  
18 always delegations from the head of agencies to  
19 subparts, but those delegees are not converted  
20 to agencies. They may be agents for a limited  
21 purpose. They may have limited authority  
22 that's delegated from the top. But they're not  
23 converted to an agency. And I think that's the  
24 leap that I'm having some difficulty with.

25           MS. REAVES: So I think it would be

1 helpful if I could maybe go through a few sets  
2 of provisions in the Federal Service Labor  
3 Management Relations Act that do indicate that  
4 the actual bargaining requirement often lies  
5 with a component of a federal agency, which I  
6 think helps bridge that gap to then seeing that  
7 Petitioners aren't like that component.

8           So the first set of provisions are the  
9 definition of "collective bargaining" and the  
10 definition of "appropriate unit." Those are on  
11 page 3a and 5a of our statutory appendix. And  
12 those indicate that bargaining is often done  
13 not on a high-level agency basis but on an  
14 agency, plant, installation, functional, or  
15 other basis.

16           Now the second set of statutory  
17 provisions that I think is helpful are the  
18 exclusions from the definition of "agency."  
19 Those are on page 3a of the statutory appendix.  
20 And that excludes entities like the FBI and the  
21 Secret Service.

22           And if we were to accept this  
23 proposition that only the high-level agency is  
24 required to comply with the Act and  
25 collectively bargain, there would have been no

1 need for Congress to exclude the FBI and the  
2 Secret Service because they aren't high-level  
3 agencies. The FBI is part of DOJ. The Secret  
4 Service is part of the Department of Homeland  
5 Security.

6 JUSTICE KAGAN: I suppose what they  
7 would say is, well, we get you as to the parts  
8 of agencies, but the -- and the parts of  
9 agencies aren't listed either, but we just  
10 assume that by saying the Department of  
11 Justice, we naturally mean as well the FBI, but  
12 -- but we don't usually mean Ohio, and so  
13 that's the difference.

14 So what gets you to Ohio?

15 MS. REAVES: What gets us to Ohio is  
16 Section 709(d) and (e) and the designation of  
17 federal authority. And this isn't just a  
18 partial designation. It is a designation to  
19 hire, fire, and control the day-to-day  
20 employment obligations of dual-status  
21 technicians.

22 JUSTICE GORSUCH: Well, and that's  
23 where I want to pick up. So I'm just curious  
24 about the federalism implications of this case.  
25 Forget about the militia for the moment, okay?

1 Under the Spending Clause today, the  
2 federal government effectively employs or  
3 provides the budgets for 30 to 40 percent of  
4 state budgets today, and many, many, many of  
5 their employees, are they now in other cases,  
6 Medicare, Medicaid, the -- the examples that  
7 Justice Barrett offered, are they now agents of  
8 the federal government effectively? Are they  
9 effectively federal agencies?

10 MS. REAVES: No, because, in that,  
11 merely providing federal funding is not the  
12 same as providing a designation of federal  
13 authority to hire, fire, and supervise  
14 employment.

15 JUSTICE GORSUCH: Well, let -- let --  
16 let's -- let's say Congress provides those  
17 similar kinds of provisions in those other  
18 areas. We -- we -- we allow the states to hire  
19 and fire the employees that we are funding, but  
20 it has to do whatever we say. You know, you're  
21 now a federal agency. I know you thought you  
22 were a sovereign state, but it turns out that  
23 you are, in fact, a federal agency.

24 MS. REAVES: So two responses to that.  
25 First of all, I think the hypothetical you just

1 gave wouldn't convert them into federal  
2 employees. If they were, in fact, federal  
3 employees, not just federally funded, and then  
4 the state was given the authority to hire,  
5 fire, and supervise them in their day-to-day  
6 federal roles, I think that would look a lot  
7 like Petitioners here.

8 JUSTICE GORSUCH: Okay. So -- so --

9 MS. REAVES: My second response --

10 JUSTICE GORSUCH: -- so, in other  
11 words, there is nothing in this case that's  
12 particularly unique. Congress could replicate  
13 this -- this same structure with respect to  
14 other Spending Clause programs?

15 MS. REAVES: It could replicate it,  
16 but it is unique in that this is the only  
17 statute, 709(d) is the only one that either we  
18 or Petitioners have been able to identify where  
19 a state employee supervises, hires, and fires  
20 federal employees into a federal role.

21 JUSTICE GORSUCH: Now I know we don't  
22 have a constitutional commandeering-type claim  
23 here, but is there some concern the government  
24 has about converting state militia officers  
25 into federal agencies?

1 MS. REAVES: So a couple of responses  
2 to that. First, I --

3 JUSTICE GORSUCH: I'm sure -- I'm just  
4 sure this is something you all have thought  
5 about too, so I'm curious.

6 MS. REAVES: Absolutely. So I don't  
7 think this case in any way implicates militia  
8 concerns because, as this Court recognized in  
9 Babcock, dual-status technicians really do have  
10 three separate roles, and one of those roles is  
11 a federal -- federal military role, one is a  
12 state military role, and one is a federal civil  
13 service role. And that's the role that this  
14 case is about.

15 And, in fact, dual-status technicians  
16 are barred by federal statute from collectively  
17 bargaining over the conditions of their state  
18 and federal military service or active-duty  
19 training.

20 JUSTICE GORSUCH: And then, I'm sorry,  
21 just to circle back, is there any limit you see  
22 on -- on Congress's power to replicate this  
23 scenario in other Spending Clause programs at  
24 all or none? I'm -- I'm just curious.

25 MS. REAVES: I don't think -- I'm not



1 aware of any limit. I think, obviously, this  
2 is a unique situation, and dual-status  
3 technicians are, as this Court recognized in  
4 Babcock, an extremely rare bird. And the --

5 JUSTICE GORSUCH: Well, I understand  
6 that. But the --

7 MS. REAVES: -- role that Adjutant  
8 Generals have is a rare --

9 JUSTICE GORSUCH: -- the government  
10 doesn't see any inhibition to Congress's power  
11 to turn states into federal agencies for  
12 purposes of whatever, you know, whether it's  
13 collective bargaining or whatever other good  
14 interest it has in mind?

15 MS. REAVES: Two responses to that.  
16 First of all, I think there's an important  
17 component of this, the state consent, you know,  
18 Petitioners have agreed that they have  
19 consented to this system. And I think, if  
20 there wasn't that consent and, you know, if  
21 they didn't have the ability to cease hiring  
22 and firing dual-status technicians, that would  
23 be a different situation.

24 But, to the extent that there was a  
25 consensual role and that Congress actually

1 wanted to make a bunch of state employees  
2 federal employees and create state entities to  
3 be federal employers of them, I think that  
4 would look a lot like this. And I don't see  
5 any distinct --

6 JUSTICE GORSUCH: Beyond consent, do  
7 you see any other limits?

8 MS. REAVES: No, not -- not -- not  
9 that I'm aware of right now.

10 JUSTICE SOTOMAYOR: Ms. Reaves, why --  
11 why are you going so far? I -- I -- I -- I'm  
12 just curious. This is a unique situation in  
13 and of itself because it's a military setting.  
14 And the militia, per the Constitution, is  
15 intimately tied between Congress and the  
16 states, correct?

17 MS. REAVES: That's correct.

18 JUSTICE SOTOMAYOR: I might have a  
19 problem if -- with the anti-commandeering if we  
20 forced, even under the Spending Clause, states  
21 to hire particular people, utilize them, or  
22 collectively bargain on their behalf. That --  
23 that really is a different issue than what's  
24 involved in the military setting, isn't it?

25 MS. REAVES: Well, a couple of

1 responses to that. I don't think the  
2 distinguishing feature of this case is the  
3 military setting. You know, the basis for  
4 these provisions is not the militia clauses,  
5 but it's the executive's ability to oversee  
6 executive branch employees.

7           And I think, to the extent we're --  
8           JUSTICE SOTOMAYOR: All right. Fair  
9 enough.

10           Now the definition of "executive  
11 department" and "agency" in Section 105 is used  
12 throughout Title V. Going back to the question  
13 that Justice Barrett asked, do we need to worry  
14 if we adopt your broad definition of "agency"  
15 or "unit" or "component" that we'll be causing  
16 unforeseen issues for other provisions?

17           MS. REAVES: No, you do not, and  
18 that's because our argument is heavily grounded  
19 on Section 709(d) and Section 709(e). And  
20 those are unique provisions that there's no  
21 analog to anywhere else in the U.S. Code. And  
22 to the extent that --

23           JUSTICE SOTOMAYOR: So your component  
24 argument seems to follow the arguments of  
25 amici, American Federation of Labor and

1 Congress of Industrial Organizations, they were  
2 talking about the National Guards being a unit  
3 or a component of DoD.

4 And I guess the counter to that  
5 argument is that Section 10105 refers to  
6 federally recognized units and organizations of  
7 the Army National Guard. How could the state  
8 National Guards be federally recognized units  
9 or components?

10 MS. REAVES: So we're not relying on  
11 the federal components or units argument  
12 because, as we envision this case, Petitioners  
13 are acting in a federal civilian employment  
14 role when they're employing dual-status  
15 technicians. They aren't acting in their  
16 federal military role in any way.

17 So I don't think that the right way to  
18 analyze this case is the way that those amici  
19 analyze it. I think the correct way to analyze  
20 it is to recognize that dual-status technicians  
21 have collective bargaining rights and then ask  
22 who are those rights against and what do the  
23 entities in this case look like as far as the  
24 Act's provisions go. And Petitioners here look  
25 the most like a component or a representative

1 of an agency who's exercising that agency's  
2 authority in hiring, firing, and supervising  
3 the day-to-day activities of federal --

4 JUSTICE ALITO: Isn't it odd --

5 MS. REAVES: -- civilian employees.

6 JUSTICE ALITO: -- to say that an  
7 entity is a component of the federal government  
8 for some purposes but not a component of the  
9 federal government for other purposes?

10 MS. REAVES: I don't think so, because  
11 I think that the Act itself is what provides  
12 the definition of an indication of what is a  
13 component.

14 Those two provisions I listed in  
15 response to Justice Thomas's question, and also  
16 there's a third set of provisions, there's  
17 exclusions that the President can make to  
18 collective bargaining under the Act. That's in  
19 Section 7103(b) of the Act. And the President  
20 can remove subcomponents of agency from the --  
21 agencies from the Act.

22 So I actually think that in the  
23 context of the Act that's at issue here, it's  
24 clear that components have to comply. And that  
25 doesn't necessarily mean that's the case for,

1 you know, other provisions throughout the  
2 federal code.

3 JUSTICE BARRETT: Ms. Reaves, is there  
4 a distinction between -- you're moving back and  
5 forth between kind of sub-agency, component,  
6 and representative. Is there any legal  
7 distinction between a sub-agency and a  
8 component and a representative?

9 I guess I would have thought that  
10 representative was a stronger argument for you  
11 than component or sub-agency for the reasons  
12 that Justice Alito was saying.

13 MS. REAVES: So I think that there --  
14 representative can be a little bit of a broader  
15 meaning in some places in the Act. Sometime a  
16 representative can be just an individual who  
17 for the purposes of bargaining is going to the  
18 table for bargaining purposes, and when we're  
19 using the term "representative" here, we mean  
20 that a little bit more broadly.

21 JUSTICE BARRETT: But I thought  
22 designate was a big part of your argument. And  
23 if you think of the Adjutant General as a  
24 designee, that seems to me more like a  
25 representative than a component.

1           MS. REAVES: So I think -- I really  
2 think it's both. You know, there is some --  
3 some component of that could be seen as  
4 representative, but to the extent that  
5 Adjutants General with very limited review have  
6 final say on hiring and firing federal  
7 employees, that really makes them look more  
8 like a component, who similarly has kind of  
9 large discretion to hire and fire federal  
10 employees.

11           JUSTICE JACKSON: Does anything turn  
12 on the distinction that Justice Barrett is  
13 pointing out? I mean, I thought that your  
14 argument was: Let's figure out who is  
15 functioning as the employer for the purpose of  
16 this statute.

17           And whether we, you know, call them,  
18 you know, a component, the agency itself, a  
19 representative or whatnot, nobody contests that  
20 this particular entity is performing those  
21 functions and those are the kinds of things  
22 that are at the heart of collective bargaining.  
23 And, as Justice Kagan says, someone has to be  
24 across the table if the rights that are being  
25 conferred have any power.

1           MS. REAVES: I think that's right,  
2 Justice Jackson. And I think all of these  
3 things -- the component argument, the  
4 representative argument, the agency arguments  
5 -- all are trying to fit together these two  
6 statutory schemes and the clear right that  
7 technicians have in this clear designation of  
8 federal authority.

9           JUSTICE KAGAN: So, Ms. Reaves, as --  
10 as I understand General Flowers' argument, and  
11 I'm not sure I did until this argument, but he  
12 says he agrees that these employees have  
13 collective bargaining rights, he agrees that  
14 that means that somebody has to be across the  
15 table, but he says it's you that has to be  
16 across the table, the DoD, and, you know, by  
17 virtue of the definitional sections.

18           And he says, you know, there's --  
19 there's no requirement that you do this  
20 nationwide, you can just do it for Ohio.

21           Now I'm not sure why Ohio would want  
22 you to bargain for them, but, apparently, Ohio  
23 does.

24           (Laughter.)

25           JUSTICE KAGAN: And I guess the



1 question is, what would that scheme look like?

2 MS. REAVES: So I do think it's  
3 important to think about what that scheme would  
4 look like. And, first of all, you know,  
5 historically, the FLRA has certified bargaining  
6 units not at the nationwide level when it comes  
7 to the DoD.

8 And that comes from the definition of  
9 "appropriate unit" in 7112(a) of the Act, which  
10 is on page 5a of the statutory appendix, that  
11 requires the agency to take into account a  
12 clear and identifiable community of interest.  
13 And, historically, that hasn't meant a  
14 nationwide bargaining unit.

15 But setting that aside --

16 JUSTICE KAGAN: Okay. So let's say  
17 it's Ohio.

18 MS. REAVES: Yeah. So setting that  
19 aside, I think we have to think about the  
20 enforcement difficulties here. So what Ohio is  
21 proposing is that DoD bargains with state --  
22 with state National Guard -- state -- employees  
23 of state National Guard units and then, when  
24 Ohio refuses to comply with that, instead of  
25 the FLRA issuing them an order and it being

1 subject to contempt, as is the ordinary case  
2 and has happened for the last nearly 50 years,  
3 DoD has to threaten to withhold federal funding  
4 or federal recognition to the state National  
5 Guard and state Adjutant General.

6 And -- and, respectfully, to my friend  
7 on the other side, I don't think that's any way  
8 to run a railroad. That has actual  
9 implications for the relationship between state  
10 National Guards and their federal components.  
11 There could be real national security risks.

12 And if I can play this out just one  
13 more way, I think you further have to imagine  
14 how could the FLRA try to enforce that against  
15 DoD. Could the FLRA hold DoD in contempt if it  
16 doesn't threaten to withhold all of a state  
17 National Guard's funding in order to enforce  
18 some minor FLRA order involving a single  
19 federal employee?

20 I think the system the Court should  
21 stick with is the system that's worked for the  
22 last 50 years.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 What entity in the federal -- I can't

1 say in the federal government, that's part of  
2 the question. I mean, what -- what entity is  
3 most like the Adjutant General here?

4 MS. REAVES: I think, for bargaining  
5 purposes, what's most --

6 CHIEF JUSTICE ROBERTS: No, just in  
7 general. If you said this is the closest  
8 analog to the Adjutant General.

9 MS. REAVES: It would probably be the  
10 secretary -- whoever in charge of the  
11 Department of the Air Force or the Department  
12 of the Army.

13 CHIEF JUSTICE ROBERTS: So a full-time  
14 federal employee, officer of the United States,  
15 head of an agency as defined under law?

16 MS. REAVES: Yes. That would be --

17 CHIEF JUSTICE ROBERTS: Well, that's  
18 nothing at all like what they are.

19 MS. REAVES: Well, I think Adjutant  
20 Generals are very unique. They're the number  
21 one military commander in their state, and so  
22 -- and they primarily do act, you know, when  
23 they're not called into federal active-duty  
24 service or when they're not supervising federal  
25 civilian employees, they do primarily act in a

1 state role. But they have these other hats.

2 CHIEF JUSTICE ROBERTS: No, no, I  
3 know. That's why I'm trying to find if there's  
4 anything remotely like them at all.

5 MS. REAVES: I mean, I -- I think the  
6 closest thing, if you're talking about the  
7 federal system, is the head of federal military  
8 departments. That would be the most analogous  
9 thing.

10 CHIEF JUSTICE ROBERTS: But how are  
11 they remotely like it? I mean, nobody would  
12 say, well, let's try to figure out if you're a  
13 federal officer or a federal agency. It's  
14 pretty clear they are. So you've got nothing  
15 that's remotely like them, I gather.

16 MS. REAVES: I -- I don't think so.  
17 They are really unique. I mean, I guess  
18 something that's analogous are individual  
19 members of state National Guards. They also  
20 have to wear three hats.

21 CHIEF JUSTICE ROBERTS: Yeah, but  
22 you'd never call them an agency.

23 MS. REAVES: No, you wouldn't.

24 CHIEF JUSTICE ROBERTS: There's Agency  
25 Fred. No.

1 MS. REAVES: Mm-hmm. No, you would  
2 not.

3 CHIEF JUSTICE ROBERTS: Okay. Justice  
4 Thomas, anything further?

5 JUSTICE THOMAS: No.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

7 JUSTICE ALITO: Well, if the Adjutant  
8 General is like the Secretary of the Army,  
9 let's say that there is -- that there are  
10 certain Army employees who have the right to  
11 bargain collectively.

12 Presumably, the Secretary of Defense  
13 could order the Secretary of the Army to engage  
14 in that bargaining personally, couldn't --  
15 couldn't he?

16 MS. REAVES: So I think, in that  
17 situation, and that was what I was trying to  
18 get at for what purposes the Chief Justice's  
19 question was asking for the comparison.

20 For the purposes of bargaining  
21 comparison, you know, DoD civilian employees  
22 have bargaining rights. Let's take -- set  
23 aside these state -- state dual-status  
24 technicians. So just normal federal civilian  
25 employees of DoD have bargaining rights.

1           But they usually bargain not with the  
2 head of DoD, they bargain because their units  
3 are set at lower levels with, like, the entity  
4 that controls their base or something along --

5           JUSTICE ALITO: No, they don't  
6 normally do it. But is there any reason why  
7 the Secretary of Defense couldn't say to the  
8 Secretary of the Army, I -- I want you to do  
9 it? Or couldn't the President order that?

10           MS. REAVES: So I think two responses  
11 to that. First, yes, I think that that could  
12 be ordered. But, second, I think, if the  
13 bargaining unit is certified at a lower level,  
14 which is what matters for the purposes of  
15 bargaining before the FLRA, you know, that  
16 person wouldn't be the appropriate person to be  
17 engaging in bargaining, but, of course, the  
18 President could, you know, order that person to  
19 actually go and engage.

20           JUSTICE ALITO: Well, what I'm getting  
21 at is, if the Adjutant General is really a  
22 component of the Department of Defense, are  
23 there any limits on what the -- what the  
24 Secretary of Defense could order the Adjutant  
25 General to do in relation to collective

1 bargaining?

2 MS. REAVES: So I -- I -- I don't  
3 think we've identified any limits. I think  
4 there are enforcement limits. You know, if DoD  
5 were to instruct the Adjutant General to do  
6 something, the enforcement options that DoD  
7 would have would be pulling threat -- federal  
8 funding or federal recognition.

9 They don't have the option to remove  
10 the federal -- the Adjutant General from their  
11 state Adjutant General role, although they  
12 could remove him from his federal role.

13 JUSTICE ALITO: Yeah, they don't have  
14 the -- the authority to order the removal of  
15 the Adjutant General. Could the Adjutant  
16 General be ordered to do what was broached at  
17 one point in this case and that is to apologize  
18 personally to these employees for violating  
19 their rights?

20 MS. REAVES: So I don't think that an  
21 order along those lines would be distinct from  
22 the other types of orders that we've suggested.  
23 You know, if there was a valid basis for that  
24 order and that instruction, you know, that  
25 instruction could come from DoD, but it would

1 be limited to these enforcement options that  
2 DoD has.

3 JUSTICE ALITO: This is a very unusual  
4 scheme, and what you're asking for may have  
5 implications. Why isn't the best solution to  
6 this problem that -- for Congress to step in  
7 and specify what is to be done in this  
8 situation, this arguably sui generis situation?

9 MS. REAVES: I think Congress already  
10 has said what it meant here, and I think the  
11 savings clause is one indication of that.  
12 Fifty years of uninterrupted collective  
13 bargaining, I mean, seven circuits have come  
14 out this way, and Congress has amended the  
15 Technicians Act multiple times in those 50  
16 years.

17 And I think there's every reason to  
18 believe that as long as Petitioners accept the  
19 benefits of dual-status technicians, which are  
20 free federal employees doing their day-to-day  
21 work, they have to accept the obligations that  
22 come along with that and have come along with  
23 it for the last 50 years.

24 JUSTICE ALITO: Do you think that the  
25 savings clause represents congressional



1 adoption of every administrative decision like  
2 the Thompson Field decision that was issued  
3 prior to that point?

4 MS. REAVES: I think it does indicate  
5 adoption of a precedential decision  
6 interpreting terms that are the same under the  
7 executive orders and the same under the Act,  
8 and that's what the Thompson Field decision is.

9 JUSTICE ALITO: How many such  
10 executive decisions or regulations would be  
11 covered by that?

12 MS. REAVES: I'm not sure, Justice  
13 Alito. I'm not sure how many precedential  
14 decisions there were.

15 JUSTICE ALITO: Well, would it be a  
16 large number?

17 MS. REAVES: I think it would be at  
18 least in the hundreds.

19 JUSTICE ALITO: And you think Congress  
20 surveyed all of those and said we want to -- we  
21 want to freeze all of those?

22 MS. REAVES: I don't know what  
23 Congress was thinking, but I do know what  
24 Congress said in the text, and it was that such  
25 decisions would survive the Act's adoption.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Well, Congress did  
4 have its attention drawn to the collective  
5 bargaining aspects of this when they were  
6 creating the carveout for the -- correct?

7 MS. REAVES: That's correct, yes.  
8 When Congress enacted Section 976, it was  
9 explicitly thinking about technician service.

10 JUSTICE SOTOMAYOR: And it knew  
11 because it was told by the National Guards that  
12 they were required to collectively bargain and  
13 also to submit to federal agency supervision of  
14 that process, correct?

15 MS. REAVES: Yes, that's correct.

16 JUSTICE SOTOMAYOR: And they wanted  
17 out of it and they didn't get it, correct?

18 MS. REAVES: That's correct, Justice  
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?  
22 Justice Gorsuch?

23 JUSTICE KAVANAUGH: Of what  
24 significance is DoD's approval of the  
25 collective bargaining agreement, if any?

1 MS. REAVES: DoD's approval does  
2 indicate and confirm that DoD is the relevant  
3 agency for these purposes. I think it's also  
4 helpful because it does indicate that to the  
5 extent there are some sort of concerns that  
6 bargaining might be touching on military  
7 matters in violation of Section 976, DoD can  
8 reject the bargaining agreement outright.

9 So some of the concerns that  
10 Petitioners are raising about DoD being the  
11 right entity to deal with this can be done by  
12 DoD's review process.

13 And I think the third relevance that  
14 that provision has is that it's yet another  
15 indication that it's often not the high-level  
16 agency or the entity at the very top of the  
17 agency who's responsible for the collective  
18 bargaining relationship and complying with the  
19 FLRA on a day-to-day basis.

20 JUSTICE KAVANAUGH: On Justice  
21 Gorsuch's questions about hypothetical schemes  
22 that would be similar in some respects to this,  
23 and I think he asked about would there be any  
24 constitutional limits, I guess I would have  
25 thought there might be, but they're not at

1 issue here and we don't have any constitutional  
2 issues in this case.

3 MS. REAVES: I -- I certainly agree  
4 with that, Justice Kavanaugh. And I took  
5 Justice Gorsuch's question to be a  
6 hypothetical. It's obviously not at issue in  
7 this case. And I think, you know, to the  
8 extent that some of the amici have raised  
9 commandeering problems, you know, Petitioners  
10 have consented. That's very clear. And the  
11 second thing is Petitioners are not  
12 administering a federal regulatory scheme.  
13 Petitioners are just complying with the federal  
14 law.

15 JUSTICE KAVANAUGH: Then two more.  
16 Third, on the role of the states, once Congress  
17 decides that these technicians are going to  
18 have collective bargaining rights, it seems to  
19 me more friendly to the state at that juncture  
20 to have them collectively bargain than to have  
21 the Assistant Secretary of Defense for  
22 Collective Bargaining, hypothetically,  
23 collectively bargain and force the state to  
24 comply with certain conditions without the  
25 state sitting across the table.

1 MS. REAVES: I very much agree with  
2 that, Justice Kavanaugh. I think that not only  
3 is it no way to run a railroad to have DoD  
4 threaten to pull federal funding or federal  
5 recognition to enforce this, it's also not ---  
6 they're also not the ideal party because they  
7 don't supervise dual-status technicians on a  
8 day-to-day basis and they don't hire or fire  
9 them on a --

10 JUSTICE KAVANAUGH: Do you know --

11 MS. REAVES: -- regular basis.

12 JUSTICE KAVANAUGH: -- if Congress was  
13 -- anyone in Congress actually said anything  
14 like that?

15 MS. REAVES: I -- I --

16 JUSTICE KAVANAUGH: If you don't,  
17 that's fine. Yeah, that's fine.

18 MS. REAVES: Yeah, I don't think  
19 anything in Congress --

20 JUSTICE KAVANAUGH: But they did --  
21 they did consider the collective bargaining  
22 issue, though, because that was -- that was  
23 raised as a concern by the state units or the  
24 state Guard units in the '70s, as I understand,  
25 right?

1 MS. REAVES: That's correct. When 976  
2 was adopted, which was about a year from when  
3 the Reform Act itself was adopted, Congress  
4 really focused in on the technician issue  
5 itself, and there was initially legislation  
6 proposed that would have said that technician  
7 service is like active-duty military service  
8 and you can't bargain over it.

9 And members of the military came  
10 before Congress and raised concerns that that  
11 would hurt relations between technicians and  
12 their immediate supervisors and also raised  
13 concerns that that would hurt military  
14 preparedness. And Congress just explicitly  
15 rejected that with the text of Section 976,  
16 which doesn't carve -- doesn't include  
17 technician service within the barred service.

18 JUSTICE KAVANAUGH: One -- last one.  
19 I'm not aware of states coming to Congress to  
20 seek a change to this scheme recently, but you  
21 would know more than I about that.

22 MS. REAVES: That's correct. There  
23 haven't -- hasn't been anything recent. There  
24 was a cert petition, Lipscomb, that was filed,  
25 I believe, about a decade ago, where a state

1 raised this argument, and the Court denied that  
2 cert petition.

3 JUSTICE KAVANAUGH: I meant to  
4 Congress.

5 MS. REAVES: Oh, to Congress, I'm  
6 sorry. I'm not aware of states raising this  
7 with Congress, no.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Barrett?

11 JUSTICE BARRETT: Ohio says that it  
12 would be impractical and even unlawful for it  
13 to comply with the collective bargaining order  
14 issued in this case and presumably in others as  
15 well, and you dispute that.

16 Would you characterize it as an open  
17 question on which you have the better of the  
18 argument, but there's a risk that Ohio would be  
19 right, or do you think Ohio is just crazy to  
20 say it?

21 MS. REAVES: I think the latter.

22 JUSTICE BARRETT: With all -- with all  
23 respect, of course, to General Flowers.

24 (Laughter.)

25 MS. REAVES: I think the latter,

1 Justice Barrett. I think the Sixth Circuit was  
2 correct. What I take Petitioners to be  
3 complaining about is the portion of the order  
4 requiring them to reinstate union dues  
5 withholding.

6 And what happened is that, although  
7 DoD may be responsible for the withholding, the  
8 Petitioners are responsible for having on hand  
9 and filing the forms necessary for that. So  
10 what Petitioners did in this case is they filed  
11 forms canceling dues withholding on behalf of  
12 dual-status technicians. They signed those  
13 forms. And that was something that was not  
14 permitted under the relevant statutes and  
15 regulatory provisions.

16 So I think it's fair that the Sixth  
17 Circuit said, to the extent that Ohio took that  
18 action, which may -- was outside the law, that  
19 they can be required to correct that action.

20 And I think, in any event, though,  
21 that's really a side show in this case, because  
22 Petitioners haven't in any way suggested that  
23 they're unable to comply with the remainder of  
24 the FLRA's orders.

25 And so, to the extent there's some



1 minor thing that on the facts of this case you  
2 might think problematic doesn't in any  
3 undermine -- any way undermine that generally  
4 there aren't a problem with FLRA orders.

5 JUSTICE BARRETT: Well, I mean, I  
6 guess the reason why I ask is that you've  
7 pointed out the real practical problems that  
8 would arise if DoD was the one sitting on the  
9 other side of the bargaining table. And Ohio  
10 says: Well, wait, wait, wait, wait, there are  
11 real practical problems and legal problems that  
12 arise if we're the ones sitting on the  
13 bargaining table because then the FLRA issues  
14 orders that we actually can't carry out.

15 And even if the Sixth Circuit was  
16 right about the order in this case on that  
17 particular issue, can you imagine other things?  
18 I mean, is Ohio right that there would be a  
19 practical problem whichever way you go because  
20 there might be a number of things that are  
21 controlled by DoD regulations that the Ohio  
22 Adjutant General just can't control?

23 MS. REAVES: I'm not aware of  
24 anything. And I actually think the onus is on  
25 Ohio here because we've spent 50 years

1 collectively bargaining. And there are many  
2 court of appeals and FLRA decisions about this.

3 Ohio hasn't been able to identify any  
4 difficulties or any sorts of things that they  
5 couldn't comply with in any of those other  
6 orders.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Jackson?

9 JUSTICE JACKSON: So I just -- I think  
10 I don't really see the federalism or  
11 commandeering concern, and I'm -- I'm worried  
12 that it's because maybe I don't understand what  
13 it is that Adjutant Generals do or what the  
14 federal law is requiring.

15 I -- I thought that by virtue of this,  
16 they weren't subjecting themselves to federal  
17 authority for all purposes in that it wasn't  
18 that they were converting themselves into an  
19 agency sort of writ large in general, and so  
20 all of the things that apply to agencies in the  
21 federal law somehow attach.

22 I thought that the Adjutant Generals  
23 are only subject to the FLRA's authority when  
24 they're acting with that hat on, that is, the  
25 capacity to be the employer of this group of

1 federal employees. Am I right? Isn't there  
2 sort of like really a limited scope of FLRA  
3 authority being exerted here?

4 If -- if they're hiring state people  
5 or if they're supervising state people, the  
6 FLRA is not involved. It's just when this  
7 group of federal employees that everybody  
8 concedes are there are being supervised by this  
9 state officer, must the state officer comply  
10 with the Federal Labor Relations Authority  
11 about collective bargaining? Am I right about  
12 that?

13 MS. REAVES: That's absolutely  
14 correct, Justice Jackson. The state Adjutants  
15 Generals don't have to collectively bargain  
16 over their federal or state military service of  
17 dual-status technicians. And they also don't  
18 have to bargain over anything that implicates  
19 or potentially implicates that from dual-status  
20 technicians' civilian federal service. That  
21 comes from Section 709(f). So you're  
22 completely right.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Mr. Grajales.

2 ORAL ARGUMENT OF ANDRES M. GRAJALES

3 ON BEHALF OF THE UNION RESPONDENT

4 MR. GRAJALES: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 A ruling in favor of the union here is  
7 not going to affect any other aspect of the  
8 Petitioners, nor is it going to affect any  
9 other state entity. The scheme is completely  
10 unique for both technicians but also for the  
11 National Guard.

12 And the authority for that is set  
13 forth in the militia clauses themselves and in  
14 the Technicians Act, and those are where we  
15 also find the limits on that authority.

16 Ultimately, this is a policy  
17 disagreement that Ohio can take to Congress,  
18 but Congress as it stands today understood the  
19 matter to be settled. They understood  
20 Adjutants General and the state National Guards  
21 to be covered. And that is the Thompson Field  
22 decision, which was a definitive decision. The  
23 very first question that was answered in that  
24 case was whether the order in that case could  
25 be applied to the Adjutant General and the

1 state National Guard.

2           And we then have to look at the  
3 context, which is what 7135 requires, to see  
4 that that carried forward to the FLRA. And I  
5 just want to get into one more thing, which is  
6 Petitioners now concede, A, that the civilian  
7 technicians are federal employees, B, that they  
8 have bargaining rights, and, C, that the FLRA  
9 could certify units on a regional basis, which  
10 is what the FLRA has done, in essence, using  
11 its authority under 7112 of the statute.

12           And they also fight against, they say  
13 they can do that, but they can't redress  
14 bargaining obligations, that has to be DoD.  
15 But, really, what they're saying is it's now  
16 just a question of degree, and that bargaining  
17 at DoD doesn't work for the reasons you've  
18 heard already, but it's inconsistent with the  
19 statutory scheme.

20           And the one thing I want to point out  
21 is, if bargaining were moved to DoD, it would  
22 render parts of the statute inoperative. Under  
23 709(d) and 709(e) and 709(f), the Technicians  
24 Act gives day-to-day supervision over working  
25 conditions and conditions of employment to the

1 Ohio Adjutant General.

2 Under 7121 of the statute, a  
3 negotiated grievance procedure must have  
4 arbitration and that arbitration must be  
5 binding. If we go to -- if the union goes to  
6 arbitration with DoD, but DoD can't issue an  
7 order to the Adjutant General, that arbitration  
8 becomes advisory, and that is inconsistent with  
9 the statute.

10 And I'd be happy to take any  
11 questions.

12 CHIEF JUSTICE ROBERTS: Well, you say  
13 it becomes advisory, but as -- what is the  
14 limit under your theory as to what the  
15 Department of Defense can order the state  
16 National Guard to do?

17 MR. GRAJALES: Well, the outer limit  
18 is unclear, but what we can say is that if they  
19 can't -- under 709(f) and 709(d), the Adjutant  
20 General has authority to suspend, to discharge,  
21 to do any number of things that directly affect  
22 technicians' civilian aspects of employment.  
23 If the statute leaves that to the Adjutant  
24 General, then that poses a problem with the  
25 authority of DoD to issue an order.

1           And if we go to arbitration with DoD,  
2 we say we -- say the union gets a favorable  
3 arbitration award on a suspension, and an  
4 arbitrator says that five-day suspension that  
5 was based on a civilian incident should be  
6 overturned and should be rescinded and taken  
7 out of a technician's record.

8           CHIEF JUSTICE ROBERTS: Well, I guess  
9 what concerns -- and maybe my perception of  
10 it's wrong -- but my concern, the Adjutant  
11 General is being treated as an agency, the idea  
12 is you can't be treated as half an agency, and  
13 if they're treated as all an agency, their  
14 character as a state entity is essentially  
15 gone.

16           MR. GRAJALES: We would not agree with  
17 that. This is a very unique and very limited  
18 scenario where they're acting as a federal  
19 actor. They're wielding federal power.  
20 They're supervising federal employees. So  
21 they're not acting with their state hat on.

22           JUSTICE SOTOMAYOR: So --

23           JUSTICE GORSUCH: If I -- oh, I'm  
24 sorry.

25           JUSTICE SOTOMAYOR: Thank you. I --

1 I'm trying to look at what the -- the Board did  
2 below and what the state agency, the Guard, was  
3 arguing. Below, I'm not sure why they're  
4 collecting the forms that say deduct my union  
5 dues, because I thought it was the federal  
6 government who paid the dual citizens' salary.

7 MR. GRAJALES: So that just  
8 strengthens our argument that the scheme as it  
9 stands today, it ain't broke. What it  
10 demonstrates is how the Technicians Act  
11 operates in conformity -- or how the statute  
12 operates in conformity with the Technicians  
13 Act. And how it works in practice is those  
14 forms are given to the Guard and then they are  
15 processed, and then the dues are -- through DoD  
16 and the dues are with -- actually withheld in  
17 the salary --

18 JUSTICE SOTOMAYOR: By DoD?

19 MR. GRAJALES: -- by DoD.

20 JUSTICE SOTOMAYOR: But the only thing  
21 is that the Guard collects the form for the  
22 government?

23 MR. GRAJALES: That has always been  
24 the case. And -- and to that point --

25 JUSTICE SOTOMAYOR: All right. Now --



1           MR. GRAJALES:  -- we don't agree with  
2           their --

3           JUSTICE SOTOMAYOR:  -- they also tried  
4           from what I understand -- they'll probably take  
5           umbrage at me calling this -- they tried to  
6           union-bust because they said they were no  
7           longer going to collectively bargain over  
8           certain terms of employment, correct?

9           MR. GRAJALES:  That's correct.

10          JUSTICE SOTOMAYOR:  And what the  
11          agency then said is, uh-uh, that's part of  
12          collective bargaining.  Those are terms that  
13          have to be, were, and should continue to be  
14          collectively bargained, correct?

15          MR. GRAJALES:  That's -- yes.

16          JUSTICE SOTOMAYOR:  Merit  
17          promotions --

18          MR. GRAJALES:  As I understand the  
19          question, what they repudiated the FLRA found  
20          they were required to bargain over, and they  
21          were required to abide by mandatory terms of  
22          the collective bargaining agreement.

23          JUSTICE SOTOMAYOR:  So they were  
24          basically saying to the Department of the Army,  
25          yes, we're giving you the opportunity to hire

1 our employees, but you have to collectively  
2 bargain with them. And they were saying, eh, I  
3 don't really want to, so I won't.

4 MR. GRAJALES: Well --

5 JUSTICE SOTOMAYOR: I'm going to keep  
6 them. I'm going to employ them. I'm not going  
7 to pay them. But I'm not going to do what I  
8 promised to do when I took them. I'm not going  
9 to collectively bargain with them.

10 MR. GRAJALES: Yes, and that's a  
11 function of the designation, again, to go back  
12 to that. That's the answer here, is the  
13 Technicians Act. The Technicians Act creates a  
14 split scheme, and it's part of the National  
15 Guard. And that was the choice that Congress  
16 made when it made these employees federal  
17 civilian employees. And Congress certainly  
18 knew that they were bargaining with Adjutant  
19 Generals. It's in the record. I mean, that --  
20 Thompson Field is in and of itself unique in  
21 that it was entered into the congressional  
22 record. So we don't really need to look to  
23 other decisions or other terms to determine  
24 what Congress intended here.

25 JUSTICE GORSUCH: Counsel, though --

1 JUSTICE SOTOMAYOR: Sorry. Entered  
2 into the record -- I'm sorry.

3 JUSTICE GORSUCH: No, please.

4 JUSTICE SOTOMAYOR: Just entered into  
5 the record when?

6 MR. GRAJALES: The congressional --  
7 the Thompson Field decision was entered into  
8 the congressional record when Congress was  
9 considering and debating the ban on military  
10 unions in 976. It was deliberately put into  
11 the record. And there's a great deal of  
12 testimony, which we refer to in our brief,  
13 where not only is the Guard or representatives  
14 of the Guard complaining and asking to be  
15 relieved of their bargaining obligations under  
16 the executive order, union representatives are  
17 also explaining to Congress how that bargaining  
18 scheme works. And --

19 JUSTICE GORSUCH: Counsel, I'm sorry  
20 to interrupt, but I just want to make sure I  
21 understand your -- your argument both -- to  
22 both of my colleagues here.

23 So the Adjutant General of Ohio is a  
24 federal agency to the extent -- sometimes, to  
25 the extent that he's dealing with dual-status

1 technicians in their civilian capacity?

2 MR. GRAJALES: That is our argument.  
3 However, I would limit it even further, which  
4 is --

5 JUSTICE GORSUCH: But he's not -- he's  
6 not a federal agency for other purposes?

7 MR. GRAJALES: Right. Only for this  
8 limited -- limited purpose of dealing with the  
9 civilian aspects of technicians' employment.

10 JUSTICE GORSUCH: Okay.

11 MR. GRAJALES: And that is the --

12 JUSTICE GORSUCH: Now, when I turn to  
13 those definitions in Section 105 -- 5 U.S.C.  
14 105, I think, is what you -- you pointed to, I  
15 don't see that -- that kind of distinction that  
16 he's -- that there can be agent -- executive  
17 agencies sometimes, that they're evanescent,  
18 that they are -- they occasionally pop up and  
19 then they disappear.

20 And the other thing I don't see is --  
21 in the definition of 105, it speaks of the  
22 executive departments from 101, but it -- it  
23 doesn't mention 102, which are the military  
24 departments. What do we do about that?

25 MR. GRAJALES: Well, the military

1 departments, I don't -- we don't believe that's  
2 a question here -- are by their own -- I think  
3 it's 10 U.S.C. 111 --

4 JUSTICE GORSUCH: Yeah, 10 --

5 MR. GRAJALES: -- think that they are  
6 --

7 JUSTICE GORSUCH: -- 10 U.S.C.  
8 suggests they are, but --

9 MR. GRAJALES: It says that they are.

10 JUSTICE GORSUCH: Yeah. Right. And  
11 105 says they are in -- in 5 U.S.C. So what do  
12 I do about that?

13 MR. GRAJALES: You have to read those  
14 together. I don't -- we don't agree that 105  
15 says they are not. They are --

16 JUSTICE GORSUCH: No, it leaves that  
17 impression, though, because it includes 101,  
18 103, 104, but it doesn't include 102, right?

19 MR. GRAJALES: But it includes the  
20 Department of Defense --

21 JUSTICE GORSUCH: Right, but it  
22 doesn't --

23 MR. GRAJALES: -- which is an  
24 executive department, and --

25 JUSTICE GORSUCH: In 101. But the

1 military departments in 102 are not included.  
2 I -- I -- I see the tension. I do. And I see  
3 your point that 10 U.S.C. should control over 5  
4 U.S.C. I'm just wondering why.

5 MR. GRAJALES: Because it's the only  
6 way that it makes sense, is if you read those  
7 statutes together, Congress intended for the  
8 Department of Defense to be composed of  
9 Department of the Army and the Department of  
10 the Air Force --

11 JUSTICE GORSUCH: All right.

12 MR. GRAJALES: -- and which they  
13 become agencies through that -- through that  
14 mechanism.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 Justice Gorsuch, anything further?

20 No?

21 Justice Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: Aren't -- just in  
24 response quickly to Justice Gorsuch's point  
25 with respect to 101 and 102, I thought that

1 what was happening there was -- was the fact  
2 that the Arm -- the Departments of Air Force  
3 and Army used to be outside of DoD, Congress  
4 brought them in, and then arrangements were  
5 made to make clear that they were now inside  
6 DoD, the military departments are a part of DoD  
7 right now.

8 And there may be other statutes in  
9 which they are referenced separately, which is  
10 why you have 102, but --

11 MR. GRAJALES: I confess and I  
12 apologize that --

13 JUSTICE JACKSON: Yes.

14 MR. GRAJALES: -- I don't know the  
15 history --

16 JUSTICE JACKSON: I see.

17 MR. GRAJALES: -- but I agree with the  
18 conclusion that that is what they did.

19 JUSTICE JACKSON: Yes. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 MR. GRAJALES: Thank you.

23 CHIEF JUSTICE ROBERTS: Rebuttal,  
24 General Flowers?

25

1                   REBUTTAL ARGUMENT OF BENJAMIN M. FLOWERS  
2                   ON BEHALF OF THE PETITIONERS

3                   MR. FLOWERS: Thank you, Mr. Chief  
4 Justice. I have just one quick point and then  
5 two larger points.

6                   The quick point responds to Justice  
7 Alito's question about the single decision and  
8 what do we make of that. This Court in  
9 Department of Interior v. FLRA looked at one of  
10 those decisions by the Assistant Secretary, and  
11 it said, basically, one decision is worth  
12 virtually nothing. That's 526 U.S. at page 95.

13                   Now for the two bigger points. The  
14 first and the most fundamental is that I think  
15 what this argument shows, what the briefing  
16 shows, is that the only way you get the  
17 Petitioners into the definitions here is to  
18 fight the text. There's just no way to get  
19 there.

20                   Now the Authority says you look to  
21 709(d) and we're designees. That's true, but  
22 why does it matter? Why does a designee become  
23 an agency under Title V? And let's also keep  
24 in mind that the relevant definitions here, the  
25 Title V definitions, are not part of the Reform



1 Act. The Reform Act incorporates them, but the  
2 Title V definitions apply throughout Title V.

3 So there were questions about  
4 consequences. Think of the other entities that  
5 might qualify as agencies under their theory.  
6 This Court in Maryland v. United States said  
7 that state militias, even though they care for  
8 equipment on behalf of the government, do not  
9 thereby become the federal government. I think  
10 that may go out the window.

11 What do we do with federal employees  
12 who are all agents of the federal government?  
13 Are they now federal agencies for purposes of  
14 Title V? What about the state actors who run  
15 our employment systems as agents of the federal  
16 government? Are they now federal agencies for  
17 purposes of Title V? I can't see why the  
18 answer would be no.

19 So, other than just an ad hoc decision  
20 that's good for this particular context and  
21 this particular case, there's just no way to  
22 read us into the Act.

23 And that brings me to my second good  
24 point. There's no reason to fight the text so  
25 hard. The Defense Department can handle this,

1 and it's, in fact, better positioned to handle  
2 this. First, they have control over many of  
3 the issues with respect to which the  
4 technicians may wish to bargain and with  
5 respect to which the Authority may wish to --  
6 to -- to make orders.

7 I think there was a suggestion that we  
8 might be crazy for saying that we would violate  
9 the law by -- by reinstating dues. I might be  
10 crazy but not for that reason. We would have  
11 to break into the federal computer system and  
12 reinstate the dues ourselves because we do not  
13 actually withhold the dues. The federal  
14 government does.

15 In addition to the control they have,  
16 there's no reason to think we're going to spar  
17 with the Department of Defense. That's just  
18 not the way it goes. We do follow National  
19 Bureau -- Bureau regulations, but then you  
20 might ask -- I think Justice Kavanaugh asked  
21 this -- well, why does Ohio care then, why are  
22 you even here?

23 Well, here's my answer, is that when  
24 we work through the Department of Defense or  
25 when the Authority has to go against the

1 Department of Defense, we have the Defense  
2 Department and the President as Commander in  
3 Chief as a buffer, and if they see what's going  
4 on and say, no, if you order that, it's going  
5 to interfere with the military interests of the  
6 United States, A, the FLRA is probably going to  
7 take that seriously when deciding what to --  
8 what to order or what to request, and, B, if  
9 somehow the Authority does order the President  
10 to do something that is contrary to military  
11 interests, there may well be a situation where  
12 the President's in court saying you cannot  
13 command us to do that. You cannot make us  
14 withhold all the federal recognition or funding  
15 from the state guards.

16 So, if there are no further questions,  
17 we simply ask that you reverse the Sixth  
18 Circuit.

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

21 (Whereupon, at 12:42 p.m., the case  
22 was submitted.)

23  
24  
25

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<p style="text-align: center;"><b>1</b></p> <p><b>10:04</b> [2] 1:17 4:2  <b>106</b> [1] 52:21  <b>106(a)</b> [1] 21:7  <b>11</b> [1] 1:13  <b>11:00</b> [1] 56:9  <b>15</b> [1] 54:22  <b>1871</b> [1] 41:23  <b>1913</b> [1] 28:4  <b>1950s</b> [2] 5:12 9:18  <b>1952-54</b> [1] 12:23  <b>19th</b> [1] 42:17</p> <hr/> <p style="text-align: center;"><b>2</b></p> <p><b>20</b> [1] 3:8  <b>200</b> [1] 12:4  <b>2016</b> [1] 4:12  <b>2023</b> [1] 1:13  <b>20th</b> [1] 47:23  <b>2126</b> [1] 55:2  <b>2126(a)</b> [9] 4:16,20,25 10:16 32:10  52:12 54:9 55:16,21  <b>2126(c)</b> [2] 32:13,18  <b>22-96</b> [1] 4:4</p> <hr/> <p style="text-align: center;"><b>3</b></p> <p><b>3</b> [7] 21:15 52:5,10,13,18,20 53:5  <b>31</b> [1] 3:11</p> <hr/> <p style="text-align: center;"><b>4</b></p> <p><b>4</b> [1] 3:4</p> <hr/> <p style="text-align: center;"><b>5</b></p> <p><b>54</b> [1] 3:14  <b>59</b> [1] 52:22</p> <hr/> <p style="text-align: center;"><b>A</b></p> <p><b>a.m</b> [3] 1:17 4:2 56:9  <b>ability</b> [1] 56:3  <b>able</b> [5] 6:3 7:21 13:10,23 17:2  <b>above-entitled</b> [1] 1:15  <b>abrogate</b> [10] 4:23 5:2 6:8,12 22:  13 35:1 37:11 47:13 49:6 56:1  <b>abrogated</b> [2] 4:20 21:11  <b>abrogates</b> [5] 10:16 21:16 52:22  54:10 55:2  <b>abrogating</b> [3] 31:16 41:8 49:10  <b>abrogation</b> [20] 16:17 21:5 23:23  24:14 33:5,9 41:12 46:9,11 47:6  50:12 51:20 52:1,3,7,16,18 53:8,  13 54:17  <b>abrogations</b> [1] 31:21  <b>Absolutely</b> [3] 15:24 35:18 44:9  <b>access</b> [1] 30:16  <b>accident</b> [1] 45:12  <b>acknowledged</b> [1] 11:2  <b>across</b> [1] 43:10  <b>act</b> [9] 7:3 9:16 12:23 18:13 28:5  32:3 35:21 36:3 46:16  <b>acted</b> [1] 12:12  <b>acting</b> [1] 25:24  <b>action</b> [4] 32:11 52:25 55:3,12  <b>actions</b> [4] 30:17 32:9 53:2 55:3  <b>acts</b> [2] 9:16 12:22  <b>actual</b> [1] 55:18</p>	<p><b>actually</b> [11] 10:12 14:17,23 30:11  35:16 36:1 38:24 41:3 46:17 52:  12 53:5  <b>Adding</b> [1] 45:3  <b>additional</b> [6] 28:1,2,2 43:18 45:3,  9  <b>Address</b> [6] 13:1 17:13 21:23 22:  15,21 50:14  <b>addressed</b> [5] 10:15 14:20 18:17,  19 27:14  <b>addressing</b> [3] 19:13 40:24 51:23  <b>adopt</b> [1] 6:3  <b>adopted</b> [1] 9:2  <b>adopting</b> [1] 31:24  <b>advantage</b> [1] 13:25  <b>adversary</b> [1] 12:22  <b>advisory</b> [1] 24:9  <b>affected</b> [1] 24:24  <b>affecting</b> [1] 25:5  <b>affirmative</b> [3] 17:15 33:15 48:12  <b>agree</b> [6] 10:14 11:8 17:23 39:22  44:14 48:20  <b>agreed</b> [1] 19:25  <b>agrees</b> [1] 35:17  <b>ahead</b> [7] 10:20 27:12 36:15,17 45:  22,23,24  <b>AIMEE</b> [3] 2:4 3:6 20:19  <b>akin</b> [2] 12:13 41:21  <b>Alito</b> [2] 19:6 29:19  <b>allow</b> [1] 21:23  <b>already</b> [2] 22:20 32:3  <b>alternative</b> [3] 18:11 39:5 49:17  <b>altogether</b> [1] 36:20  <b>ambiguous</b> [1] 42:14  <b>Amendment</b> [11] 14:6,7,11,17,24  15:8,10 47:4,8 48:12,15  <b>amici</b> [1] 51:11  <b>amicus</b> [4] 2:6 3:7 20:20 30:20  <b>among</b> [1] 41:14  <b>analogize</b> [1] 8:5  <b>analogizing</b> [1] 39:18  <b>analogy</b> [2] 9:23 41:19  <b>analyses</b> [1] 34:21  <b>analysis</b> [6] 9:4 11:7 14:17 26:1,4  33:9  <b>announced</b> [1] 40:14  <b>another</b> [6] 18:10 19:3 22:25 34:  21 36:8 37:14  <b>answer</b> [8] 14:19,19 18:5 24:13,17  27:22 52:7 54:10  <b>answering</b> [1] 10:11  <b>antecedent</b> [1] 24:18  <b>anybody</b> [1] 39:20  <b>anyway</b> [1] 16:13  <b>apart</b> [2] 28:1,3  <b>appeals</b> [2] 15:4,5  <b>APPEARANCES</b> [1] 2:1  <b>appears</b> [1] 48:20  <b>applicable</b> [3] 32:5 43:17 46:19  <b>applied</b> [4] 15:12 25:17 28:22 30:  23  <b>applies</b> [9] 7:20,24 14:24 15:10 23:  8 26:1 33:9 34:21 37:25  <b>apply</b> [15] 6:3,10 7:22 15:8 19:24</p>	<p>21:14 26:7 33:10 35:24 38:3,24  40:19 43:10 50:6 54:14  <b>applying</b> [1] 6:18  <b>approach</b> [1] 49:18  <b>approaching</b> [1] 54:12  <b>appropriate</b> [6] 6:9 10:24 16:24  18:3 22:21 30:11  <b>Aqueduct</b> [1] 15:2  <b>areas</b> [1] 45:11  <b>aren't</b> [4] 26:24 37:13 45:11 51:8  <b>argued</b> [2] 48:10,11  <b>argument</b> [29] 1:16 3:2,5,9,12 4:3,  8 5:23,25 8:6 10:22 13:1 14:25 15:  4,13 18:16,18,19 19:15,19,22 20:  19 22:2 26:6 31:6 33:3 48:10 51:6  54:5  <b>arguments</b> [3] 11:3 36:22 54:22  <b>Article</b> [1] 6:7  <b>articulating</b> [1] 41:4  <b>aside</b> [1] 37:21  <b>aspect</b> [1] 7:18  <b>assembly</b> [2] 5:12 9:18  <b>asserting</b> [1] 17:17  <b>assigned</b> [1] 4:13  <b>Assistant</b> [1] 2:4  <b>associated</b> [1] 7:8  <b>assume</b> [18] 6:15,16 10:11 16:10,  12,13,16 17:7,9,18 18:3 22:3,10  33:14 34:6 35:22 36:20 42:7  <b>assumed</b> [4] 10:24 16:21 17:5 22:  8  <b>assumes</b> [2] 17:22 33:25  <b>assuming</b> [5] 12:20 18:16 22:1 38:  20 42:22  <b>assumption</b> [6] 10:10,22 16:10,  19 20:8 24:12  <b>assumptions</b> [2] 34:13 42:9  <b>attributes</b> [2] 7:2 9:14  <b>authorities</b> [1] 18:6  <b>authority</b> [6] 6:6 8:23 13:9 16:24,  25 26:2  <b>autonomy</b> [6] 5:14 7:19 8:4 29:9  31:19 42:8  <b>availability</b> [2] 5:3 56:4  <b>available</b> [1] 30:8  <b>avoid</b> [2] 22:18 36:20  <b>avoidance</b> [1] 45:8  <b>aware</b> [2] 23:16 24:5  <b>away</b> [1] 40:7</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>back</b> [8] 4:14 11:15 16:8 22:19 28:  4 39:14 42:17 55:11  <b>backdrop</b> [1] 46:7  <b>bakes</b> [1] 34:12  <b>balance</b> [1] 25:7  <b>bandied</b> [1] 41:19  <b>Bankruptcy</b> [4] 21:16 52:6,21,23  <b>Barrett</b> [8] 20:14 31:1 43:4 45:19,  22,24 47:24 54:1  <b>barrier</b> [1] 45:9  <b>based</b> [4] 10:8 24:14 27:1 33:17  <b>baseline</b> [6] 26:10,21 27:25 28:7  29:5 47:17</p>	<p><b>basically</b> [1] 7:4  <b>basis</b> [10] 6:16 23:25 25:10,13 31:  14 38:22 41:15 43:23 45:17 52:10  <b>Bay</b> [1] 25:21  <b>bear</b> [1] 17:21  <b>became</b> [2] 11:18 40:3  <b>becomes</b> [1] 37:14  <b>begs</b> [2] 33:10 50:4  <b>behalf</b> [8] 2:2,8 3:4,11,14 4:9 31:7  54:6  <b>behind</b> [1] 7:1  <b>believe</b> [3] 26:14 27:18,18  <b>believes</b> [1] 5:8  <b>below</b> [7] 4:19 11:4 14:21 18:19,  20 19:1 33:19  <b>belt-and-suspenders</b> [1] 49:17  <b>benefit</b> [1] 46:24  <b>benefits</b> [1] 32:4  <b>besides</b> [3] 18:13 26:7 50:10  <b>best</b> [3] 43:21 46:15 47:20  <b>better</b> [3] 10:21 39:2 46:14  <b>between</b> [1] 40:9  <b>bit</b> [7] 6:16 10:9 22:10,14 24:8 37:  18 42:3  <b>blow</b> [1] 11:5  <b>BOARD</b> [37] 1:4 4:5,13,15,18 5:7,8  21:9,18 31:11 32:7,8,11,12,14,17,  20,22 33:18 36:24 37:18 39:11 43:  10 51:1,9,25 52:17 53:1,2,4,16,21  54:18 55:3,8,10,11  <b>Board's</b> [4] 4:20 21:11,20 48:10  <b>body</b> [1] 6:23  <b>books</b> [1] 55:2  <b>both</b> [8] 7:6,8 8:9 40:12 42:19 44:7  50:22 55:4  <b>branch</b> [1] 36:8  <b>branches</b> [1] 36:4  <b>Breyer</b> [1] 15:7  <b>brief</b> [4] 22:2 30:20 33:20 54:21  <b>briefing</b> [1] 10:9  <b>briefed</b> [4] 19:11 30:7 33:18 41:7  <b>briefs</b> [1] 10:6  <b>broader</b> [1] 13:16  <b>brought</b> [3] 30:16 53:21 55:12  <b>BROWN</b> [25] 2:4 3:6 20:18,19,22  22:5 23:1,13,24 24:5,22 25:16 26:  9,25 27:5,7,18,24 28:11,15,21 29:  2,7 30:2 31:4  <b>burden</b> [3] 17:16,21 48:13  <b>buy</b> [1] 34:14  <b>bypass</b> [1] 33:4</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>called</b> [1] 20:5  <b>came</b> [4] 1:15 18:22 36:2 43:1  <b>cannot</b> [3] 7:12 52:7 53:12  <b>canons</b> [2] 42:12,13  <b>carried</b> [3] 8:11,12,12  <b>carry</b> [1] 8:15  <b>carveout</b> [1] 52:13  <b>Case</b> [50] 4:4 5:3 9:3 10:12 15:2  16:7,20 17:3,8,10,23 18:7,10,20  19:3,13 22:23 23:1,2,6,7,11,14 24:</p>
--	---	---	---

Official - Subject to Final Review

<p>7 25:14 26:17,23 27:1,19 34:19  35:12,15,16,19,25 36:2,21 37:12  39:3,5 41:6,9 48:14,22 51:8 53:7  54:25 56:3,8,9  <b>cases</b> [25] 11:23 12:16 16:23 17:6,  8 19:20 27:13 33:18 34:8,17,18  35:4,6 37:4 38:23 39:24 41:11 42:  16,23 43:24 44:8 47:18 49:22,24  53:4  <b>cause</b> [1] 52:25  <b>CENTRO</b> [2] 1:7 4:5  <b>century</b> [4] 20:24 22:19 42:17 47:  23  <b>cert</b> [6] 11:2 23:15,22 37:9,24 49:  11  <b>certain</b> [3] 7:2 25:4 55:19  <b>certainly</b> [4] 23:6 30:6 35:18 44:8  <b>certiorari</b> [2] 11:2 54:9  <b>change</b> [1] 5:20  <b>changes</b> [1] 17:20  <b>channels</b> [1] 21:8  <b>CHIEF</b> [30] 4:3,10 8:5 9:9,21 10:3  14:3,5 15:3 19:4 20:13,18,22 27:3,  10,12,20 28:18,24 29:18 31:1,5,8  43:3,5 44:14 45:25 53:22 54:1 56:  7  <b>choose</b> [1] 51:12  <b>chooses</b> [1] 23:24  <b>Circuit</b> [17] 4:19 11:6 14:12 15:11  26:14 33:19 34:6 37:9 38:2 47:25  48:5,18 49:4 50:11 55:1,19,19  <b>Circuit's</b> [2] 49:2 51:20  <b>circumstance</b> [1] 17:18  <b>circumstances</b> [4] 6:9 10:24 33:  25 39:7  <b>cited</b> [2] 17:8 41:7  <b>citizens</b> [1] 13:21  <b>claim</b> [1] 21:9  <b>claiming</b> [2] 39:20 51:10  <b>claims</b> [7] 21:10,18 32:20 47:23  48:22 50:10 52:17  <b>clarify</b> [1] 49:18  <b>clarity</b> [1] 45:5  <b>class</b> [1] 32:13  <b>clear</b> [75] 4:24 6:10,11 19:23 21:6  25:9,14,16 31:10,14,15,18,20,22  33:8,11,16,24 34:1,3,10,13,22 35:  1,13,24 37:11,25 38:20,21 39:9,15  40:8,15,19,22 41:4,7,13,15 42:2,  18,24 43:2,6,8,9,12,18,19,24 44:4,  17 45:3,17 46:6,8,8,9 47:11 49:10,  21,23 50:3,11,24 51:21 52:4 53:  11 54:12,14,23,24 55:22,22  <b>clearly</b> [4] 20:8 22:13 32:8 51:24  <b>client</b> [1] 37:9  <b>close</b> [3] 4:25 43:1 55:23  <b>closely</b> [1] 14:14  <b>closest</b> [1] 23:1  <b>Co</b> [1] 29:8  <b>Code</b> [2] 21:16 52:22  <b>coequal</b> [2] 36:3,4  <b>come</b> [5] 25:10 33:11 40:9 42:19  49:7  <b>comes</b> [2] 4:25 39:25</p>	<p><b>comment</b> [2] 22:2 33:3  <b>common</b> [9] 6:23,24 7:4,9 14:12  15:15,15 35:2 48:2  <b>Commonwealth</b> [3] 21:21 30:12  51:7  <b>compact</b> [1] 26:16  <b>comparable</b> [1] 5:14  <b>compared</b> [1] 29:10  <b>complexities</b> [1] 48:1  <b>complicated</b> [1] 53:9  <b>conceded</b> [1] 49:19  <b>conceding</b> [1] 37:25  <b>concept</b> [1] 54:17  <b>concern</b> [3] 24:12 29:10,17  <b>concerned</b> [4] 5:25 10:7 16:3 39:  1  <b>concession</b> [2] 38:9,13  <b>conclude</b> [1] 25:24  <b>conclusion</b> [1] 36:2  <b>confer</b> [2] 8:19 9:14  <b>conflict</b> [2] 21:22 31:22  <b>Congress</b> [46] 4:12,14 6:2,6,8 7:1  9:14 15:21,22,24 16:3 21:17 25:  24 26:2,16,17 31:10,19 32:12,21  36:10,25 37:5,10 42:4,7 43:11 44:  3,6,9,11,12,15,19,22 45:12 46:4,  10,13,21 47:1,4,5,16 52:9 55:6  <b>Congress's</b> [5] 8:23 31:23 37:15  43:7,14  <b>congressional</b> [1] 46:7  <b>consent</b> [4] 7:15 12:8 17:10 21:1  <b>consented</b> [1] 20:1  <b>consenting</b> [1] 7:13  <b>consider</b> [3] 23:21,25 39:3  <b>consideration</b> [1] 50:15  <b>considerations</b> [1] 42:21  <b>considered</b> [1] 26:6  <b>consistent</b> [1] 22:6  <b>constantly</b> [1] 36:9  <b>Constitution</b> [10] 8:17,18 18:14  19:11,19 31:12 32:18,21 48:21 53:  18  <b>constitution's</b> [1] 39:6  <b>constitutional</b> [23] 5:12 6:23 9:17  20:5 30:7 31:14 32:10,15,17 37:3  38:23 39:12 43:22 45:8,14 48:22  51:24 52:1,8,11,19 53:3,13  <b>constitutionally</b> [1] 44:10  <b>constraint</b> [2] 44:1,9  <b>construction</b> [1] 54:16  <b>construing</b> [1] 42:14  <b>context</b> [3] 21:14 25:17 53:5  <b>control</b> [1] 50:12  <b>controlled</b> [1] 50:22  <b>controls</b> [1] 15:21  <b>convention</b> [3] 8:11,21,22  <b>corollary</b> [1] 25:19  <b>correct</b> [24] 11:19,20,22 12:2,8,13,  17,18 14:21 15:23 16:1,2 18:17,  18 19:1 22:11,12 24:23 27:16 28:  10,11,20 39:22 55:16  <b>correctly</b> [1] 37:9  <b>couldn't</b> [1] 32:16  <b>Counsel</b> [12] 4:7 11:11 19:4 20:16</p>	<p>26:5 27:9 31:3 36:13 48:25 50:7  54:3 56:7  <b>counter</b> [1] 51:6  <b>counterintuitive</b> [3] 13:7,8 55:6  <b>counties</b> [2] 34:24 35:2  <b>countries</b> [1] 11:22  <b>course</b> [3] 6:7 23:3 26:1  <b>COURT</b> [101] 1:1,16 4:11 5:1,9,10,  19 6:19,20 7:6,12,15,24 8:1 9:2,4,  6,18 10:14,23 11:1,8,9,10 12:7,25  13:10,12,17 14:2,23 15:1,4,5,8,9  16:1,7 17:4,12,22,24 18:20 19:24  20:3,7,9,10,23,24 21:3,3,9,22 22:7  23:3,6,9,9,16,23,24 25:6,21,22 26:  11 28:10,14,20,23 29:2,7,10 30:5,  11 31:9,13,18,20 32:14,20 33:8,20  34:25,25 35:17,24 41:4 42:6 43:  22 44:18,22 45:6 49:7 51:7 54:8,  14 55:11,14 56:3,5  <b>Court's</b> [16] 5:21 21:24 22:19 33:1  34:8,16 35:4,6,8 36:2 38:23 39:24  47:18 49:22,24 55:21  <b>courts</b> [29] 4:17 5:17 6:18,19,20 7:  6 12:1,24 13:5,13,22 20:2 21:23  22:25 26:13 28:25 29:25 32:16 35:  19,22 36:9 42:1 44:1 45:2,11 47:  19,21,22,23  <b>covenant</b> [1] 26:17  <b>cover</b> [2] 8:22 32:18  <b>CPI</b> [3] 5:6 11:1,5  <b>CPI's</b> [2] 5:16 7:23  <b>create</b> [3] 8:19 47:10,13  <b>created</b> [1] 32:12  <b>creates</b> [1] 32:10  <b>creating</b> [1] 50:8  <b>creation</b> [1] 36:25  <b>critical</b> [1] 4:13  <b>crystal-clear</b> [2] 44:6,20  <b>curiae</b> [3] 2:6 3:8 20:20  <b>curious</b> [2] 46:1 53:15  <b>currently</b> [1] 46:4  <b>curtail</b> [1] 31:19</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> [3] 1:12 2:5,8  <b>dating</b> [2] 22:19 42:17  <b>day</b> [1] 37:14  <b>DE</b> [2] 1:7 4:5  <b>dealt</b> [1] 41:23  <b>decades</b> [1] 40:21  <b>decide</b> [8] 7:20,21 23:25 26:23 30:  5,12 33:4 51:18  <b>decided</b> [3] 10:12 22:20 28:4  <b>decides</b> [1] 55:15  <b>deciding</b> [2] 22:8 23:11  <b>decision</b> [3] 4:22 51:20 55:5  <b>decisions</b> [1] 47:22  <b>defendant</b> [1] 32:9  <b>defendants</b> [1] 32:13  <b>defense</b> [5] 5:4 17:15 33:15 55:18  56:4  <b>defer</b> [1] 37:14  <b>define</b> [1] 29:4  <b>degree</b> [2] 5:13 45:5</p>	<p><b>demanded</b> [1] 45:7  <b>Department</b> [1] 2:5  <b>departure</b> [1] 43:19  <b>depend</b> [1] 9:1  <b>dependent</b> [1] 15:22  <b>depending</b> [2] 25:10,12  <b>derives</b> [1] 21:1  <b>described</b> [2] 25:21 29:8  <b>design</b> [1] 36:3  <b>determinations</b> [1] 44:17  <b>determine</b> [2] 16:19 34:21  <b>determined</b> [1] 40:7  <b>dictates</b> [1] 7:4  <b>differ</b> [1] 41:20  <b>difference</b> [6] 5:23 6:1,6 25:9 40:  1,9  <b>differences</b> [2] 26:19 50:13  <b>different</b> [11] 6:24 7:7,10 8:9 16:  14,15 21:25 25:14 41:17 50:21 52:  23  <b>differently</b> [2] 40:17,18  <b>DIG</b> [3] 50:7,17 54:25  <b>directly</b> [1] 47:21  <b>disclosure</b> [1] 19:20  <b>discomfort</b> [1] 53:7  <b>discourage</b> [1] 51:13  <b>discusses</b> [1] 30:21  <b>discussion</b> [5] 23:6 42:13,20,23  52:20  <b>dismissing</b> [1] 48:25  <b>disposition</b> [1] 16:19  <b>distorting</b> [1] 50:4  <b>diversity</b> [2] 14:1 32:6  <b>doctrine</b> [3] 6:23 40:10,25  <b>documents</b> [1] 30:16  <b>doing</b> [6] 32:20 43:11 44:22 45:2,4  47:6  <b>done</b> [5] 16:23 17:24 20:2 44:19  52:11  <b>double</b> [1] 9:4  <b>down</b> [1] 36:2  <b>dragged</b> [2] 11:25 12:7  <b>drastic</b> [1] 31:25</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>earlier</b> [1] 22:7  <b>effect</b> [4] 22:9 32:15 46:20 51:25  <b>effectively</b> [2] 26:23 37:5  <b>either</b> [2] 39:3 55:24  <b>Eleventh</b> [11] 14:5,7,11,17,24 15:8,  10 47:4,8 48:12,15  <b>eliminate</b> [1] 42:8  <b>elsewhere</b> [2] 21:11 35:23  <b>Emadeline</b> [1] 12:16  <b>Emanuel</b> [7] 23:2 28:19,21 36:11  42:19,21 43:1  <b>embedded</b> [1] 49:20  <b>embrace</b> [1] 47:7  <b>emphasize</b> [1] 7:8  <b>enable</b> [1] 46:14  <b>enact</b> [1] 6:3  <b>enacted</b> [1] 4:14  <b>end</b> [3] 22:9 24:7 25:5  <b>ended</b> [1] 23:3</p>
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<p><b>engaged</b> [1] 48:6  <b>enjoys</b> [1] 47:19  <b>enormous</b> [1] 55:5  <b>enough</b> [2] 15:17 39:9  <b>entertained</b> [1] 12:11  <b>entirely</b> [1] 39:10  <b>entities</b> [1] 20:1  <b>entitled</b> [6] 5:8 7:5 22:20 32:23 34:4 37:18  <b>entity</b> [5] 9:15 12:7 23:12,12 55:8  <b>equal</b> [1] 40:10  <b>equally</b> [1] 23:8  <b>especially</b> [2] 32:9 48:19  <b>ESQ</b> [4] 3:3,6,10,13  <b>ESQUIRE</b> [2] 2:2,8  <b>essentially</b> [5] 16:19 29:14 38:22 49:22 53:17  <b>establish</b> [1] 17:17  <b>established</b> [1] 4:12  <b>Estacia</b> [1] 30:21  <b>even</b> [16] 4:25 7:17 9:17 19:23 24:16 35:22 42:23 46:11 49:9 52:4 53:11,15 54:12,14,15 55:7  <b>event</b> [2] 24:9 34:8  <b>Everybody</b> [2] 40:5,14  <b>everyone</b> [3] 32:25 35:17 48:20  <b>evidence</b> [2] 46:12,16  <b>Ex</b> [1] 30:19  <b>exact</b> [2] 14:1 41:4  <b>exactly</b> [3] 13:18 16:4 27:7  <b>example</b> [7] 6:19 7:3 18:6 25:22 34:24 41:7,9  <b>examples</b> [1] 42:20  <b>exceptions</b> [1] 55:20  <b>exclusive</b> [1] 4:17  <b>excuse</b> [1] 5:14  <b>existence</b> [8] 17:3,18 22:15 24:25 25:19 26:21 36:20 40:25  <b>existing</b> [1] 8:17  <b>exists</b> [2] 10:25 25:23  <b>expire</b> [1] 36:24  <b>explain</b> [3] 38:7 52:20 53:12  <b>explore</b> [1] 36:19  <b>expressly</b> [1] 52:13  <b>extends</b> [1] 21:2  <b>extent</b> [6] 8:16 10:10 12:10 24:25 25:3 30:12  <b>extremely</b> [1] 5:20</p>	<p>1 55:4,11  <b>Feeney</b> [1] 17:8  <b>few</b> [1] 41:2  <b>final</b> [1] 6:13  <b>FINANCIAL</b> [2] 1:3 4:4  <b>find</b> [4] 13:10 17:2 34:20 42:17  <b>findings</b> [1] 44:5  <b>findings</b> [1] 24:15  <b>Fine</b> [3] 38:13 45:24 51:17  <b>firmly</b> [1] 48:20  <b>First</b> [31] 4:19 10:4 11:6,9 14:11,16 15:11 19:24 20:11 22:16,22 25:20 33:19 34:6 37:9,17 38:2 41:20 47:25 48:5,18 49:2,4,8,13 50:11 51:19 52:9 55:1,18,19  <b>fiscal</b> [1] 4:14  <b>flooded</b> [1] 32:1  <b>flows</b> [1] 42:3  <b>focused</b> [1] 36:7  <b>foist</b> [1] 43:23  <b>foisting</b> [2] 44:18 45:17  <b>follow</b> [2] 19:10 20:2  <b>following</b> [2] 11:6 28:21  <b>follows</b> [3] 34:10,22 35:14  <b>footing</b> [1] 40:10  <b>footnote</b> [1] 15:2  <b>Foraker</b> [3] 28:5 35:21 36:3  <b>force</b> [2] 46:20 47:2  <b>foreign</b> [2] 14:12 41:21  <b>forfeited</b> [1] 30:4  <b>form</b> [1] 34:15  <b>forum</b> [1] 32:12  <b>forward</b> [3] 8:11,12,12  <b>found</b> [3] 18:12 29:13 35:12  <b>foundational</b> [1] 11:16  <b>founding</b> [1] 41:23  <b>framed</b> [3] 37:10 38:11 44:9  <b>France</b> [1] 11:22  <b>free</b> [1] 34:14  <b>front</b> [1] 56:2  <b>full</b> [1] 30:12  <b>fully</b> [2] 14:20 48:6  <b>functions</b> [1] 42:6  <b>fundamental</b> [1] 40:9  <b>fundamentally</b> [1] 41:17  <b>funny</b> [1] 16:18  <b>further</b> [3] 19:7 29:20 47:20  <b>fuss</b> [2] 43:13,16</p>	<p><b>GORSUCH</b> [18] 17:13 19:9,18 20:12 26:5,22 27:21 33:13,22 35:10 36:12,14,16,18 37:21 38:6,12,16  <b>got</b> [2] 10:21 40:22  <b>governing</b> [2] 12:7 29:15  <b>government</b> [15] 12:21,21 14:10 20:7 21:2 29:11 30:17 32:23 36:10 37:20 41:10,23 45:15 53:6,20  <b>government's</b> [2] 48:2 50:1  <b>governmental</b> [2] 20:1 55:8  <b>governor</b> [2] 5:18 18:8  <b>grant</b> [4] 23:22 36:3 49:13,13  <b>granted</b> [7] 22:24 23:16,19 29:11,12 49:1 54:9  <b>granting</b> [1] 38:14  <b>ground</b> [6] 16:14 18:12 27:15 44:11 48:14 53:7  <b>guard</b> [1] 45:15  <b>guardrail</b> [1] 45:12</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>haled</b> [5] 7:12,13 13:16 28:14 36:9  <b>hanging</b> [1] 53:7  <b>happen</b> [1] 7:25  <b>happened</b> [3] 7:25 9:8 17:9  <b>happening</b> [1] 52:4  <b>happens</b> [1] 52:3  <b>harmful</b> [1] 5:20  <b>HARRIS</b> [75] 2:2,8 3:3,10,13 4:8,10 5:24 6:5,21 8:25 9:11,25 10:13,23 11:14,20,23 12:3,9,14,18 13:2,18 14:4,7,15,22 15:5,24 16:2,9 17:2,19 18:18,24 19:2,16,21 20:17 31:5,6,8 33:2,6 34:12,23 35:15 36:14 37:17,23 38:9,15,18 39:23 40:4,8,23 41:2 43:15 44:7,25 45:20 46:2,15 47:24 48:8 49:15 50:19,24 51:5,14 54:4,5,7  <b>health</b> [1] 4:14  <b>hear</b> [3] 4:3 5:3 56:3  <b>heard</b> [4] 23:10 33:3 55:17,24  <b>held</b> [5] 4:19 5:1,10,11 16:7  <b>help</b> [1] 54:25  <b>hesitant</b> [1] 25:24  <b>higher</b> [1] 44:12  <b>historical</b> [4] 31:13 43:23 45:7,16  <b>historically</b> [3] 11:24 38:23 43:22  <b>history</b> [4] 9:1,2 12:5 42:12  <b>hold</b> [3] 8:4 38:21 44:11  <b>holding</b> [4] 15:7 16:11 23:3 44:13  <b>holdings</b> [1] 15:6  <b>holds</b> [1] 26:14  <b>Holmes</b> [2] 12:5 13:15  <b>Holmes's</b> [1] 12:5  <b>hoop</b> [1] 43:18  <b>hundred</b> [1] 5:10  <b>hypothesis</b> [1] 13:23</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> [4] 7:1 34:13 36:7 44:9  <b>ideas</b> [1] 39:3  <b>ideal</b> [1] 29:14  <b>identify</b> [2] 24:4 54:22  <b>immune</b> [6] 15:15 20:25 32:7,17</p>	<p>34:25 47:8  <b>immunity</b> [132] 4:20 5:8,11,16 6:15,16,17,18,22,24 7:6,9 8:6,7 9:12,24,24 10:17,25 11:4 13:4,5,12,24,24 14:11 15:16,19,23 16:6,16,20,21 17:3,15,25 18:12,15 21:1,4,5,11,16,20 22:1,4,13,15,21,25 23:4,7 24:15,19,25 25:4,11,13,18 26:6,13,18,20 27:6 28:2,4,8 29:6 31:16,21,25 32:4,22,24 33:4,12,14,17 34:9,16,20 35:2,3,8,13,18,21,22 36:21 37:6,12,16,19 39:7,17 41:5,6,8,12,16,25 42:1,21,22 44:8,24 45:15 46:5,10,13,24 47:2,17,19 48:3,12,13,21 49:5,6,8,10,20,24 50:1,1,2 52:22 53:5,19 54:19 55:9  <b>impact</b> [1] 17:11  <b>impediment</b> [9] 24:4 37:22,24 38:4,7,10,17,18 44:2  <b>imperative</b> [1] 45:14  <b>implemented</b> [1] 28:5  <b>implements</b> [1] 20:4  <b>implicated</b> [1] 17:14  <b>implication</b> [2] 23:8 44:22  <b>implications</b> [2] 11:12 44:20  <b>important</b> [4] 7:10 9:17 37:2 40:1  <b>impose</b> [1] 45:8  <b>imposed</b> [2] 31:18,20  <b>impossible</b> [1] 24:2  <b>improper</b> [1] 49:12  <b>imprudently</b> [1] 49:1  <b>inappropriate</b> [1] 16:25  <b>INC</b> [1] 1:8  <b>include</b> [2] 21:7 52:24  <b>includes</b> [1] 48:21  <b>including</b> [3] 32:14 39:5 40:6  <b>inconsistent</b> [2] 36:5,10  <b>incorporated</b> [1] 29:13  <b>incorporates</b> [1] 52:21  <b>incorrect</b> [2] 52:6 55:15  <b>independent</b> [1] 24:19  <b>Indians</b> [2] 40:13,17  <b>indicate</b> [1] 21:17  <b>indicated</b> [1] 51:9  <b>indication</b> [1] 47:3  <b>inextricably</b> [1] 50:3  <b>inferences</b> [1] 5:4  <b>infringement</b> [1] 43:13  <b>initial</b> [2] 34:2,3  <b>inquiry</b> [3] 37:10 39:2 43:1  <b>instance</b> [4] 20:11 22:22 25:20 46:23  <b>instances</b> [1] 26:18  <b>instead</b> [2] 35:25 49:1  <b>intend</b> [1] 44:23  <b>intended</b> [4] 21:17 23:17 44:6,24  <b>intent</b> [1] 6:11  <b>interested</b> [1] 18:5  <b>interfere</b> [1] 43:7  <b>interpretation</b> [3] 24:23 36:1 55:16  <b>intertwined</b> [3] 24:11,17 25:12  <b>invasion</b> [1] 8:3  <b>INVESTIGATIVO</b> [2] 1:7 4:6</p>
<hr/> <p style="text-align: center;"><b>F</b></p> <p><b>face</b> [2] 4:24 32:12  <b>fact</b> [17] 4:20 9:6 13:6,14 14:22 19:25 20:4 24:24 30:7 39:12 41:23 47:5,16,19,21 51:13 54:22  <b>factors</b> [1] 24:20  <b>fairly</b> [1] 49:19  <b>far</b> [4] 5:24 8:21 9:23 16:3  <b>favor</b> [4] 10:1 42:15 48:25 53:10  <b>favors</b> [1] 19:19  <b>federal</b> [40] 4:16,21 5:19 6:19 7:6,15 8:1 11:25 12:25 14:2 16:1 19:24 20:3 21:3,4,9,10,19 23:9 28:20,23 32:2,3,5,11,16,19,20 37:7 41:5,10 45:15 46:16,19 47:14,18,21 50:</p>	<hr/> <p style="text-align: center;"><b>G</b></p> <p><b>gave</b> [2] 9:19 55:19  <b>General</b> [7] 2:4 13:15 15:18 29:15 30:22 37:7 55:25  <b>generally</b> [7] 24:22 30:8,16,23 32:5 37:16 46:19  <b>generic</b> [1] 32:13  <b>gets</b> [1] 40:5  <b>getting</b> [1] 49:1  <b>give</b> [6] 9:10,10 15:17 17:6 46:24 48:9  <b>given</b> [10] 12:6,20 28:7 37:4,5,15 40:16 47:25 48:19 53:10  <b>gives</b> [5] 4:16 7:2 20:6 29:5 32:3  <b>giving</b> [1] 53:16</p>		

**invite** [2] 50:21 51:11  
**involved** [1] 9:13  
**involves** [1] 35:20  
**involving** [2] 25:18 27:14  
**ironic** [1] 37:18  
**Ironies** [1] 37:21  
**irony** [1] 39:19  
**Islands** [2] 26:15 28:13  
**isn't** [7] 10:4 14:13 43:25,25 44:20  
 51:7 54:23  
**isolating** [1] 23:23  
**issue** [22] 5:6,9 10:14,15,16,25 11:  
 10,12 14:14,20 21:23 23:17,18,22,  
 25 29:3,24 30:4 32:16 36:20 49:  
 18 50:12  
**issues** [3] 29:16 50:8,15  
**itself** [9] 14:10 15:10 28:25 30:17,  
 24 35:16 39:8,11 45:2  
**IV** [1] 6:7

**J**

**JACKSON** [20] 10:4,13,19 20:15  
 23:19 24:3,10 27:2,4,6,8 31:2 33:  
 21,23 34:18 35:9,11 43:25 44:13  
 54:2  
**Jackson's** [1] 16:9  
**January** [1] 1:13  
**Jencks** [1] 34:23  
**jeopardy** [1] 9:4  
**judicial** [3] 20:10 39:10 52:14  
**jurisdiction** [7] 4:17 14:1 17:11  
 21:8 27:14 32:6 56:2  
**jurisdictional** [3] 5:2 27:15 56:1  
**Justice** [154] 2:5 4:3,10 5:22 6:2,  
 13 8:5 9:9,21 10:3,4,13,19 11:11,  
 14,15,16,16,21,24 12:4,5,10,15,19  
 13:2,14 14:3,5,9,18 15:3,7,20,25  
 16:8,9 17:6,13,14 18:11,21,25 19:  
 4,5,6,7,8,9,10,18 20:12,13,13,14,  
 15,18,22 21:25 22:6,23 23:10,19  
 24:3,10 25:8 26:5,22 27:2,3,4,6,8,  
 9,10,11,12,13,20,21 28:9,12,16,17,  
 18,19,24 29:4,18,18,19,20,21,22  
 30:25 31:1,1,2,5,8 33:2,13,21,22,  
 23 34:18 35:9,10,11 36:12,13,14,  
 15,16,17,18 37:21 38:6,12,16 39:  
 14 40:2,5,13,24 43:3,4,5,25 44:13,  
 15 45:19,21,22,23,24,25,25 46:1  
 47:24 49:3 50:7,20 51:3,11 53:22,  
 22,23,24,25 54:1,1,2 56:7

**K**

**KAGAN** [12] 16:8 17:6,14 19:8 22:  
 6 25:8 28:17 29:4 45:21,23,25 46:  
 1  
**Kavanaugh** [7] 20:13 29:21,22 30:  
 25 49:3 53:24,25  
**key** [1] 45:13  
**kind** [14] 16:18 22:5 23:14 24:6 25:  
 1,6,9,18 26:10 28:1,22 29:8 30:21  
 55:24  
**kinds** [3] 32:9 50:21 55:2

**L**

**language** [5] 25:2 37:11 46:17 47:

12 53:11  
**large** [3] 6:22,23 37:2  
**larger** [1] 17:13  
**last** [1] 41:3  
**law** [21] 5:19 6:23,24 7:4,20,21,22  
 8:1,2 14:2,12 15:15 21:10,19 25:4  
 30:12 35:2 41:25 48:2 55:4,4  
**lawmaker** [2] 7:18,19  
**laws** [4] 18:14 30:15 32:5 46:19  
**lawsuits** [4] 50:21,21,25,25  
**layer** [1] 45:3  
**layers** [1] 50:8  
**lead** [5] 13:7,13,19 25:14 33:23  
**leading** [1] 4:13  
**leads** [1] 26:12  
**least** [10] 17:15 18:9 23:20 28:6 33:  
 7 34:24 42:6 43:23 50:13,15  
**left** [2] 14:23 15:1  
**legal** [5] 24:3 37:22,24 38:17,18  
**legislative** [1] 29:11  
**legislature** [1] 36:8  
**level** [7] 26:10 27:23,25 28:7,7,9  
 29:5  
**likely** [3] 26:4,10,25  
**likewise** [1] 21:14  
**line** [2] 12:16 48:5  
**linked** [1] 50:3  
**little** [7] 10:6,9 22:10,14 24:8 37:  
 18 48:17  
**local** [3] 6:20 29:10,16  
**long** [4] 6:9 12:16 21:21 48:5  
**longstanding** [2] 15:11 42:12  
**look** [6] 14:14 24:8 39:4 42:16 45:  
 10 48:23  
**looked** [6] 12:12 28:10 35:25 50:  
 17,23 52:24  
**looking** [3] 25:1 38:16 43:21  
**lose** [1] 16:13  
**lost** [1] 46:3  
**lot** [5] 13:13 19:11 34:12 43:15,16  
**lots** [1] 53:16  
**Louisiana** [1] 11:17  
**lower** [2] 21:23 29:25

**M**

**made** [3] 9:19 11:3 24:15  
**MANAGEMENT** [2] 1:3 4:4  
**mandamus** [1] 30:22  
**manner** [1] 6:4  
**many** [7] 5:1 9:19 11:8 39:4 41:14  
 42:17 53:17  
**Mariana** [1] 26:15  
**Marie** [1] 41:6  
**MARK** [5] 2:2 3:3,13 4:8 54:5  
**matter** [5] 1:15 24:11 32:2 38:24  
 51:18  
**mattered** [1] 17:4  
**mattering** [1] 24:8  
**matters** [3] 9:2 29:9 45:13  
**mean** [21] 5:17 7:14,24 10:6,21 12:  
 6 14:18,19 18:2 24:11 28:24 33:  
 17 38:8 39:2,15 43:18 44:14 47:3  
 48:24 49:21 51:17  
**meaning** [4] 9:7 14:10 25:3 39:11

**means** [1] 12:23  
**mention** [4] 18:2 41:13 54:17,18  
**mentioned** [1] 17:6  
**mere** [1] 5:4  
**merits** [1] 19:18  
**might** [3] 26:6,19 48:25  
**Mills** [1] 25:21  
**minimum** [2] 51:22 53:9  
**misapply** [1] 38:2  
**most** [4] 11:23 18:5 21:15 41:19  
**Ms** [57] 20:18,22 22:5 23:1,13,24  
 24:5,22 25:16 26:9,25 27:5,7,18,  
 24 28:11,15,21 29:2,7 30:2 31:4,5,  
 8 33:2,6,22 34:12,23 35:10,15 36:  
 12,14 37:17,23 38:9,15,18 39:23  
 40:4,8,23 41:2 43:4,15 44:7,25 45:  
 19,20 46:15 47:24 48:8 49:15 50:  
 19,24 51:5,14  
**much** [2] 45:4 46:2  
**muddled** [1] 47:20  
**muddy** [1] 47:20  
**mulligan** [1] 48:9  
**municipality** [1] 39:19  
**must** [1] 4:23

**N**

**names** [1] 6:25  
**nation** [1] 41:22  
**nations** [2] 15:22 41:25  
**nature** [2] 21:2 23:14  
**necessarily** [1] 26:12  
**necessary** [4] 22:18 23:5 25:19  
 30:11  
**need** [11] 5:9 10:14 11:10 14:16 15:  
 1,13 29:23 31:10 35:1 45:10 46:  
 19  
**needs** [2] 42:24 46:7  
**never** [6] 18:19,19 29:24 31:18 47:  
 18 50:8  
**Nevertheless** [2] 17:5,22  
**New** [2] 2:2,2  
**nineteen-teens** [1] 40:21  
**Ninth** [1] 26:14  
**nobody** [1] 50:22  
**noncitizens** [1] 13:25  
**none** [2] 11:3 52:24  
**nonetheless** [1] 10:21  
**nor** [2] 31:19 49:19  
**normally** [2] 17:16 45:2  
**Northern** [1] 26:15  
**note** [1] 50:13  
**noted** [1] 33:13  
**notes** [1] 30:22  
**nothing** [5] 4:24 5:3 21:16 54:12,  
 20  
**notion** [1] 8:24  
**number** [2] 4:15 37:4

**O**

**objections** [1] 19:13  
**obtain** [1] 20:7  
**obviously** [2] 8:13 42:9  
**odd** [1] 17:18  
**oddities** [2] 47:10,14

**off-ramps** [1] 39:5  
**officers** [2] 30:18,23  
**officials** [1] 5:18  
**often** [2] 49:16,16  
**Okay** [5] 9:11 12:22 17:7 38:15,16  
**once** [2] 7:1 25:22  
**One** [17] 4:15 5:20 6:13,20 7:11 9:  
 13 13:20 18:15 19:9 27:14 32:23  
 34:14,14 35:15 39:2 41:3,14  
**one-size-fits-all** [1] 31:24  
**ones** [2] 32:10 50:10  
**only** [23] 5:17 7:23 9:3 10:15 12:23  
 13:4,11,12 16:16,20 19:21 20:9  
 21:13 23:25 24:13 25:2 28:4 37:3  
 39:11 46:16 50:20 52:22 54:8  
**open** [6] 14:23 15:1,14 19:12 50:  
 16 51:17  
**opening** [2] 33:20 43:6  
**operate** [1] 46:6  
**operating** [1] 47:16  
**opinion** [8] 24:9 26:14 33:15 34:  
 11 38:5,10,19 49:2  
**opportunity** [1] 46:3  
**opposition** [2] 11:2 37:8  
**oral** [7] 1:16 3:2,5,9 4:8 20:19 31:6  
**order** [2] 4:23 33:7  
**orders** [5] 32:14,16 51:24 52:10,  
 19  
**ordinary** [4] 9:7 35:25 43:20 50:5  
**organic** [3] 7:3 9:15,16  
**organized** [1] 29:12  
**original** [1] 15:7  
**other** [36] 5:18 10:8 11:22 18:2,4  
 19:24 21:13 26:7,24 27:17 29:23  
 31:24 36:25 37:23 38:4,25 39:25  
 42:1,13 45:17 46:18 47:3,7,22 48:  
 9 49:24 50:10,15 51:8 52:5 53:12,  
 16,17,19 55:17,21  
**others** [3] 11:17 27:16 50:9  
**otherwise** [3] 16:7 43:16 50:6  
**out** [8] 6:16 9:5 16:10 23:15 25:7  
 31:16 37:6 42:9  
**outcome** [5] 17:4,12 22:9 23:5 24:  
 8  
**outside** [1] 11:12  
**over** [8] 4:17 8:15 29:9 31:23 42:4,  
 7 48:19,25  
**OVERUSED** [1] 53:18  
**OVERSIGHT** [3] 1:3 4:4,12  
**OWN** [21] 5:17,19 7:6 10:7 11:6,18  
 13:5,13,22 15:6 20:2 21:3 34:7,17  
 35:19,21 44:18 47:2 52:14,15 55:  
 9

**P**

**PAGE** [1] 3:2  
**pages** [1] 54:22  
**papers** [2] 23:15 37:24  
**parsing** [2] 42:23 43:20  
**part** [7] 6:22 7:18 8:23 27:21 32:23  
 37:20 55:9  
**Parte** [1] 30:19  
**participate** [1] 51:9  
**particular** [4] 17:22 24:14 26:18

Official - Subject to Final Review

<p>48:22  <b>particularly</b> [2] 17:18 25:23  <b>parties</b> [3] 18:4,4,9  <b>parts</b> [1] 53:19  <b>party</b> [1] 17:21  <b>pass</b> [2] 8:1 54:15  <b>passes</b> [1] 7:20  <b>past</b> [1] 8:14  <b>pedigree</b> [3] 43:23 45:7,16  <b>Pennhurst</b> [1] 48:15  <b>people</b> [3] 32:24 51:8,9  <b>people's</b> [1] 42:1  <b>perhaps</b> [4] 18:10 30:9 44:23 46:15  <b>PERIODISMO</b> [2] 1:7 4:5  <b>permitted</b> [1] 12:11  <b>person</b> [1] 17:16  <b>petition</b> [1] 49:12  <b>Petitioner</b> [9] 1:5 2:3 3:4,14 4:9 36:19 38:17 49:6 54:6  <b>petitioners</b> [1] 49:16  <b>picture</b> [1] 46:11  <b>place</b> [2] 19:24 22:16  <b>Plan</b> [2] 8:21,22  <b>plausible</b> [1] 33:6  <b>please</b> [3] 4:11 20:23 31:9  <b>plenary</b> [5] 8:23 16:2 26:2 31:23 42:4  <b>point</b> [13] 7:5 8:13 9:22 13:19 16:10 23:22 28:5 29:23 35:16 37:6 44:15 45:6 48:16  <b>pointed</b> [2] 52:5 53:4  <b>pointing</b> [2] 52:17 53:1  <b>points</b> [4] 8:14 41:2 48:1,2  <b>policy</b> [1] 44:16  <b>political</b> [1] 36:8  <b>position</b> [13] 6:21 8:25 9:2 10:1,5,10,20,23 13:3 22:1,5 30:3 51:19  <b>possible</b> [1] 55:3  <b>possibly</b> [3] 22:3 24:13 25:14  <b>posture</b> [1] 16:18 49:3  <b>power</b> [8] 5:3 6:8,9 7:19 16:3 29:11 42:4 43:14  <b>powerful</b> [1] 7:17  <b>powers</b> [3] 31:23 43:7 53:17  <b>precedent</b> [7] 13:6 15:11 16:22 24:1 34:7 48:6 50:22  <b>precedents</b> [3] 11:7 22:19 55:22  <b>predicate</b> [1] 10:25  <b>prefer</b> [1] 6:15  <b>preference</b> [1] 6:14  <b>prescribes</b> [1] 32:13  <b>present</b> [2] 18:7 27:15  <b>presented</b> [3] 10:15 14:20 50:14  <b>preserve</b> [1] 42:15  <b>pressing</b> [1] 11:5  <b>presumably</b> [1] 52:11  <b>prevent</b> [1] 43:11  <b>preventing</b> [2] 44:5,18  <b>previously</b> [1] 29:25  <b>principle</b> [4] 7:11,13 15:16 17:25  <b>principles</b> [2] 15:8 36:1  <b>problem</b> [2] 35:5 44:25  <b>procedural</b> [1] 19:13</p>	<p><b>proceed</b> [1] 21:10  <b>proceeding</b> [2] 37:22 38:17  <b>proceedings</b> [4] 21:15 52:6,23,25  <b>PROMESA</b> [15] 4:16 6:3 11:13 18:13 21:7,13,22 32:19 33:10 39:8 51:1,15 52:4 53:8,16  <b>PROMESA's</b> [1] 32:8  <b>promoting</b> [1] 19:12  <b>proper</b> [1] 49:4  <b>proposition</b> [2] 12:5 13:16  <b>propositions</b> [1] 12:20  <b>protect</b> [1] 32:1  <b>protected</b> [1] 33:12  <b>protections</b> [1] 4:15  <b>prove</b> [1] 16:5  <b>provision</b> [1] 21:17  <b>provisions</b> [7] 5:2 21:13 25:2,5 26:16 55:21 56:1  <b>PUERTO</b> [85] 1:4 4:5,14 5:7,11,12,13,16,17,19,20,23 7:14,20,21 8:1,2,3,8,13,20 9:19 12:17 13:4 14:24 15:1,18,21 18:6,8,8,14 19:11,19,25 20:6,25 21:2,5 22:20 26:7,23 27:25 28:25 31:12,15 32:1,4,18,21,23,24 34:4 35:19,21 36:4,8,9,23 37:5,16,19 38:24 39:6,18,20,23,25 40:16 46:5,10,21,25 47:1,19,22 48:11,20 49:9 50:9 51:7,10 53:18,20 55:8  <b>purpose</b> [3] 9:3 10:11 37:7  <b>purposes</b> [3] 36:21 37:6 39:21  <b>putting</b> [2] 44:2 50:5</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qualify</b> [1] 5:5  <b>question</b> [51] 6:13 8:16,18 9:11 10:11,15 11:16 14:19,19,23 15:14 16:12,16 17:14,22 18:6,10 19:9 22:8,18,22 23:20 24:14,19 25:11 27:21 33:11 34:2,3 35:20 37:3,14 39:6,15 40:14 46:2 48:1,3,3,7 49:9,13,14,20 50:4,14 51:15,23 53:8 54:8,11  <b>questions</b> [12] 5:21 16:9,11 21:24 30:14 33:1 49:7,11,17 50:16 51:16,17  <b>quite</b> [2] 17:1 43:8</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raise</b> [4] 30:10 48:1 49:11 53:5  <b>raised</b> [9] 5:6 10:17 11:5 18:19,22 19:1,2 29:24 48:2  <b>raising</b> [1] 50:10  <b>rather</b> [2] 34:2 37:2  <b>rationales</b> [1] 7:10  <b>reach</b> [9] 5:9 10:14,20 11:10,11 24:16 27:4,5 30:11  <b>read</b> [4] 33:16 34:11 46:14 55:20  <b>reading</b> [3] 22:12 36:5 43:21  <b>really</b> [16] 9:3,19 10:5,8 11:3,7 14:4 23:5 37:3 41:10 44:1 48:6 49:18 51:1 55:18,24  <b>reason</b> [13] 14:13 17:7,12 18:2 40:16 41:14 42:2 45:8 46:22 48:23</p>	<p>49:25 55:1 56:1  <b>reasoning</b> [1] 28:22  <b>reasons</b> [4] 37:13 52:8 55:18 56:5  <b>REBUTTAL</b> [4] 3:12 54:4,5 55:25  <b>received</b> [1] 19:10  <b>reciprocity</b> [1] 46:23  <b>recognition</b> [1] 34:9  <b>recognized</b> [3] 8:17 20:25 26:11  <b>records</b> [2] 19:12 20:7  <b>recurs</b> [1] 46:17  <b>refer</b> [2] 52:9,13  <b>reference</b> [1] 52:21  <b>references</b> [1] 30:6  <b>referencing</b> [1] 22:7  <b>refers</b> [1] 51:23  <b>reflective</b> [1] 47:17  <b>refuted</b> [1] 34:16  <b>regard</b> [2] 16:4 17:24  <b>regarding</b> [1] 10:22  <b>regardless</b> [2] 26:4 32:7  <b>regular</b> [1] 54:16  <b>related</b> [1] 42:12  <b>Relations</b> [2] 32:3 46:16  <b>relative</b> [1] 24:15  <b>relevant</b> [2] 37:3,15  <b>relevantly</b> [1] 21:15  <b>relied</b> [3] 14:12 33:18 55:19  <b>relies</b> [1] 21:14  <b>rely</b> [3] 6:7 15:17 24:20  <b>relying</b> [5] 10:7 14:25 15:4,12 34:7  <b>remand</b> [9] 14:13,16,18 21:22 29:22,24 30:4 47:25 50:14  <b>remanded</b> [1] 27:15  <b>remedies</b> [1] 39:12  <b>remedy</b> [1] 53:3  <b>remedying</b> [1] 52:19  <b>repeatedly</b> [1] 5:10  <b>required</b> [2] 31:13 43:22  <b>requires</b> [1] 21:5  <b>requiring</b> [1] 45:5  <b>reserve</b> [1] 51:16  <b>resolved</b> [2] 39:4 50:9  <b>respect</b> [16] 6:18 8:9,9,19 16:17 22:1 26:15,19 34:7,13,24 39:6 40:12,15 42:9 51:15  <b>respectfully</b> [1] 51:14  <b>respects</b> [1] 53:17  <b>respond</b> [1] 29:25  <b>Respondent</b> [7] 1:9 2:9 3:11 18:23 21:14 23:17 31:7  <b>respondents</b> [1] 49:16  <b>responsible</b> [1] 8:4  <b>restraining</b> [1] 44:2  <b>result</b> [2] 7:4 53:2  <b>results</b> [3] 13:8,20,20  <b>retained</b> [1] 41:24  <b>reticulated</b> [3] 32:10 39:10 52:14  <b>reverse</b> [1] 56:6  <b>reversed</b> [1] 4:22  <b>review</b> [5] 11:9 20:10 32:11 39:10 52:14  <b>reviewed</b> [1] 50:17  <b>reviewing</b> [1] 47:21  <b>Rican</b> [1] 18:14</p>	<p><b>RICO</b> [69] 1:4 4:5,14 5:7,11,13,16,17,20,23 7:14,20,21 8:1,2,13,20 9:19 12:17 13:4 14:24 15:1,18,21 18:6,8,8 19:19,25 20:6,25 22:20 26:7,23 27:25 28:25 31:15 32:1,4,24 34:4 35:19 36:4,8,9,23 37:5,16 38:24 39:6,18,20,24,25 40:16 46:10,21,25 47:1,19,22 48:11,20 49:9 50:9 51:7,10 53:18 55:8  <b>Rico's</b> [15] 5:12,19 8:3,8 19:11 21:2,5 31:12 32:18,21,23 35:21 37:19 46:5 53:20  <b>rid</b> [1] 49:1  <b>rightly</b> [1] 16:10  <b>rise</b> [2] 28:8 29:5  <b>ROBERTS</b> [27] 4:3 8:5 9:9,21 10:3 11:17 14:3,5 15:3 19:4 20:13,18 27:3,10,12,20 28:18,24 29:18 31:1,5 43:3,5 45:25 53:22 54:1 56:7  <b>Rosalyn</b> [13] 12:16 26:11 28:10,18,25 29:3,7 35:16 36:7 40:20,24 41:3 42:19  <b>rule</b> [44] 6:10 9:6 25:9,15,17 31:11,15 33:7,11,17,24 34:1,10 35:1,13,25 37:25 38:20,21 39:15 40:15,19,22 41:8,13 42:2,18 43:2,7,9,10,18,19,24 44:4 45:4,17 46:8 47:12 49:21 50:4 52:4 53:11 55:25  <b>rules</b> [11] 31:14,18,20,22 34:14 41:5,15 44:17 46:6 49:24 54:16  <b>ruling</b> [3] 26:22 55:1,14</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>same</b> [20] 6:10 14:1 15:16 16:4,6 24:20 25:16,25 26:2,4,10,21 27:20,23,24 28:22 39:21 41:4 46:20,24  <b>Sanchez</b> [2] 9:3,5  <b>SARAH</b> [3] 2:8 3:10 31:6  <b>satisfied</b> [1] 42:24  <b>satisfying</b> [1] 43:1  <b>saying</b> [6] 14:10 35:17 37:15 38:1,22 48:24  <b>says</b> [12] 5:3 12:22 14:7 20:10,10 24:1 29:23 32:8 38:20 43:9 47:7 55:2  <b>scale</b> [1] 50:6  <b>scheme</b> [3] 32:11 39:10 52:14  <b>Schillinger</b> [1] 41:9  <b>score</b> [1] 23:2  <b>sea</b> [1] 5:20  <b>second</b> [5] 7:16 13:19 49:9,13 52:16  <b>Section</b> [9] 4:16,25 10:16 20:9 21:7 52:12,21 54:9 55:21  <b>see</b> [3] 10:6 27:16 39:19  <b>seem</b> [4] 17:6,23 46:25 47:16  <b>seemed</b> [3] 17:3 23:23 53:6  <b>seems</b> [5] 17:1 23:7 39:2 47:4,7  <b>self-governance</b> [3] 26:11 28:3 29:9  <b>self-government</b> [6] 25:20,23,25 27:1,23 39:22  <b>sense</b> [6] 8:15 14:4 18:9 24:20 28:</p>
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Official - Subject to Final Review

<p>13 55:13  <b>sensitive</b> [2] 44:10 45:11  <b>separate</b> [2] 28:3 52:25  <b>Separately</b> [1] 5:6  <b>series</b> [1] 15:6  <b>serious</b> [1] 8:3  <b>set</b> [3] 23:15 34:21 36:11  <b>several</b> [3] 9:16 17:7 41:11  <b>severe</b> [1] 44:21  <b>SG's</b> [1] 10:20  <b>shall</b> [1] 47:7  <b>share</b> [1] 37:19  <b>Shell</b> [1] 29:8  <b>shouldn't</b> [1] 40:19  <b>show</b> [1] 48:13  <b>shunts</b> [1] 32:19  <b>side</b> [5] 29:23 47:7 48:9 52:5 55:17  <b>side's</b> [2] 31:24 53:12  <b>significant</b> [3] 19:22 40:11 43:13  <b>significantly</b> [1] 8:8  <b>silentio</b> [1] 53:17  <b>similar</b> [2] 16:23 46:17  <b>simple</b> [1] 55:1  <b>simply</b> [9] 11:6 18:20 21:8 28:25 33:4 43:20 52:6 55:13 56:2  <b>since</b> [2] 5:13 6:15  <b>single</b> [1] 55:12  <b>situation</b> [5] 8:8 13:10,25 44:21 54:19  <b>situations</b> [2] 17:21 55:7  <b>slightly</b> [1] 7:10  <b>small</b> [1] 37:4  <b>so-called</b> [1] 41:25  <b>sole</b> [1] 48:14  <b>Solicitor</b> [1] 2:4  <b>somehow</b> [1] 40:18  <b>sometime</b> [1] 40:21  <b>sorry</b> [2] 27:11 36:16  <b>sort</b> [23] 9:22 10:7 24:16 33:8 34:2, 14 35:4,6 38:22 39:1 41:19 42:3, 21 43:12 44:12 45:7,8 46:25 47:14 50:5 51:20 52:3 53:1  <b>SOTOMAYOR</b> [41] 11:11,14,15,21, 24 12:4,10,15,19 13:2,14 14:9,18 15:20,25 18:11,21,25 19:7 23:10 27:9,11,13 28:9,12,16,19 29:20 36:13,15,17 39:14 40:2,5,13,24 50:7,20 51:3,11 53:23  <b>Sotomayor's</b> [1] 19:10  <b>source</b> [1] 6:6  <b>sovereign</b> [77] 5:8 6:17,18,22,24 7:9,12,17 8:6,7 9:12,24,24 10:17, 25 11:4 12:6,8 13:4,11,12 14:2 15:16,19,22 16:6 17:14,25 18:14 21:5 22:1,3,25 23:7 24:15,19 25:4,13, 18 26:6,12,18,20 27:5,6 28:8 31:16 32:4 33:4,14,17 34:5,9,15,20 35:8,13,18 36:21 37:5,11,16,19 39:16,16,21 41:6,8 44:8,24 45:15 46:13 47:17 49:8,9 50:1 52:22  <b>sovereign's</b> [2] 21:3 22:25  <b>sovereigns</b> [1] 28:13  <b>sovereignty</b> [34] 5:14 7:2,5,18,23</p>	<p>8:3,10,14,17,19,19,24 9:1,7,14 10:2 11:18,21 12:1,21,24,25 13:5 14:13 23:11,21 28:2 29:5 34:1 39:24 40:6 41:21,21 42:15  <b>Spain</b> [1] 8:14  <b>specific</b> [3] 15:18 39:10 51:1  <b>specifically</b> [1] 17:24  <b>specificity</b> [1] 45:5  <b>spot</b> [1] 38:13  <b>squarely</b> [2] 35:5,6  <b>standalone</b> [2] 52:25 53:1  <b>standard</b> [4] 9:6 38:2 44:12,14  <b>stands</b> [2] 18:1 28:1  <b>start</b> [1] 41:18  <b>started</b> [1] 40:21  <b>starting</b> [1] 41:3  <b>starts</b> [1] 24:8  <b>state</b> [16] 5:15,23 6:3 9:23 11:25 12:17,22 21:4 31:16 32:4 33:17 34:25 41:6,8 44:8 49:25  <b>stated</b> [1] 37:9  <b>statement</b> [62] 6:11 21:6,8 25:9, 15,17 31:11,14,15,18,20,22 33:9, 11,16,24 34:1,3,10,14,22 35:1,13, 24 37:25 38:20,21 40:15,19,22 41:5,8,13,15 42:2,18,25 43:2,6,6,8,18, 19,24 44:4,17 45:3,17 46:6,8 47:12 49:10,21,23 50:3 52:4 53:11 54:13,15,23,24 55:23  <b>STATES</b> [29] 1:1,17 2:6 3:7 8:6,9 11:19 12:11,13 14:6,6,8 20:20 31:17 39:21,23,25 40:3,6,9 41:9,16, 16 42:5 45:14 46:20,24 47:5,7  <b>states'</b> [1] 8:11  <b>status</b> [2] 34:4 41:25  <b>statute</b> [14] 4:23 20:4,5,6 22:12 25:6 37:4,15 44:19 45:2 46:14 49:5, 10 51:23  <b>statutes</b> [6] 37:7 42:14,23 43:16 45:6 47:14  <b>statutory</b> [5] 24:23 25:1 36:1 46:24 54:16  <b>steps</b> [1] 9:13  <b>still</b> [2] 51:18 55:14  <b>stops</b> [1] 45:2  <b>straightforward</b> [1] 54:10  <b>strand</b> [1] 7:16  <b>strands</b> [1] 7:7  <b>strange</b> [5] 13:20 22:10,14 24:6 33:14  <b>stretch</b> [1] 9:23  <b>stripping</b> [1] 44:23  <b>strong</b> [2] 36:23 42:5  <b>structural</b> [2] 39:7 53:19  <b>sub</b> [1] 53:17  <b>subject</b> [2] 21:20 31:11  <b>submitted</b> [2] 56:8,10  <b>subset</b> [1] 13:1  <b>substance</b> [2] 19:15,16  <b>sue</b> [3] 13:22 14:1 50:9  <b>sued</b> [5] 5:18 7:14 8:2 16:1 20:25  <b>sufficient</b> [3] 26:12 27:25 30:10  <b>sufficiently</b> [2] 34:15 51:21  <b>suggest</b> [2] 16:24 47:1</p>	<p><b>suggested</b> [1] 34:8  <b>suggestion</b> [2] 33:3 36:19  <b>suggests</b> [3] 34:20 38:17 46:21  <b>suit</b> [8] 4:21 21:18 30:19 31:11 32:12 50:2,2 55:10  <b>suits</b> [6] 4:17 12:12 18:15 20:1 32:2,6  <b>super-clear</b> [1] 47:6  <b>superior</b> [1] 6:19  <b>supporting</b> [3] 2:6 3:8 20:21  <b>SUPREME</b> [2] 1:1,16  <b>surmount</b> [1] 31:10  <b>susceptible</b> [1] 21:18  <b>suspend</b> [1] 32:21</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>target</b> [1] 55:11  <b>task</b> [1] 4:13  <b>tease</b> [1] 6:16  <b>tells</b> [1] 54:23  <b>TEPRA</b> [1] 20:5  <b>terms</b> [4] 26:20 39:9,9 51:10  <b>territorial</b> [18] 4:21 6:20 7:21,24 12:1,24 20:9 21:10,19 23:9 25:4 30:18 31:19,21 32:19 47:22,23 55:4  <b>territories</b> [31] 8:23 11:17,19 12:12 15:18 26:3,7,10,24 27:22 28:6 29:12,13 30:8 31:23 32:6 34:17, 19 37:1 38:25 40:3,11,18 41:11 42:10 43:17 46:18 47:9,12,13 48:4  <b>territory</b> [16] 6:17,22 7:3 11:25 13:21,21,22 16:4 22:24 23:4 30:18, 24 31:15 42:16 44:23 55:10  <b>test</b> [1] 54:15  <b>text</b> [5] 32:8 43:21 45:1,1 46:16  <b>textual</b> [1] 5:4  <b>themselves</b> [2] 18:7 30:9  <b>theory</b> [7] 5:16 7:23 11:4 13:3 31:24 35:7 40:25  <b>there's</b> [26] 7:16 9:13 13:6,9 14:15 16:5 24:3 25:8 26:13 29:23 30:20 34:21 35:22 38:20 42:25 46:17 49:8,23 50:11 52:2 54:10,16,18,19,23 55:1  <b>therefore</b> [2] 5:7 11:10  <b>they've</b> [2] 12:12 48:13  <b>third</b> [1] 42:11  <b>THOMAS</b> [10] 5:22 6:2,13 11:16 19:5 21:25 22:23 29:18 33:2 53:22  <b>though</b> [3] 7:7 8:8 23:23  <b>three</b> [2] 36:4 41:20  <b>thumb</b> [1] 50:6  <b>tilts</b> [1] 53:10  <b>Title</b> [7] 21:15 52:5,10,13,18,20 53:5  <b>today</b> [1] 4:4  <b>totally</b> [1] 24:12  <b>treated</b> [2] 40:16,17  <b>treaties</b> [1] 41:24  <b>tremendous</b> [1] 11:12  <b>tribal</b> [2] 9:24 21:4</p>	<p><b>tribes</b> [22] 8:7,10 15:17,20 16:1,3 26:1 31:17 40:6,11 41:16,18,20, 22,24 42:3,4,7,8,11,12 45:16  <b>tribes'</b> [4] 8:12 16:7 42:14 50:2  <b>tried</b> [1] 13:22  <b>true</b> [2] 16:6 27:23  <b>truly</b> [1] 50:2  <b>trustee</b> [1] 42:7  <b>try</b> [2] 22:18 49:18  <b>trying</b> [2] 36:11 42:8  <b>two</b> [7] 7:7 9:13 24:17 49:7,11 50:8 52:8  <b>two-tiered</b> [2] 11:4 13:3  <b>type</b> [6] 4:21 52:17 53:1,2,14 55:12  <b>types</b> [2] 47:6 52:23</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimate</b> [1] 39:15  <b>under</b> [21] 5:18 8:2 14:1 21:9,19 25:4 26:1 29:16,16 30:18 32:17 40:10 47:8,11 52:4,18 53:11,12 54:16 55:4,4  <b>underlying</b> [1] 33:12  <b>undermine</b> [1] 25:25  <b>underscores</b> [1] 36:6  <b>understand</b> [9] 15:3 19:12 24:12 33:21 35:9,11 38:6 43:8 47:4  <b>understanding</b> [3] 42:5 43:20 46:7  <b>understands</b> [3] 46:5,13 47:1  <b>understood</b> [3] 23:20 24:18 44:4  <b>unelected</b> [1] 32:22  <b>unfair</b> [2] 48:9,17  <b>unified</b> [1] 35:7  <b>unimportant</b> [2] 51:4,5  <b>union</b> [1] 40:10  <b>unique</b> [4] 9:19,22,25 10:1  <b>UNITED</b> [14] 1:1,17 2:6 3:7 11:19 12:11 20:20 39:21,23,25 40:6 41:9,16 42:5  <b>universal</b> [1] 35:7  <b>universe</b> [2] 38:1 50:25  <b>unless</b> [3] 12:1 53:12 55:14  <b>unlike</b> [3] 31:17 45:14,16  <b>unmistakable</b> [5] 4:24 6:10,11 54:12 55:23  <b>unmistakably</b> [1] 37:11  <b>unnecessary</b> [2] 31:25 48:19  <b>until</b> [3] 41:23 45:6 53:6  <b>unusual</b> [2] 45:6,20  <b>up</b> [11] 18:22 19:10 23:3 24:7 25:5, 10 36:11 42:20 48:14 49:7 56:2</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>vacate</b> [3] 47:25 48:4,18  <b>vacating</b> [1] 51:19  <b>vacatur</b> [3] 2:7 3:8 20:21  <b>Valle</b> [2] 9:3,5  <b>various</b> [1] 42:13  <b>versus</b> [1] 4:5  <b>Viertos</b> [1] 30:21  <b>view</b> [6] 11:9 22:11,12 44:19 47:11 53:12  <b>views</b> [3] 10:7 25:6 26:8</p>
---	---	---	---

**violating** <sup>[1]</sup> 31:12  
**violations** <sup>[10]</sup> 32:15,17 39:12 51:  
24 52:2,8,11,19 53:3,13  
**virtue** <sup>[1]</sup> 42:1

---

**W**

---

**wait** <sup>[1]</sup> 24:10  
**waive** <sup>[3]</sup> 15:22 18:14 26:17  
**waived** <sup>[6]</sup> 12:2 18:12 21:12 23:4  
35:21,23  
**waiver** <sup>[14]</sup> 19:22,23 21:4,21,21 25:  
3 32:22 35:20 36:5 39:5,7 40:15  
48:21 53:19  
**waivers** <sup>[4]</sup> 31:20 41:5,12 42:21  
**waiving** <sup>[1]</sup> 39:16  
**wanted** <sup>[3]</sup> 36:18 52:9 55:7  
**wants** <sup>[2]</sup> 43:11 44:16  
**Washington** <sup>[3]</sup> 1:12 2:5,8  
**way** <sup>[18]</sup> 5:11 7:13 8:4,19 9:5 15:  
20 16:11 24:13 25:5,20 26:2 31:  
25 37:22 38:10 40:20 42:25 44:3  
52:2  
**ways** <sup>[2]</sup> 24:24 41:20  
**Wednesday** <sup>[1]</sup> 1:13  
**weigh** <sup>[1]</sup> 18:10  
**weird** <sup>[1]</sup> 17:1  
**welcome** <sup>[3]</sup> 5:21 21:24 33:1  
**whatever** <sup>[1]</sup> 43:11  
**Whereupon** <sup>[1]</sup> 56:9  
**whether** <sup>[22]</sup> 5:7 9:11 10:10,16 14:  
24 19:19,23 23:21 25:12 27:14 30:  
3,15 34:22 35:20,23 37:10 39:3  
42:24 43:13 45:10 48:3 54:9  
**who's** <sup>[1]</sup> 10:21  
**will** <sup>[9]</sup> 16:19 32:1,8,15 38:13 42:  
17 47:13 50:8,12  
**win** <sup>[1]</sup> 16:17  
**window** <sup>[1]</sup> 42:9  
**withdrew** <sup>[1]</sup> 32:24  
**within** <sup>[2]</sup> 26:16 49:20  
**without** <sup>[11]</sup> 7:12,15 12:7 21:1 22:  
8 34:1 38:14 43:17,17 49:24 52:3  
**wonder** <sup>[2]</sup> 8:7 16:22  
**wondering** <sup>[1]</sup> 9:23  
**word** <sup>[1]</sup> 54:17  
**words** <sup>[1]</sup> 19:25  
**writ** <sup>[1]</sup> 30:22  
**writing** <sup>[1]</sup> 38:19  
**written** <sup>[2]</sup> 20:8 48:14

---

**Y**

---

**year** <sup>[1]</sup> 28:22  
**years** <sup>[2]</sup> 5:10 12:4  
**York** <sup>[2]</sup> 2:2,2  
**Young** <sup>[1]</sup> 30:19  
**yourself** <sup>[1]</sup> 39:19  
**yourselves** <sup>[1]</sup> 29:15