

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A884  
CASA, INC., ET AL., )  
Respondents. )  
- - - - -

DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A885  
WASHINGTON, ET AL., )  
Respondents. )  
- - - - -

DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A886  
NEW JERSEY, ET AL., )  
Respondents. )  
- - - - -

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23   - - - - -  
24                               Washington, D.C.  
25                               Thursday, May 15, 2025

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 a.m.

APPEARANCES:

GEN. D. JOHN SAUER, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Applicants.

JEREMY M. FEIGENBAUM, Solicitor General, Trenton, New Jersey; on behalf of the State and City Respondents.

KELSI B. CORKRAN, ESQUIRE, Washington, D.C.; on behalf of the Private Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GEN. D. JOHN SAUER, ESQ.	
4	On behalf of the Applicants	4
5	ORAL ARGUMENT OF:	
6	JEREMY M. FEIGENBAUM, ESQ.	
7	On behalf of the State and	
8	City Respondents	77
9	ORAL ARGUMENT OF:	
10	KELSI B. CORKRAN, ESQ.	
11	On behalf of the Private Respondents	125
12	REBUTTAL ARGUMENT OF:	
13	GEN. D. JOHN SAUER, ESQ.	
14	On behalf of the Applicants	160
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 24A884, Trump  
5 versus CASA, Incorporated, and the consolidated  
6 cases.

7 General Sauer.

8 ORAL ARGUMENT OF GEN. D. JOHN SAUER

9 ON BEHALF OF THE APPLICANTS

10 GENERAL SAUER: Mr. Chief Justice, and  
11 may it please the Court:

12 On January 20, 2025, President Trump  
13 issued Executive Order 14,160, Protecting the  
14 Meaning and Value of American Citizenship. This  
15 order reflects the original meaning of the  
16 Fourteenth Amendment, which guaranteed  
17 citizenship to this children of former slaves,  
18 not to illegal aliens or temporary visitors.

19 Multiple district courts promptly  
20 issued nationwide or universal injunctions  
21 blocking this order, and a cascade of such  
22 universal injunctions followed. Since  
23 January 20, district courts have now issued 40  
24 universal injunctions against the federal  
25 government, including 35 from the same five

1     judicial districts. This is a bipartisan  
2     problem that has now spanned the last five  
3     presidential administrations.

4             Universal injunctions exceed the  
5     judicial power granted in Article III, which  
6     exists only to address the injury to the  
7     complaining party. They transgress the  
8     traditional bounds of equitable authority, and  
9     they create a host of practical problems.

10            Such injunctions prevent the  
11    percolation of novel and difficult legal  
12    questions. They encourage rampant forum  
13    shopping. They require judges to make rushed,  
14    high-stakes, low-information decisions. They  
15    circumvent Rule 23 by offering all the benefits  
16    but none of the burdens of class certification.  
17    They operate asymmetrically, forcing the  
18    government to win everywhere while the  
19    plaintiffs can win anywhere. They invert --  
20    invert the ordinary hierarchal -- hierarchy of  
21    appellate review. They create the ongoing risk  
22    of conflicting judgments. They increase the  
23    pressures on this Court's emergency docket.  
24    They create what Justice Powell described as  
25    repeated and essentially head-on confrontations

1     between the life-tenured and representative  
2     branches of government. And they disrupt the  
3     Constitution's careful balancing of the  
4     separation of powers.

5                 I welcome the Court's questions.

6                 JUSTICE THOMAS: General Sauer, the --  
7     these universal injunctions, as you say, have  
8     proliferated over the last three decades or so.  
9     Would you discuss, though, the origins of  
10    universal injunctions? In particular, I'm  
11    interested in sort of historical analogues or  
12    the historical pedigree, particularly the bill  
13    of peace that -- that was proffered by  
14    Respondents.

15                GENERAL SAUER: Yes, Justice Thomas.  
16    As you, I think, first pointed out in your  
17    separate opinion in Trump against Hawaii, the  
18    bill of peace is something very distinct from a  
19    universal injunction. So the bill of peace  
20    involved a -- a resolution of a small, discrete  
21    set of claims of a small, discrete group. And,  
22    even more fundamentally, it was binding on the  
23    members of that class and those represented by  
24    the class. So it's much more analogous to a  
25    modern class action under Rule 23.

1                   And, in fact, as we've argued in other  
2     cases and as this Court has described in  
3     opinions like *Ortiz*, the bill of peace evolved  
4     into and -- and -- and has directly developed  
5     into, so to speak, the modern class action that  
6     has all the -- the same features of a bill of  
7     peace.

8                   So, in -- in the words of Chief Judge  
9     Sutton in the Sixth Circuit, the bill of peace  
10    was a domesticated animal that looks nothing  
11    like the dragon of a universal injunction.

12                  JUSTICE SOTOMAYOR: I'm sorry.

13                  CHIEF JUSTICE ROBERTS: You --

14                  JUSTICE SOTOMAYOR: Here --

15                  CHIEF JUSTICE ROBERTS: Go ahead.

16                  JUSTICE SOTOMAYOR: Here, there's a  
17    discrete identified group on one issue: Does  
18    citizenship mean are you born in the territory  
19    of the United States, or does it mean are you  
20    loyal to someone else, which is your claim, or  
21    are your parents loyal to someone else?

22                  So that's no different than what  
23    happened in a peace -- in a bill of peace. The  
24    United States is bigger, so it extends more  
25    broadly, but it's still an identifiable group on



1 a discrete, singular question.

2 GENERAL SAUER: In -- Your Honor, I'd  
3 say three things in response to that.

4 First of all, our primary contention  
5 is that the Citizenship Clause related to the  
6 children of former slaves, not to illegal aliens  
7 who weren't even present as a discrete class at  
8 that time.

9 But, more fundamentally here, as to  
10 the issue of the bill of peace, there are  
11 critical differences. The bill of peace was a  
12 binding judgment that would bind absent class  
13 members. Here, we have the (a)(C)(3) --

14 JUSTICE SOTOMAYOR: Well, here, class  
15 actions don't bind anyone who opts out, so class  
16 actions are not like bills of peace.

17 GENERAL SAUER: I would think that a  
18 Rule 23(b)(2) class action, which would be the  
19 relevant analogue here, would be one that would  
20 be binding on absent class members and would not  
21 have the same notice and opt-out procedures.

22 And, more fundamentally, that sort of  
23 argument that there's a commonality here among,  
24 you know, all the people who purport to be  
25 affected by this is the sort of argument made in

1 class certification motions that were never  
2 presented.

3 JUSTICE SOTOMAYOR: So can I ask you a  
4 question? Your theory here is argue -- arguing  
5 that Article III and principles of equity both  
6 prohibit federal courts from issuing universal  
7 injunctions. Do I have your argument correct?

8 GENERAL SAUER: We argue both of those  
9 and there are independent reasons.

10 JUSTICE SOTOMAYOR: You argue both of  
11 those?

12 GENERAL SAUER: Yeah.

13 JUSTICE SOTOMAYOR: If that's true,  
14 that means even the Supreme Court doesn't have  
15 that power.

16 GENERAL SAUER: The Supreme Court  
17 would have the authority to issue binding  
18 precedent nationwide, but as this Court --

19 JUSTICE SOTOMAYOR: But we couldn't  
20 enforce it against -- universally is your  
21 argument?

22 GENERAL SAUER: If there was a -- a --  
23 a decision that violated the precedent of the  
24 Court, then the affected plaintiffs could get a  
25 separate judgment.

1 JUSTICE SOTOMAYOR: And that means --

2 GENERAL SAUER: So -- and that is what  
3 this Court --

4 JUSTICE SOTOMAYOR: -- you're --  
5 you're talking about the hundreds and thousands  
6 of people who weren't part of the judgment of  
7 the court. They would all have to file  
8 individual actions?

9 GENERAL SAUER: Not necessarily.  
10 There are other --

11 JUSTICE SOTOMAYOR: Or -- or -- or --  
12 or a class action?

13 GENERAL SAUER: A class action would  
14 be --

15 JUSTICE SOTOMAYOR: Isn't that -- that  
16 makes no sense whatsoever.

17 GENERAL SAUER: Respectfully, we  
18 believe that --

19 JUSTICE SOTOMAYOR: Well -- well --  
20 the -- what was the purpose of the bill of peace  
21 if not to settle a legal question finally?

22 GENERAL SAUER: In --

23 JUSTICE SOTOMAYOR: And if even the  
24 Supreme Court doesn't have that right and must  
25 invite hundreds of thousands of lawsuits, what

1 are we buying into?

2 GENERAL SAUER: If a set of claims  
3 satisfies the rigorous criteria of Rule 23, Rule  
4 23 is the modern analogue of a bill of peace.  
5 We have something very different here.

6 JUSTICE SOTOMAYOR: So what -- what --

7 CHIEF JUSTICE ROBERTS: Did it --

8 JUSTICE SOTOMAYOR: No, but we don't,  
9 because the argument here is that the president  
10 is violating an established -- not just one but,  
11 by my count, four established Supreme Court  
12 precedents.

13 We have the Wong Ark case, where we  
14 said fealty to a foreign sovereign doesn't  
15 defeat your entitlement -- your parents' fealty  
16 to a foreign sovereign doesn't defeat your  
17 entitlement to citizenship as a child. We have  
18 another case where we said that even if your  
19 parents are here illegally, if you're born here,  
20 you're a citizen. We have yet another case that  
21 says, even if your parents came here and were  
22 stopped at the border and -- but you were born  
23 in our territory, you're still a citizen. And  
24 we have another case that says, even if your  
25 parents secured citizenship illegally, you're

1 still a citizen.

2 So, as far as I see it, this order  
3 violates four Supreme Court precedents.

4 GENERAL SAUER: Yeah. We are --

5 JUSTICE SOTOMAYOR: And you are -- and  
6 you are claiming that not just the -- Supreme  
7 Court -- that both the Supreme Court and no  
8 lower court can stop an executive from --  
9 universally, from violating that holding --  
10 those holdings by this Court.

11 GENERAL SAUER: We are not claiming  
12 that because we're conceding that there could be  
13 a -- in an appropriate case, a Rule 23 class  
14 action.

15 JUSTICE SOTOMAYOR: Only a class --  
16 only by a class action.

17 CHIEF JUSTICE ROBERTS: Can I hear  
18 the -- can I hear the rest of his answer?

19 GENERAL SAUER: A Rule 23 class  
20 action. And then the more fundamental point as  
21 to all those Supreme Court decisions you  
22 referred to --

23 JUSTICE SOTOMAYOR: So what do we do  
24 temporarily?

25 GENERAL SAUER: Temporarily, the

1 court may issue -- the -- the lower courts may  
2 issue injunctions that remediate the injuries to  
3 the plaintiffs that appear before them. Lower  
4 courts in appropriate cases may certify class  
5 actions --

6 JUSTICE SOTOMAYOR: So, when a new  
7 president --

8 CHIEF JUSTICE ROBERTS: Could I,  
9 counsel?

10 JUSTICE SOTOMAYOR: -- so, when a new  
11 president orders that because there's so much  
12 gun violence going on in the country and he  
13 comes in and he says, I have the right to take  
14 away the guns from everyone, then people -- and  
15 he sends out the military to seize everyone's  
16 guns -- we and the courts have to sit back and  
17 wait until every named plaintiff gets -- or  
18 every plaintiff whose gun is taken comes into  
19 court?

20 GENERAL SAUER: In appropriate cases,  
21 courts have certified class actions on an  
22 emergency basis. We found at least four cases  
23 in recent years where that was done.

24 But, more fundamentally, we profoundly  
25 disagree with the characterization of the

1 merits. This is now fully briefed in the Ninth  
2 Circuit in Case Number 25-807, where we describe  
3 how that characterization of the holding of Wong  
4 Kim Ark and the other decisions is profoundly  
5 incorrect. And that is --

6 JUSTICE SOTOMAYOR: You still  
7 haven't --

8 CHIEF JUSTICE ROBERTS: Counsel, could  
9 I ask you about a different type of -- of case  
10 that has broader impact than on the particular  
11 claimant, like a claimant who's alleging that  
12 the districting in a particular case has  
13 resulted in racial discrimination against him or  
14 her based on how the district is drawn.

15 Now a judicial decision about that one  
16 plaintiff would implicate the redistricting  
17 throughout the whole case, so -- so --  
18 throughout the whole state.

19 How -- how does your theory address  
20 that situation?

21 GENERAL SAUER: That would be what you  
22 might call an indivisible remedy, where what the  
23 Court is doing there by, for example, redrawing  
24 the district lines is, as this Court said in  
25 Gill against Whitford, the only way to remediate

1 the injury of voting in an unconstitutionally  
2 drawn district, that is similar to abatement of  
3 a public nuisance or, for example, in the school  
4 desegregation cases, where remediating the  
5 injury to the plaintiff before the court  
6 necessarily has collateral consequences to many  
7 others.

8 Certain environmental cases might have  
9 a similar thing. For example, you stop the  
10 local plant from pouring, you know, water  
11 pollution into the water. That benefits the  
12 plaintiff. It happens to benefit a bunch of  
13 other people.

14 Now that's very different than what we  
15 have in these universal injunctions, where it is  
16 a divisible remedy. I mean, I point to the  
17 holding of the District of Massachusetts in this  
18 case looking at the individual plaintiffs. That  
19 court said: Well, obviously, I don't have to  
20 give a universal injunction to -- to protect  
21 individuals other than the individual  
22 plaintiffs. They are given complete relief by  
23 an injunction that tells federal officials only  
24 to treat their children as citizens.

25 JUSTICE JACKSON: But why -- I guess



1     the question is: Why -- why does the law  
2     require that? I mean, I appreciate that a court  
3     could, in a divisible remedy kind of case,  
4     narrow in to the plaintiff. But you seem to be  
5     suggesting that Article III or Rule 23 or  
6     something requires that, and I -- I guess I  
7     don't really understand it.

8                 GENERAL SAUER: Yeah. If -- if I may  
9     offer two responses to that.

10                JUSTICE JACKSON: Yes. Yes.

11                GENERAL SAUER: In the Article III  
12     context, that is the principle announced in  
13     Warth against Seldin, announced in Gill against  
14     Whitford, in Lewis against Casey, where this  
15     Court has said again and again: What we do in  
16     the Article III context is grant remedy that is  
17     tailored to -- grant remedies that are tailored  
18     to remove the injury to the complaining  
19     plaintiff.

20                Sometimes they have even very broad  
21     collateral consequences. But, in the Article  
22     III context, what the Court has not done and  
23     every time it's focused on this in National  
24     Treasuries Union, Employees Union, in the --  
25     the Perkins against Lukens --

1 JUSTICE JACKSON: But I guess I -- I  
2 don't see why then the divisible remedies or  
3 indivisible remedies is an argument. I mean, if  
4 Article III is suggesting that the Court has to  
5 focus in on the plaintiff only, then it would  
6 seem to me that that would be the power  
7 requirement across the board.

8 I thought Article III was really about  
9 limiting the Court's power with respect to  
10 jurisdiction, that we say the Court has to  
11 determine whether or not there's subject matter  
12 jurisdiction over the issue and whether or not  
13 there's personal jurisdiction over the  
14 defendant, and once you have those things, the  
15 Court can evaluate the merits of the legal issue  
16 and issue, especially in equity, appropriate  
17 relief.

18 Now I appreciate that there are some  
19 -- prudential concerns that the Court considers,  
20 but it seems to me that in many, many, many  
21 circumstances we have not required the Court to  
22 limit their relief to the particular plaintiff  
23 as a matter of constitutional Article III  
24 requirement.

25 GENERAL SAUER: I disagree with that.

1 And I offer a response both, first, as to  
2 Article III and then as to the -- the scope of  
3 equitable authority.

4 In the Article III context, this Court  
5 said in Warth against Seldin, for example, that  
6 the Article III judicial power exists only to  
7 redress the injury to the complaining parties.

8 Again, in Gill against Whitford and  
9 Lewis against Casey --

10 JUSTICE JACKSON: All right. So let  
11 me give you a hypothetical. So suppose we have  
12 a manufacturing plant that unlawfully releases  
13 environmental toxins into the air, and we have a  
14 plaintiff who live -- lives near the plant,  
15 brings a nuisance lawsuit and says they're being  
16 harmed by unlawful release.

17 Your argument suggests that the  
18 judgment for the plaintiff has to narrow in on  
19 preventing -- to the extent possible, preventing  
20 harm to the plaintiff. But it seems to me that  
21 that's not necessarily the case.

22 You -- you suggest with the Chief  
23 Justice in response to him that there can be  
24 incidental beneficiaries, that the Court could  
25 say no more toxins if it's unlawful for the --

1 the defendant to do that, correct?

2 GENERAL SAUER: Yes, we do -- that --

3 JUSTICE JACKSON: So why -- why if  
4 your Article III principle is correct?

5 GENERAL SAUER: Because, again, the  
6 Article III principle is remedying the injury to  
7 the plaintiff who -- or set of plaintiffs -- it  
8 could be many -- who are before the court --

9 JUSTICE JACKSON: Right.

10 GENERAL SAUER: -- and that has  
11 collateral consequences that could help.

12 JUSTICE BARRETT: Counsel, let me --  
13 let me ask you on that point: Would one  
14 distinction be who is bound by the judgment?

15 Like, I'm wondering whether if the  
16 plaintiff needs -- you can only -- I think Judge  
17 Strauss said in the Eighth Circuit when  
18 addressing this issue you can't peel off part of  
19 a nuisance, so the whole thing has to be shut  
20 down.

21 Could a neighbor sue affirmatively to  
22 hold the nuisance-maker in contempt if he  
23 started to re-begin, you know, begin again the  
24 nuisance?

25 GENERAL SAUER: That's a great point.

1     It would not be binding on those collaterally  
2     benefitted parties, so to speak. I don't want  
3     to call them parties because they're not parties  
4     before the court. And that, of course,  
5     highlights one of the deep problems with the  
6     universal --

7                 JUSTICE JACKSON: No, but why isn't  
8     that the answer, though?

9                 JUSTICE BARRETT: Could you do that --

10                JUSTICE JACKSON: I mean, yeah.

11                JUSTICE BARRETT: Could you -- well,  
12     could you do that now for the universal  
13     injunction? Could another -- could a -- could a  
14     plaintiff, for example, who has the protection  
15     of the universal injunction but was not named in  
16     the suit bring a contempt action of the sort I  
17     just described?

18                GENERAL SAUER: They could not do  
19     that, but what they could do is run to any of 93  
20     other judicial districts and bring their own  
21     lawsuit if they -- if they --

22                JUSTICE BARRETT: No, no, no, no.  
23     Under the -- under the injunction as it  
24     stands -- under the injunctions as they stand,  
25     could a non-named plaintiff who has the benefit

1 of the universal injunction that's currently in  
2 place, could that plaintiff bring a contempt  
3 proceeding?

4 GENERAL SAUER: We would --

5 JUSTICE BARRETT: Or I guess I  
6 shouldn't call them a plaintiff. Could that --  
7 could that non-party?

8 GENERAL SAUER: Yeah, we would -- we  
9 would dispute that they would have the standing  
10 to do that because it goes to the heart of the  
11 problem.

12 JUSTICE BARRETT: Well, no, no, no,  
13 I -- I -- let's see. Maybe I'm not being clear.  
14 Assume the universal injunction is --  
15 is good. Like, drop your argument right now.

16 GENERAL SAUER: Oh, I see.

17 JUSTICE BARRETT: As they currently  
18 stand, could someone who is not named in this  
19 suit but a beneficiary bring a contempt  
20 proceeding?

21 GENERAL SAUER: I think that that is  
22 what the Respondents --

23 JUSTICE BARRETT: You think they  
24 could?

25 GENERAL SAUER: -- would certainly

1     contend.

2                 JUSTICE BARRETT:  Do you concede that  
3     the plaintiffs could bring a Rule 23, like the  
4     individual plaintiffs?

5                 GENERAL SAUER:  We -- we would  
6     dispute -- I mean, we'd have to address the Rule  
7     23 issues, kind of at all the -- the criteria  
8     as they come up.

9                 JUSTICE BARRETT:  Okay.  But you  
10    could -- you -- they could seek it.  Okay.  And  
11    then last question.

12                GENERAL SAUER:  And -- and they have  
13    done that in Western District of Washington.  
14    It's just never been briefed because the -- they  
15    laughed at it.

16                JUSTICE BARRETT:  Okay.  Just last  
17    question on this point.  The states have a  
18    different kind of claim for financial harm, and  
19    they've pointed out that it would be very  
20    difficult to -- to remedy that without some sort  
21    of broader relief.

22                I know you contest their standing.  I  
23    want you to assume that I think they have  
24    standing.  Why wouldn't they be entitled to an  
25    injunction of the scope of the one that has

1 currently been entered?

2 GENERAL SAUER: I would say two  
3 reasons.

4 First of all, it's not necessary to  
5 provide complete relief to the plaintiffs. What  
6 we offered, for example, in the District of  
7 Massachusetts in the Second or the First  
8 Circuit was an injunction that would enjoin the  
9 federal officials and order them to treat the  
10 people who would otherwise be covered by the  
11 Executive Order as eligible for the services  
12 that result in the pocketbook injuries to the  
13 states.

14 And there's really no response to  
15 that. That is -- obviously would -- would fully  
16 remediate their injuries and does not require  
17 the -- the injunction to be applied in all other  
18 50 states. One state comes in and says, well,  
19 people are going to move across state lines;  
20 therefore, we've got 21 states in this case who  
21 don't want this relief. Sorry, you've got to  
22 impose it on everybody because it has to be --  
23 it has to be offered to this one particular  
24 state. So that's -- that's one response.

25 The other response is this notion that



1 the states have to be provided complete relief  
2 because of interstate travel and patchwork. I  
3 think that's very effectively responded to by  
4 Chief Judge Sutton's opinion in the Second  
5 Circuit, where he says this is a problem. If we  
6 adopt this logic, it justifies an universal  
7 injunction in every single case, and that can't  
8 be the case. The Fifth Circuit's recent DACA  
9 decision comes to the same conclusion.

10 JUSTICE GORSUCH: Well, what -- what  
11 do you say, though, to the suggestion, General,  
12 that in this particular case, those patchwork  
13 problems for, frankly, the government, as -- as  
14 well as for plaintiffs, justify broader relief?

15 GENERAL SAUER: As to the government,  
16 again, Chief Judge Sutton addressed that  
17 directly as well when he said that's the federal  
18 government's problem. In other words, the  
19 federal government -- for example, in the First  
20 Circuit, we offered that as a narrower scope of  
21 injunction, and the decision was: Well, that  
22 would cause you too many administrative  
23 problems. And I think Chief Judge Sutton  
24 directly addresses that when he says that's a  
25 problem for the Executive Branch in the first

1 instance.

2 JUSTICE GORSUCH: That -- that's your  
3 problem. All right.

4 GENERAL SAUER: Yeah.

5 JUSTICE GORSUCH: And then, with  
6 respect to class certification, your -- your  
7 friends on the other side point out that that  
8 takes time, and there are, as you've emphasized,  
9 hurdles that have to be met to achieve class  
10 certification.

11 And the argument, of course, is that  
12 the injury is immediate and ongoing and, as  
13 Justice Sotomayor suggested, might be seriously  
14 questioned as to its compliance with this  
15 Court's precedents. Your thoughts?

16 GENERAL SAUER: I would offer a -- a  
17 couple things in response to that.

18 First of all, there are tools to in --  
19 to -- for the courts have tools to achieve sort  
20 of class-wide universal relief. I referred  
21 earlier there we found four recent district  
22 court decisions where class-wide relief was  
23 given on kind of an emergency basis.

24 However, more fundamentally than  
25 that --

1 JUSTICE GORSUCH: And you agree that  
2 that's appropriate in -- in -- in certain cases?

3 GENERAL SAUER: It may be  
4 appropriate -- we do not concede that it's  
5 appropriate in this case, but it may be  
6 appropriate in other cases. Certainly, it's an  
7 equitable tool that is consistent with, for  
8 example, the grant of equitable authority in the  
9 1789 Judiciary Act, as this Court interpreted in  
10 the Grupo Mexicano decision and -- and,  
11 honestly, a line of decisions going all the way  
12 back to the early 19th century. So there are  
13 tools to address emergency situations.

14 But, more fundamentally than that, it  
15 is a feature, not a bug, of Article III that  
16 courts grant relief to the people who sue in  
17 front of them. So if -- it -- it -- the notion  
18 that relief has to be given to the whole world  
19 because others who have not taken the time to  
20 sue are not before the courts --

21 JUSTICE GORSUCH: Last -- last --

22 GENERAL SAUER: -- is something that  
23 results in all of these problems.

24 JUSTICE GORSUCH: -- last question.  
25 Do we need to reach the Article III question? I

1 mean, shouldn't we -- wouldn't it be wise, it --  
2 even if you were to prevail, for the Court to  
3 reserve that question rather than decide that  
4 Congress, for example, could never endow this  
5 Court with that authority?

6 GENERAL SAUER: All the -- it --  
7 that's exactly correct. The Court does not have  
8 to rest on Article III because the Court could  
9 say, and as we've argued and as Justice Thomas's  
10 separate opinion in Trump against Hawaii says,  
11 the 1789 Judiciary Act, when it said suits in  
12 equity are what the federal courts can do, had  
13 nothing like this in mind.

14 And then I'd point to the language in  
15 Grupo Mexicano where the Court said -- there,  
16 what was at issue was a preliminary injunction  
17 that froze an likely insolvent debtor's assets  
18 so that the plaintiff could collect at the end  
19 of the case, and the Court said that's a nuclear  
20 weapon in the law and we're not -- that -- that  
21 had no analogue in 1789 in the practices of the  
22 Court of Chancery.

23 And if that's a nuclear weapon, I  
24 don't know what this is, where, repeatedly, 40  
25 times in this administration, we're being

1       enjoined against the --

2                   JUSTICE KAGAN:   General --

3                   GENERAL SAUER:   -- against the entire  
4       world.

5                   JUSTICE KAGAN:   -- I'm -- I'm just  
6       going to ask to -- you to put yourself in a  
7       different frame of mind, hard to do, assume  
8       something you won't want to assume.   But the  
9       assumption that I want you to make is that, on  
10      the merits, which, of course, you did not take  
11      to this Court, on the merits, you are wrong,  
12      that the EO is unlawful.

13                  And I want to ask you, if we assume  
14      that, how do we get to that result on your view  
15      of the rules?

16                  GENERAL SAUER:   It is very difficult  
17      for me to attempt the hypothetical --

18                  JUSTICE KAGAN:   Yeah.   Well --

19                  GENERAL SAUER:   -- but I will.

20                  JUSTICE KAGAN:   -- you know, I think  
21      that that's the important question in this case.  
22      Let's just assume you're dead wrong.   How do we  
23      get to that result?   Does every single person  
24      that is affected by this EO have to bring their  
25      own suit?   Are there alternatives?   How long

1     does it take?  How -- how do we get to the  
2     result that there is a single rule of  
3     citizenship that is not -- that is -- that is  
4     the rule that we've historically applied rather  
5     than the rule that the EO would have us do?

6                 GENERAL SAUER:  Rule 23 would be one  
7     natural path, assuming that a class could be  
8     certified, which we might dispute in this  
9     particular case.

10                JUSTICE KAGAN:  Well, you might  
11     dispute it, and, you know, I mean -- I mean, I  
12     think the question is:  Is there a class that's  
13     just all children of people who have entered  
14     illegally?  You know, is -- is that an  
15     appropriate class?  Can the same thing be done  
16     under Rule 23, or are you going to tell me that,  
17     no, Rule 23 has lots of requirements, and -- and  
18     -- you'll -- never be able to certify a class  
19     like that?

20                GENERAL SAUER:  Rule 23 provides the  
21     equitable tools subject to rigorous criteria,  
22     appropriately rigorous criteria, to obtain that  
23     kind of class-wide and emergency relief.

24                JUSTICE KAGAN:  That suggests to me  
25     you're going to be standing up here in the next

1 case saying that Rule 23 is inapt for this  
2 circumstance with this number of people, maybe  
3 with some questions that are individual, who  
4 knows. So let's put Rule 23 aside, because I  
5 got to tell you that does not fill me with great  
6 confidence.

7 How else are we going to get to the  
8 right result here, which is on my assumption  
9 that the EO is illegal?

10 GENERAL SAUER: That would be a  
11 profoundly wrong result. But I think what I  
12 would offer is that, very similar to Labrador  
13 against Poe, what the Court should be engaging  
14 in here is a balancing of the equitable factors  
15 as to the scope of remedial relief, not as to  
16 the underlying merits.

17 And our contention that this exceeds  
18 the traditional scope of equity that's reflected  
19 in the 1789 Judiciary Act, we're overwhelmingly  
20 likely to succeed on those merits for all the  
21 reasons that I've stated in our briefs and in  
22 the separate --

23 JUSTICE KAGAN: Yeah. I -- I mean,  
24 that's a lot of words, and I don't have an  
25 answer for, if one thinks -- and, you -- you

1 know, look, there are all kinds of abuses of  
2 nationwide injunctions, but I think that the  
3 question that this case presents is that if one  
4 thinks that it's quite clear that the EO is  
5 illegal, how does one get to that result in what  
6 time frame on your set of rules without the  
7 possibility of a nationwide injunction?

8 GENERAL SAUER: On this case and on  
9 many similar cases, the -- the appropriate way  
10 to do it is for there to be multiple lower  
11 courts considering it, the appropriate  
12 percolation that goes through the lower courts,  
13 and then, ultimately, this Court decides the  
14 merits in a nationwide binding precedent.

15 You have a complete inversion of that  
16 through the nationwide injunctions with the  
17 district courts --

18 JUSTICE BARRETT: But, General  
19 Sauer --

20 JUSTICE KAGAN: Let's say --

21 JUSTICE BARRETT: -- are you really  
22 going to answer Justice Kagan by saying there's  
23 no way to do this expeditiously?

24 GENERAL SAUER: Well, I, I'll refer to  
25 my fourth -- former answer, is Rule 23 provides



1 the tools to do so, multiple injunctions --

2 JUSTICE BARRETT: But you resisted  
3 Justice Kagan when she said could the individual  
4 plaintiffs form a class.

5 GENERAL SAUER: We -- that has never  
6 been briefed in the court below. I do not  
7 concede that we wouldn't oppose class  
8 certification in this particular case. There  
9 may be arguments that this case is or is not  
10 appropriate for class certification. And if  
11 just --

12 JUSTICE BARRETT: If there were a  
13 class appropriate for class certification, you  
14 concede that that could resolve the question  
15 quickly?

16 GENERAL SAUER: Yes, absolutely.

17 JUSTICE BARRETT: You concede it could  
18 resolve the question quickly through precedent?

19 GENERAL SAUER: Yes, absolutely, it  
20 could do so. I mean, we obviously dispute  
21 the --

22 JUSTICE KAGAN: So just on that --

23 JUSTICE GORSUCH: And if -- and if the  
24 Court --

25 JUSTICE KAGAN: -- point --

1 JUSTICE GORSUCH: Sorry. Sorry.

2 Sorry to interrupt. Go ahead, please.

3 All right. I got a quick one. I got  
4 a quick one. I think it's fair --

5 JUSTICE KAGAN: Well, I'm going --

6 (Laughter.)

7 JUSTICE KAGAN: -- I'm going to say  
8 just -- I'm just going to say just on that  
9 point, so, you know, let's -- let's say that  
10 we're an individual person even, let's say it  
11 wasn't a class, and goes up and gets a ruling  
12 from the Second Circuit that the EO is illegal.

13 Does the government commit to not  
14 applying its EO in the entire Second Circuit, or  
15 does it say, no, we can continue to apply the  
16 rule as to everybody else in the Second Circuit?

17 GENERAL SAUER: I can't say as to this  
18 individual case. Generally, our practice is to  
19 respect circuit precedent within the circuit,  
20 but there are exceptions to that.

21 JUSTICE KAGAN: Yes, that is generally  
22 your practice --

23 (Laughter.)

24 JUSTICE KAGAN: -- and I'm asking  
25 whether it would be your practice in this case.

1           GENERAL SAUER: I can't answer because  
2     it would depend on what the lower court decision  
3     said. So there are circumstances, as I was  
4     suggesting, where we think that we want to  
5     continue to litigate that in other district  
6     courts in the same circuit as well as other  
7     circuits.

8           JUSTICE KAGAN: Yeah. So that means  
9     it's not even the normal time it takes for  
10    everything to get up, you know, through the  
11    circuit courts and to the Supreme Court because,  
12    even in those circuits that -- that say that the  
13    EO is illegal, you're going to be saying, no,  
14    you know, we only commit to saying it's illegal  
15    to this one guy who brought the suit.

16          GENERAL SAUER: Article III and the  
17    courts' traditional equitable practices provide  
18    a range of tools to address that, including a  
19    potentially nationwide class action, not --  
20    nationwide -- a universal injunction is not one  
21    of those tools.

22          JUSTICE KAGAN: A nationwide class  
23    action, which you say you're going to oppose  
24    when that gets -- gets challenged --

25          GENERAL SAUER: We are likely to

1     oppose it on the merits.

2                 JUSTICE KAGAN:  -- when that gets  
3     put -- put -- put -- you know, proposed.

4                 GENERAL SAUER:  Yes, and if it does  
5     not meet the rigorous criteria of class  
6     certification, the court should not enter that  
7     injunctive relief.  That's -- that's a feature,  
8     not a bug.

9                 JUSTICE KAGAN:  Do you think -- like,  
10    suppose -- how about you're not willing to  
11    commit to abiding by the Second Circuit's  
12    precedent in my -- suppose that there's a -- a  
13    single person who brings a suit and it gets all  
14    the way up to us after three or four or five  
15    years, and we say, you know, we really do agree  
16    with those four precedents that Justice  
17    Sotomayor started with and your EO is illegal.

18                Is -- is -- is that only going to bind  
19    the one guy who brought the suit?

20                GENERAL SAUER:  No.  That would be a  
21    nationwide precedent that the government would  
22    respect.

23                JUSTICE KAGAN:  So, finally, once it  
24    gets to us after four years, you're going to  
25    respect that?

1           GENERAL SAUER: Yes. And in addition,  
2 we may well respect circuit-wide precedent. The  
3 Second Circuit, it just is --

4           JUSTICE KAGAN: And -- and -- and for  
5 four years, there are going to be, like, an  
6 untold number of people who, according to all  
7 the law that this Court has ever made, ought to  
8 be citizens who are not being treated as such.

9           GENERAL SAUER: And, in the meantime,  
10 any of those plaintiffs could have come forward  
11 and sought, you know, preliminary injunctive  
12 relief, and they could do so on a class-wide  
13 basis. There are tools to address this, but the  
14 universal injunction which was issued here three  
15 days after the Executive Order was issued is not  
16 one of those tools.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19           Three -- three years, four years,  
20 we've been able to move much more expeditiously.  
21 I think we did the TikTok case in a month.  
22 Presuming -- I gather an important part of your  
23 answer is that people can litigate differently  
24 and one goes -- one will go to Massachusetts,  
25 the other one will go to Houston, and you'll get

1 conflicting decisions fairly quickly.

2 And is there any reason why this  
3 Court -- and I gather that's your -- your safety  
4 net, is that at the end of the day, whenever --  
5 how long -- long the day is, this Court can  
6 issue a decision and it will bind everything  
7 else.

8 Is there any reason in this particular  
9 litigation that we would be unable to act  
10 expeditiously?

11 GENERAL SAUER: Absolutely not,  
12 Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Okay. Thank  
14 you.

15 Justice Thomas?

16 JUSTICE THOMAS: General, when were  
17 the first universal injunctions used?

18 GENERAL SAUER: We believe that the  
19 best reading of that is what you said in Trump  
20 against Hawaii, which is that Wirtz in 1963 was  
21 really the first universal injunction. There's  
22 a dispute about Perkins against Lukens Oil going  
23 back to 1940. And, of course, we point to the  
24 Court's opinion that reversed that -- that --  
25 that universal injunction issued by the D.C.

1 Circuit and said it's -- it's profoundly wrong.

2 Now, if you look at the -- the cases  
3 that either party cite, you see a common theme.  
4 The cases that we cite, like National  
5 Treasuries, Treasuries Employment Union, Perkins  
6 against Lukens Oil, Frothingham in -- in  
7 Massachusetts against Mellon, going back to  
8 Scott against Donald, in all of those, those are  
9 cases where the Court considered and addressed  
10 the sort of universal, in that case, statewide  
11 issue of provision of injunctive relief.

12 So, when the Court has considered and  
13 addressed this, it has consistently said you  
14 have to limit the remedy to the plaintiffs who  
15 are appearing in court and complaining of that  
16 remedy.

17 JUSTICE THOMAS: So we survived until  
18 the 1960s without universal injunctions?

19 GENERAL SAUER: That's exactly  
20 correct. And, in fact, those were very  
21 limited -- very rare even in the 1960s. It  
22 really exploded in 2007 in our cert petition in  
23 Summers against Earth Island Institute. We  
24 pointed out that the Ninth Circuit had started  
25 doing this in a whole bunch of cases involving

1 environmental claims.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: You began by outlining  
4 what you see as the practical problems that have  
5 been created by universal injunctions.

6 If we were to hold that the states  
7 have standing and if it is possible for a  
8 plaintiff to get emergency certification of a  
9 class, would we -- suppose we agreed with you on  
10 universal injunctions but allowed those other  
11 two avenues.

12 Would those -- would the practical  
13 problem be rectified to any substantial degree?

14 GENERAL SAUER: Certainly, if there  
15 were an injunction that extended to, you know,  
16 all of the litigating states, that would a cover  
17 -- cover a very substantial portion of the  
18 country, and also, an emergency sort of class  
19 certification decision might also grant very  
20 broad relief.

21 JUSTICE ALITO: So the -- the answer  
22 is that the practical problem would not be  
23 solved, and, if that's the case, what is the --  
24 what is the point of this argument about  
25 universal injunctions?



1                   GENERAL SAUER: I think the point is  
2     that universal injunctions exceed traditional  
3     principles of Article III and they exceed the  
4     traditional equitable authority and that's what  
5     yields all these sort of pathologies, so to  
6     speak, of the current practice of issuing them  
7     very, very easily.

8                   JUSTICE ALITO: Thank you.

9                   CHIEF JUSTICE ROBERTS: Justice  
10    Sotomayor?

11                  JUSTICE SOTOMAYOR: You answered  
12    Justice Gorsuch, I think, correctly that if  
13    Article III precludes universal injunctions,  
14    then even class actions are illegal. That's  
15    what you're arguing, isn't it?

16                  GENERAL SAUER: I -- I -- I disagree  
17    with that profoundly.

18                  JUSTICE SOTOMAYOR: How could it? If  
19    Article III and only prohibits injunctions that  
20    affect non-members or non-plaintiffs, how could  
21    Congress give a remedy like a class action?

22                  GENERAL SAUER: In an Article -- or in  
23    a Rule 23 class, every member, represented  
24    member of the class, has standing by hypothesis.  
25    So every single one of them has an Article III

1 injury. And Rule 23, again, provides --

2 JUSTICE SOTOMAYOR: So that would be  
3 the only method?

4 GENERAL SAUER: It would be very  
5 similar to the bill of peace, where all those  
6 parties --

7 JUSTICE SOTOMAYOR: All right. Now  
8 why shouldn't --

9 GENERAL SAUER: -- even are present in  
10 a represented capacity are bound.

11 JUSTICE SOTOMAYOR: We can act quickly  
12 if we are worried about those thousands of  
13 children who are going to be born without  
14 citizenship papers that could render them  
15 stateless in some places because some of their  
16 parents' homes don't recognize children of their  
17 nationals unless those children are born in  
18 their countries.

19 They're not going to be receiving  
20 federal benefits because that's the claim of  
21 the -- of the -- of the plaintiffs here that --  
22 they -- of the state plaintiffs, that they're  
23 going to -- they're not going to be able to  
24 provide services to those children.

25 Shouldn't we grant cert before

1 judgment on that issue?

2 If we're afraid that this is or even  
3 have a thought that this is unlawful executive  
4 action, that it is Congress who decides  
5 citizenship, not the executive, if we believe,  
6 some of us were to believe that, why should we  
7 permit those countless others to be subject to  
8 what we think is an unlawful executive action,  
9 as unlawful as an executive taking the guns away  
10 from every citizen?

11 GENERAL SAUER: Cert before judgment  
12 would be another tool but through which this  
13 Court could act expeditiously.

14 JUSTICE SOTOMAYOR: Is this the kind  
15 of case where the equities would call for that?  
16 And why wouldn't it? It's a pure legal  
17 question: What does the Constitution mean with  
18 respect to citizenship? There are no individual  
19 facts that would alter our conclusion.

20 If we can't do it by a universal  
21 injunction because you say Article III doesn't  
22 permit that, Article III wouldn't permit us to  
23 give a universal injunction even if we rule, why  
24 don't we grant cert before judgment so that all  
25 of these parents would have a firm Supreme Court

1 decision that they can take where? Because  
2 you're saying nobody can grant a universal  
3 injunction.

4 GENERAL SAUER: No party has asked for  
5 that in this case, and I think one reason is  
6 that would deny the Court of the benefit of  
7 percolation and multiple lower courts of a novel  
8 and sensitive and important constitutional  
9 question.

10 JUSTICE SOTOMAYOR: Right now, we have  
11 multiple courts -- we have novel courts who  
12 have -- who have percolated this issue and said  
13 you're violating precedent. Not only precedent  
14 but the plain meaning of the Fourteenth -- of  
15 the Constitution.

16 GENERAL SAUER: Respectfully, I think  
17 what we have are lower courts making snap  
18 judgments on the merits that ignore the  
19 fundamental principle of the Fourteenth  
20 Amendment that it was about giving citizenship  
21 to the children of slaves, not to the children  
22 of illegal immigrants who really were not even a  
23 very discrete class at that time.

24 JUSTICE SOTOMAYOR: And there were --

25 GENERAL SAUER: And that's the sort of

1 argument that deserves percolation.

2 JUSTICE SOTOMAYOR: -- and there were  
3 some people in Congress who argued against the  
4 Thirteenth Amendment just because of that, some  
5 people who argued against passing the amendment  
6 just because of that, because it would give  
7 citizenship to gypsies.

8 GENERAL SAUER: I think the relevant  
9 history of the Fourteenth Amendment is the  
10 statements of Senator Trumbull, who emphasized  
11 that domicile was the key criteria, and he said  
12 that in a letter to Andrew Jackson, and there --  
13 we've cited in our Ninth Circuit briefing --

14 JUSTICE SOTOMAYOR: And got  
15 rejected -- and it got --

16 GENERAL SAUER: -- a host of decisions  
17 that back that up.

18 JUSTICE SOTOMAYOR: -- it got rejected  
19 repeatedly. We can go into the history of  
20 citizenship, but I still go back to my question.

21 You claim that there is absolutely no  
22 constitutional way to stop -- put this aside --  
23 to stop a president from an unconstitutional  
24 act, a clearly, indisputably unconstitutional  
25 act, taking every gun from every citizen, we

1       couldn't stop that.

2               GENERAL SAUER: I disagree with that  
3       for the reasons I've said, including the  
4       equitable tools that are --

5               JUSTICE SOTOMAYOR: No, because you  
6       said to us we'd have to wait until there was a  
7       final judgment. You're not sure you would  
8       respect the judgment of every circuit. You're  
9       not sure that you would respect even a final  
10       judgment of the Supreme Court because it only  
11       binds the parties before it, and, if there's no  
12       class action, that only binds the parties before  
13       the Court.

14              GENERAL SAUER: I don't think there is  
15       a, so to speak, really, really unconstitutional  
16       exception to the strictures of Article III or  
17       the scope of equitable authority, and the Court  
18       should not recognize one because what we see not  
19       just in this case but in the 39 others is that  
20       the district courts who are issuing these  
21       injunctions all passionately disagree with the  
22       thing that's being challenged in that.

23              So that principle that, well, this we  
24       think is really unconstitutional, therefore, we  
25       should ignore the general principles of Article

1     III, is not a principle the Court ought to  
2     adopt.

3                 CHIEF JUSTICE ROBERTS:   Justice Kagan?

4                 JUSTICE KAGAN:   So, General, on this  
5     question of expedition, I mean, it -- it sort of  
6     depends on the government's own actions in a  
7     case like this one, where one can expect that  
8     there is not going to be a great deal of  
9     disagreement among the lower courts.

10                I mean, let's assume that you lose in  
11     the lower courts pretty uniformly, as you have  
12     been losing on this issue, and that you never  
13     take this question to us.

14                I mean, I notice that you didn't take  
15     the substantive question to us.   You only took  
16     the nationwide injunction question to us.   I  
17     mean, why would you take the substantive  
18     question to us?   You're losing a bunch of cases.  
19     This guy over here, this woman over here, you  
20     know, they'll have to be treated as citizens,  
21     but nobody else will.

22                Why would you ever take this case to  
23     us?

24                GENERAL SAUER:   Well, in this  
25     particular case, we have deliberately not

1 presented the merits to this Court on the  
2 question of the scope of remedies because, of  
3 course, that makes it a clean vehicle where the  
4 Court doesn't have to look at the vast --

5 JUSTICE KAGAN: You're -- you're  
6 ignoring the import of my question. I'm  
7 suggesting that in a case in which the -- the  
8 government is losing constantly, there's nobody  
9 else who's going to appeal, they're winning,  
10 it's up to you to decide whether to take this  
11 case to us. If I were in your shoes, there is  
12 no way I'd approach the Supreme Court with this  
13 case.

14 So you just keep on losing in the  
15 lower courts, and what's supposed to happen to  
16 prevent that?

17 GENERAL SAUER: Again, I respectfully  
18 disagree with that forecast of the merits. But,  
19 in response to the question, what I would say is  
20 we have an adversarial system. And if the  
21 government is not -- for example, not respecting  
22 circuit precedent on the Court's hypothetical in  
23 the Second Circuit, someone easier in the Second  
24 Circuit could take the case up and they could  
25 say, look, the government is violating circuit



1 precedent on the hypothetical of multiple  
2 circuits and so --

3 JUSTICE KAGAN: That's the case we're  
4 going to take, somebody who says -- who -- who  
5 says, you know, after we've said that -- that  
6 this all has to be done one by one by one, then  
7 we're going to take a case from somebody who  
8 objects to proceeding one by one by one?

9 GENERAL SAUER: I'm not sure I  
10 understand the question. I understood the  
11 hypothetical to be --

12 JUSTICE KAGAN: If you win this  
13 challenge and say there is no nationwide  
14 injunction and it all has to be through  
15 individual cases, then I can't see how an  
16 individual who is not, you know, being treated  
17 equivalently to the individual who brought the  
18 case would have any ability to bring the  
19 substantive question to us.

20 GENERAL SAUER: They would bring a  
21 lawsuit in the federal district courts against  
22 the -- the government for an injunction  
23 protecting them. And if the government wasn't  
24 respecting, you know, on the applicable circuit  
25 precedent --

1 JUSTICE KAGAN: Yeah, and then -- and  
2 then they win, and, again, I mean, you need  
3 somebody to lose, but nobody's going to lose in  
4 this case. It's just you're --

5 (Laughter.)

6 JUSTICE KAGAN: -- you're going to  
7 have, like, individual by individual by  
8 individual, and all of those individuals are  
9 going to win, and the ones who can't afford to  
10 go to court, they're the ones who are going to  
11 lose.

12 GENERAL SAUER: The tools that are  
13 provided to address hypotheticals like this,  
14 again, I --

15 JUSTICE KAGAN: This is not a  
16 hypothetical. This is happening out there,  
17 right? Every court has ruled against you.

18 GENERAL SAUER: We've only had snap  
19 judgments on the merits. You know, obviously,  
20 we're fully briefing the merits in the courts of  
21 appeals, and our arguments are compelling. More  
22 fundamentally, in response to the question --

23 JUSTICE KAGAN: I'm suggesting to you,  
24 like, the -- the -- the real brunt of my  
25 question is, in a case like this, the government

1 has no incentive to bring this case to the  
2 Supreme Court because it's not really losing  
3 anything. It's losing a lot of individual  
4 cases, which still allow it to enforce its EO  
5 against the vast majority of people to whom it  
6 applies.

7 GENERAL SAUER: And, again, Rule 23  
8 provides an avenue to present -- to address  
9 those very concerns.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Gorsuch?

13 JUSTICE GORSUCH: Well, Justice Kagan  
14 asked my questions better than I could have.

15 (Laughter.)

16 JUSTICE GORSUCH: How do you suggest  
17 we reach this case on the merits expeditiously?

18 GENERAL SAUER: There's a number of  
19 tools the Court could do that -- we think this  
20 case is one that cries out for percolation, that  
21 the Court should allow the lower courts to  
22 address -- address the merits issue multiple  
23 times. It's currently on briefing in three  
24 different cases in the First, Fourth, and Ninth  
25 Circuits, and we think that that's the

1 appropriate way to do it. If the Court  
2 disagreed, obviously --

3 JUSTICE GORSUCH: When you lose one of  
4 those, do you intend to seek cert?

5 GENERAL SAUER: If we lose, yes,  
6 absolutely.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Kavanaugh?

9 JUSTICE KAVANAUGH: So the technical  
10 problem here seems to be class-wide relief  
11 without the district courts going through the  
12 steps to assess whether a class should be  
13 certified, correct?

14 GENERAL SAUER: Correct.

15 JUSTICE KAVANAUGH: Okay. And if you  
16 win here on this procedural point, it seems very  
17 likely that the day after there are going to be  
18 suits filed all over the place seeking  
19 class-wide treatment, maybe statewide classes,  
20 circuit-wide classes, maybe nationwide classes.  
21 I'm sure they're being prepared now, right?

22 And on what basis would you oppose a  
23 statewide class?

24 GENERAL SAUER: I could imagine  
25 certain bases, and, again, it hasn't -- we

1 haven't briefed this in the lower courts yet,  
2 but yes.

3 JUSTICE KAVANAUGH: You've been  
4 promising everyone here that Rule 23 is the  
5 cure-all, and I want to explore on what basis  
6 you would oppose a statewide class. Just take  
7 that one for -- for now.

8 GENERAL SAUER: For example -- and,  
9 again, this is very hypothetical because I'm not  
10 predicting that we will or will not oppose that.  
11 We haven't taken a position on that yet. But --

12 JUSTICE KAVANAUGH: If you were to  
13 oppose it, on what basis would you plausibly  
14 oppose it?

15 GENERAL SAUER: There may be problems  
16 of commonality and typicality, for example.  
17 For -- for example, there's two different sets  
18 of groups that are affected by the Executive  
19 Order. There are those where the mothers are  
20 temporarily present and those where the mother  
21 are illegally present, and in both cases, the  
22 father is neither a citizen nor a lawful  
23 permanent resident. So there might be issues of  
24 typicality. Adequacy of representation might  
25 very well be an issue. So there would have to

1 be that rigorous application of those criteria.

2 Now the argument may be this is a case  
3 that is a natural candidate for a Rule 23(b)(2)  
4 certification. That may well be true. The  
5 government hasn't taken a position on that. Our  
6 position is not that class certification will  
7 necessarily be granted. Our position is that  
8 Rule 23 is how these sorts of claims should be  
9 channeled.

10 JUSTICE KAVANAUGH: And you think, I  
11 think you just said, it's very possible that  
12 class certification may be granted?

13 GENERAL SAUER: It is possible. We  
14 don't know yet because there was a class  
15 certification motion filed at the very beginning  
16 in the Western District of Washington and it was  
17 just never briefed because, obviously, the  
18 pathology here is that the nationwide  
19 injunctions just go blowing past the class  
20 certification procedures.

21 JUSTICE KAVANAUGH: And I guess Rule  
22 23(b)(2), for a lot of the cases we've had over  
23 the past 25 years that you talked about where  
24 there have been universal injunctions or the  
25 lower courts have had that, I mean, 23(b)(2)

1     could have been used in a lot of those  
2     presumably, correct?  Eviction moratorium,  
3     student loans, OSHA vaccine mandate.  Do you see  
4     the possibility that 23(b)(2) could have been  
5     used instead of -- and some of those were APA,  
6     but put aside the APA issue for now.

7                 GENERAL SAUER:  Yeah, we -- we do set  
8     aside that issue if I may.

9                 JUSTICE KAVANAUGH:  Yes.  I got it.  
10                (Laughter.)

11               GENERAL SAUER:  Right.  Yes, I agree  
12     with that as to some but not in the other cases.  
13     It's hard to see how, for example, Biden against  
14     Nebraska might have -- where a state was the  
15     plaintiff, might have been a 23(b)(2) class.  
16     Alabama Association of Realtors might have been  
17     a much better candidate for that.

18               And, again, we're not taking a  
19     position on the individual merits.  The --  
20     our -- our -- our overarching point is there's a  
21     tradition of equitable -- of equity in this  
22     country that goes back to the English Court of  
23     Chancery.  And what's happening in these  
24     universal injunctions -- again, 40 times in this  
25     administration, at least 22 times in the last

1 administration, 64 times in the administration  
2 before that -- is just disregarding those  
3 appropriate procedures to -- to seek this kind  
4 of global relief.

5 JUSTICE KAVANAUGH: I want to ask one  
6 thing about something in your brief. You said:  
7 "And, of course, this Court's decisions  
8 constitute controlling precedent throughout the  
9 nation. If this Court were to hold a challenged  
10 statute or policy unconstitutional, the  
11 government could not successfully enforce it  
12 against anyone, party or not, in light of stare  
13 decisis." You agree with that?

14 GENERAL SAUER: Yes, we do.

15 JUSTICE KAVANAUGH: Okay. If you  
16 prevail here -- the original executive order had  
17 a 30-day period before it took effect. If you  
18 prevail here, should there be any pause in -- so  
19 that things can happen that need to happen for  
20 30 days or some period of time, or should it  
21 just -- should we not even worry about that?

22 GENERAL SAUER: Yes, we concede that  
23 the 30-day ramp-up period that the Executive  
24 Order itself calls for never started because the  
25 injunction -- the universal TROs were granted



1 almost immediately. And we don't dispute that  
2 there should be a 30-day ramp-up period for  
3 another reason as well, which is that we've been  
4 enjoined from even doing guidance, even  
5 formulating a policy, and that itself is another  
6 problem with these injunctions.

7 JUSTICE KAVANAUGH: On the day after  
8 it goes into effect -- this is just a very  
9 practical question, how it's going to work --  
10 what do hospitals do with a newborn, what do  
11 states do with a newborn?

12 GENERAL SAUER: I don't think they do  
13 anything different. What the executive order  
14 says in Section 2 is that federal officials do  
15 not accept documents that have the wrong  
16 designation of citizenship from people who are  
17 subject to the executive order.

18 JUSTICE KAVANAUGH: How are they going  
19 to know that?

20 GENERAL SAUER: The states can  
21 continue to -- the federal officials will have  
22 to figure that out essentially.

23 JUSTICE KAVANAUGH: How?

24 GENERAL SAUER: So you can imagine a  
25 number of ways that the federal officials

1       could --

2                   JUSTICE KAVANAUGH:   Such as?

3                   GENERAL SAUER:   Such as they could  
4       require a showing of, you know, documentation  
5       showing legal presence in the country.  For a  
6       temporary visitor, for example, they could see  
7       whether they're on a B-1 visa, which would  
8       exclude kind of the birthright citizenship in  
9       that kind of --

10                  JUSTICE KAVANAUGH:   For all the  
11       newborns?  Is that how it's going to work?

12                  GENERAL SAUER:   Again, we don't know  
13       because the agencies were never given the  
14       opportunity to formulate the guidance.  They  
15       would have had 30 days --

16                  JUSTICE KAVANAUGH:   They're only going  
17       to have 30 days to do this.  Do you think they  
18       can get it together in time?

19                  GENERAL SAUER:   They're under --  
20       that's what the Executive Order instructs them  
21       to do, and, hopefully, they will do so.  Again,  
22       it's a speculative and hypothetical scenario  
23       because they were enjoined from even starting  
24       that process.

25                  JUSTICE KAVANAUGH:   And then last

1 question. You mentioned before this has come up  
2 in the last four or five administrations  
3 primarily. You know, I guess I've thought about  
4 that a lot too. Why? It seems why might be  
5 it's harder to get legislation through Congress,  
6 particularly with the filibuster rule.  
7 Presidents want to get things done with good  
8 intentions. The executive branches that work  
9 for those presidents push hard to -- when they  
10 can't get new authority, to stretch or use  
11 existing authority, and they've been pushing,  
12 understandably, all with good intentions. All  
13 the presidents, both parties, right, with good  
14 intentions, pushing.

15 Is that your understanding of why this  
16 has happened more, that there's less ability to  
17 get legislation? Because I'm trying to figure  
18 out the why to your opening about the last four  
19 or five administrations. I agree with it. I  
20 think that might be the why, but I'm curious  
21 what you think.

22 GENERAL SAUER: I'm speculating about  
23 the motivations of the individual district  
24 judges who grant these, but one explanation  
25 might be this is an extraordinary power. It's a

1     very strong power for the reasons the questions  
2     have reflected for a district judge --

3             JUSTICE KAVANAUGH: Well, let me --  
4     let me just pause you right there. The -- the  
5     underlying point is that these district judges  
6     are not just doing universal injunctions;  
7     they're finding these actions illegal because  
8     they're exceeding existing authority, and  
9     oftentimes we are too when it gets to us,  
10    finding the actions of presidents of both  
11    parties unlawful because they exceeded existing  
12    authority.

13            So is that coming up more often  
14    because of -- why is that coming up more often?

15            GENERAL SAUER: You know, it's hard to  
16    do a historical analysis, but I would draw an  
17    analogy to the -- to the New Deal, and Professor  
18    Bray makes this point in his article, that,  
19    actually, there were very, very passionate  
20    challenges to, you know, sort of nationwide  
21    policies during the Roosevelt administration and  
22    they were not addressed by issuing universal  
23    injunctions. He cites an example where, in one  
24    case, a policy had been held illegal, and there  
25    were, like, 1600 injunctions against that policy

1 all protecting the individual plaintiffs.

2 So, if you look at the history, it's  
3 not clear that what we have of, you know,  
4 disagreement, difficulty, gridlock, getting  
5 things through Congress and so forth, that's not  
6 just necessarily new.

7 What is new and is certainly unique to  
8 the last five presidential administrations is  
9 having these given on this widespread basis and  
10 this systematic basis, 40, again, in the last  
11 four months.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 JUSTICE BARRETT: General Sauer, I  
16 want to ask you about a potential tension --  
17 well, no, not potential tension, an actual  
18 tension that I see in answers that you gave to  
19 Justice Kavanaugh and Justice Kagan.

20 You resisted Justice Kagan when she  
21 asked you whether the government would obey  
22 within the Second Circuit a precedent -- I'm  
23 distinguishing between opinions and judgments  
24 here.

25 Did I understand you correctly to tell

1 Justice Kagan that the government wanted to  
2 reserve its right to maybe not follow a Second  
3 Circuit precedent, say, in New York because you  
4 might disagree with the opinion?

5 GENERAL SAUER: Our general practice  
6 is to respect those precedents, but there are  
7 circumstances when it is not a categorical  
8 practice. It is -- and that is not a new  
9 policy. That's --

10 JUSTICE BARRETT: This  
11 administration's practice or the longstanding  
12 practice of the federal government?

13 And I'm not talking about in the  
14 Fourth Circuit are you going to respect a Second  
15 Circuit. I'm talking about within the Second  
16 Circuit. And can you say is that this  
17 administration's practice or a longstanding one?

18 GENERAL SAUER: As I understand it,  
19 longstanding --

20 JUSTICE BARRETT: Really?

21 GENERAL SAUER: -- policy of the  
22 Department of Justice, yes, that we generally --  
23 as it was phrased to me, generally respect  
24 circuit precedent but not necessarily in every  
25 case. And certain -- some examples might be a

1 situation where we're litigating to try and get  
2 that circuit precedent overruled and so forth.

3 JUSTICE BARRETT: Well, okay. So I'm  
4 not -- I'm not talking about a situation in  
5 which, you know, the Second Circuit has a case  
6 from 1955 and you think it's time for it to be  
7 challenged. That's not what I'm talking about.

8 I'm talking about in this kind of  
9 situation. I'm talking about this week the  
10 Second Circuit holds that the executive order is  
11 unconstitutional, and then what do you do the  
12 next day or the next week?

13 GENERAL SAUER: Generally, we follow  
14 that.

15 JUSTICE BARRETT: So you're still  
16 saying "generally."

17 GENERAL SAUER: Yes.

18 JUSTICE BARRETT: And you still think  
19 that it's generally the policy, longstanding  
20 policy, of the federal government to take that  
21 approach?

22 GENERAL SAUER: That is my  
23 understanding.

24 JUSTICE BARRETT: Okay. So -- but it  
25 sounds to me like you accept a Cooper versus

1 Aaron kind of situation for the Supreme Court  
2 but not for, say, the Second Circuit?

3 GENERAL SAUER: I would say --

4 JUSTICE BARRETT: So you would respect  
5 the opinions and the judgments of the Supreme  
6 Court, and you're saying you would respect the  
7 judgment but not necessarily the opinion of a  
8 lower court.

9 GENERAL SAUER: And, again, in -- I  
10 think, in the vast majority of instances, our  
11 practice has been to respect the opinion as well  
12 in -- in the circuits as well, but my  
13 understanding is that has not been a categorical  
14 practice in the way respect for the precedents  
15 and the judgments of the Supreme Court has been.

16 JUSTICE BARRETT: So you're not  
17 hedging at all with respect to the precedent of  
18 this Court?

19 GENERAL SAUER: That is correct. I --  
20 I believe the --

21 JUSTICE BARRETT: Okay.

22 GENERAL SAUER: -- quotation from our  
23 application directly addresses that.

24 JUSTICE BARRETT: Okay.

25 GENERAL SAUER: And we stand by that



1 completely.

2 JUSTICE BARRETT: Okay. Next  
3 question. So this is also a follow-up to some  
4 of your -- the questions that others have asked  
5 you about the merits of the order not being  
6 before us.

7 Did I understand your answer to be  
8 because you think percolation is really  
9 important for this one?

10 GENERAL SAUER: We do think  
11 percolation is really important for this one.  
12 But the reason the merits are not before us is  
13 because we've only submitted a stay application  
14 on the scope of relief question.

15 And as Labrador against Poe indicates,  
16 the scope of relief is a separate question from  
17 the --

18 JUSTICE BARRETT: Oh, I understand  
19 it's a separate question, but there are plenty  
20 of times that the government comes to us and  
21 asks for both.

22 GENERAL SAUER: Absolutely. For  
23 example, recently, in the Wilkinson Cox  
24 application, we did exactly that.

25 JUSTICE BARRETT: And the reason why

1     you didn't ask for both here is because you  
2     think that the merits question needs  
3     percolation.

4                 GENERAL SAUER:  Yes.  But also, more  
5     fundamentally, it illustrates that the very  
6     problem with these nationwide injunctions is  
7     they force -- they -- they -- they force this  
8     rushed, you know, fast-and-furious decisions on  
9     the merits.  So I think it would be very  
10    inappropriate in this case to come to a stay  
11    application saying please give us a rushed, you  
12    know, decision on the merits of something that's  
13    very, very complex and --

14                JUSTICE BARRETT:  But the government's  
15    done that in other cases too, right?

16                GENERAL SAUER:  Those cases would be  
17    different from this case.  The example I gave  
18    earlier we think is very clear-cut on the  
19    merits.  You know, this one is, we -- we  
20    concede, a novel and central question.

21                JUSTICE BARRETT:  So this one isn't  
22    clear-cut on the merits from the government?

23                GENERAL SAUER:  This one -- in this  
24    case, we want the Court to address the remedial  
25    issue.  If we offered the merits first, that's a

1 vehicle problem because the Court has, in many  
2 cases, just addressed the merits and not the  
3 remedial issue. And it's imperative from the  
4 federal government's perspective that the  
5 remedial question be addressed.

6 JUSTICE BARRETT: Okay. So last  
7 question is about why that is.

8 Justice Alito asked you, well,  
9 what's -- what's the point of this? If the same  
10 thing could happen, which is, effectively, the  
11 EO being enjoined everywhere via class action or  
12 because it's necessary to provide complete  
13 relief, say, to the states, is there any  
14 difference in your view between, say, a class is  
15 certified of all individual plaintiffs and they  
16 win and the executive order classwide -- there's  
17 a judgment saying that it can't be enforced?

18 Do you want to say, you know, follow  
19 up -- is there any practical distinction you  
20 see? Why -- why does the government care? Is  
21 it just the rigors of the certification process,  
22 or is it something more?

23 GENERAL SAUER: The -- the rigors of  
24 the certification process. Keep in mind that in  
25 many of these cases we successfully oppose class

1 action. But we have not --

2 JUSTICE BARRETT: Let's assume I think  
3 you can't successfully oppose it here for  
4 individual plaintiffs.

5 GENERAL SAUER: Well, I mean, that  
6 opportunity to have our day in court on that is  
7 very, very important.

8 JUSTICE BARRETT: I -- I understand.  
9 But let's -- let's assume. Go with my  
10 assumption.

11 GENERAL SAUER: The -- assuming that  
12 we were to lose in -- in opposing the  
13 certification --

14 JUSTICE BARRETT: Assume the class is  
15 certified. Is there any benefit -- if a class  
16 is certified -- and let's say, you know, you  
17 were pointing out that the Executive Order  
18 targets two different kinds of people. Let's  
19 assume that it's commonality because, you know,  
20 they only target one portion of the order,  
21 right?

22 In that circumstance, does the  
23 government get anything different -- this is  
24 back to Justice Alito's question about what --  
25 what's it to you, what's the practical

1 difference to you. Do you want to say anything  
2 about whether there's a practical difference  
3 between a universal injunction and a loss in the  
4 class?

5 GENERAL SAUER: Absolutely.

6 JUSTICE BARRETT: Okay.

7 GENERAL SAUER: Among many others, the  
8 represented class members are bound in the class  
9 action context, and that means that if they  
10 lose, they're bound by that as well. So they're  
11 taking a grave risk, so to speak, by proceeding  
12 through a class action.

13 And it has this symmetry, where the  
14 government is bound if -- if -- if we lose; they  
15 are bound if we don't lose. And that's a very,  
16 very important distinction.

17 JUSTICE BARRETT: And you would  
18 respect that judgment?

19 GENERAL SAUER: If it were -- yes, if  
20 it were a judgment. You know, now we may try to  
21 litigate in other contexts to try and get a  
22 different judgment from a different --

23 JUSTICE BARRETT: Sure.

24 GENERAL SAUER: -- district court, but  
25 we would be bound by that judgment, as would

1       they, and that's the crucial point.

2                   JUSTICE BARRETT:   Okay.

3                   CHIEF JUSTICE ROBERTS:   Justice  
4       Jackson?

5                   JUSTICE JACKSON:   So, as far as I can  
6       tell, your bottom line seems to be that what you  
7       call universal injunctions give relief to  
8       nonparties without going through the necessary  
9       steps, which you identify in Rule 23.

10                  Do I have that right?  I mean, is that  
11       sort of like boiled to bare essence what you're  
12       saying?

13                  GENERAL SAUER:   I would say there's a  
14       lot more to it --

15                  JUSTICE JACKSON:   Yeah.

16                  GENERAL SAUER:   -- but that's one very  
17       important one.

18                  JUSTICE JACKSON:   That's -- that's a  
19       key point that I want to focus in on for a  
20       moment.  I guess I don't understand why you are  
21       saying that these kinds of injunctions are  
22       giving relief to nonparties.

23                  First of all, I think they can be also  
24       easily characterized as focusing only on the  
25       defendant pursuant to the court's jurisdiction,

1     personal jurisdiction, over this person relative  
2     to the subject matter jurisdiction that the  
3     court has, and the relief is telling the  
4     defendant stop doing this thing that the court  
5     has found to be unlawful.

6             So, rather than characterizing it as a  
7     "universal injunction," I think one could easily  
8     see that this is just about the extent to which  
9     the court can constrain a defendant over whom it  
10    has personal jurisdiction, can it do so  
11    completely or just partially with respect to --  
12    you know, just say stop with respect to this  
13    plaintiff.

14            Am I mischarac- -- like, I just -- I  
15    don't understand where this idea of universal  
16    injunctions comes from in this context.

17            GENERAL SAUER: I think the relevant  
18    distinction is an order. That order's in this  
19    case the government defendant to cease allegedly  
20    unlawful activity as to the parties who have  
21    come into court and sued and one that says to  
22    the government defendant cease the allegedly  
23    unlawful activity against everyone in the entire  
24    world.

25            JUSTICE JACKSON: No, just cease it,

1     just stop. This thing, this Executive Order --  
2     I mean, we do this in the APA context all the  
3     time, right? The statute says you hold that  
4     the -- you set aside the conduct, right, that  
5     it's unlawful. And we don't really parse it out  
6     and say, okay, but it's unlawful only as it  
7     applies to the plaintiff or not.

8                 So it's a very common concept for the  
9     court to enjoin a defendant from doing  
10    particular unlawful behavior.

11                And what you're now asking us to do is  
12    to require that the court have an additional  
13    limitation in its order that says you only have  
14    to stop doing this with respect to the  
15    plaintiff, and that's the part that I don't  
16    understand.

17                I -- I guess -- I guess, from what I  
18    can read from your papers and what you've said  
19    here, that limitation, you say, comes from this  
20    principle that if you don't do that, you would  
21    be somehow giving relief to nonparties.

22                But I -- I -- I wonder if that's  
23    right. I mean, it -- it seems to me that the  
24    relief is the judgment that you provide to the  
25    plaintiff that says stop doing this conduct, and



1     you give it only to the plaintiff. That's where  
2     the limitation comes.

3             The plaintiff is the only person who  
4     can go to court after you violate this order and  
5     enforce it. Other people are incidental  
6     beneficiaries of -- of a court ordering you to  
7     follow the law. I mean, that's like everyone in  
8     the world. When a court says follow the law,  
9     anybody who would have been hurt by your not  
10    following the law benefits.

11            Okay. I -- I don't understand why  
12    that would limit the court in its ability to  
13    tell you: Don't do this unlawful conduct.

14            GENERAL SAUER: Two responses to that.

15            JUSTICE JACKSON: Yes.

16            GENERAL SAUER: There is a lot there.

17            JUSTICE JACKSON: Yes.

18            GENERAL SAUER: Two responses to that.

19    One is that principle that your question  
20    referred to is the holding of the Court in Warth  
21    against Seldin and it's reaffirmed in Gill  
22    against Whitford, in Lewis against Casey and  
23    similar cases, that the authority of the federal  
24    court, whether it's viewed as arising under  
25    Article III or under its traditional scope of

1 equitably authority, is to remediate the  
2 injuries to the complaining party.

3 And then, to address your question  
4 about --

5 JUSTICE JACKSON: Can I just stop you  
6 there? I'm, as the Court, remediating the  
7 injury by telling the defendant to stop doing  
8 this behavior. The plaintiff has brought a  
9 claim that this Executive Order is unlawful, I  
10 look at it, I litigate it, and I say you're  
11 right, stop doing it, you cannot enforce this  
12 order.

13 So I don't understand why that's,  
14 like, outside the scope of Warth versus Seldin.

15 GENERAL SAUER: If the Court in that  
16 case is imposing a -- what we've called an  
17 indivisible remedy, for example, vacatur under  
18 the APA -- there's a debate about what "set  
19 aside" means. Assuming it means to vacate, then  
20 the remedy that Congress has provided as a  
21 condition of its delegation to the -- the agency  
22 is, if one part of the, you know -- if the -- if  
23 the regulation is unlawful, then the remedy  
24 granted, which directly remediates the  
25 plaintiff's injury in that hypothetical, is an

1 indivisible remedy that benefits others.

2                   Here, in this case and in all the  
3 other 40 cases, we see something totally  
4 different --

5                   JUSTICE JACKSON: Yeah, I understand.

6                   GENERAL SAUER: -- because it's not  
7 necessary to remediate --

8                   JUSTICE JACKSON: Yeah.

9                   GENERAL SAUER: -- the injuries of the  
10 plaintiff before them. That is the concern of  
11 Warth versus Seldin.

12                   JUSTICE JACKSON: I -- I understand.  
13 Let me just -- let me just turn your attention  
14 to one other thing because the real concern, I  
15 think, is that your argument seems to turn our  
16 justice system, in my view at least, into a  
17 "catch me if you can" kind of regime from the  
18 standpoint of the executive, where everybody has  
19 to have a lawyer and file a lawsuit in order for  
20 the government to stop violating people's  
21 rights.

22                   Justice Kagan says let's assume for  
23 the purpose of this that you're wrong about the  
24 merits, that the government is not allowed to do  
25 this under the Constitution. And yet it seems

1 to me that your argument says we get to keep on  
2 doing it until everyone who is potentially  
3 harmed by it figures out how to fire -- file a  
4 lawsuit, hire a lawyer, et cetera.

5 And I don't understand how that is  
6 remotely consistent with the rule of law, you  
7 know, a system -- and I appreciate that you go  
8 back to English common law and the Chancery  
9 Court. But they had a different system. The  
10 fact that courts back in English Chancery  
11 couldn't enjoin the king, I think, is not  
12 analogous or indicative of what courts can do in  
13 our system, where "the king," the executive, is  
14 supposed to be bound by the law, and the court  
15 has the power to say what the law is.

16 And so one would think that the court  
17 could say this conduct is unlawful and you have  
18 to stop doing it.

19 GENERAL SAUER: I think the "catch me  
20 if you can" problem operates in the opposite  
21 direction where we have the government racing  
22 from jurisdiction to jurisdiction having to sort  
23 of clear the table in order to implement a new  
24 policy.

25 A great example of this is in the

1 Shilling litigation, where the -- the military  
2 had a military readiness policy. It was  
3 universally enjoined by the DDC. It went up to  
4 the D.C. Circuit. The D.C. Circuit stayed that  
5 injunction to allow that policy to go into  
6 effect, and then, one hour later, a district  
7 court on the other side of the country  
8 universally --

9 JUSTICE JACKSON: Can I just ask you  
10 one final thing, because this relates to also  
11 something that Justice Kagan said?

12 I would think we'd want the system to  
13 move as quickly as possible to reach the merits  
14 of the issue and maybe have this Court decide  
15 whether or not the government is entitled to do  
16 this under the law. Wouldn't having universal  
17 injunctions actually facilitate that?

18 It seems to me that when the  
19 government is completely enjoined from doing the  
20 thing it wants to do, it moves quickly to appeal  
21 that to get it to the Supreme Court, and that's  
22 actually what we would want.

23 What I worry about is similar to what  
24 Justice Kagan points out, is that, if the  
25 government is saying no lower court can

1 completely enjoin it, it actually means that the  
2 government just keeps on doing the purportedly  
3 unlawful thing, and it delays the ability for  
4 this Court to reach the underlying issue.

5 GENERAL SAUER: Percolation of novel,  
6 sensitive constitutional issues is a merit of  
7 our system. It is not a -- not -- not a bad  
8 feature of the system.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. Feigenbaum.

13 ORAL ARGUMENT OF JEREMY M. FEIGENBAUM  
14 ON BEHALF OF THE STATE AND CITY RESPONDENTS

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

17 This Court should deny the emergency  
18 application because this injunction was properly  
19 designed to ensure that the states would get  
20 relief for our own Article III injuries as we  
21 suffer significant pocketbook and sovereign  
22 harms from implementation of this Executive  
23 Order, including from the application of this EO  
24 to the 6,000 babies born to New Jersey parents  
25 out of state every year.

1           The U.S. prefers alternative  
2   approaches for granting that relief,  
3   alternatives it never raised in the district  
4   court below. But its approach would require  
5   citizenship to vary based on the state in which  
6   you're born or even turn on or off when someone  
7   crosses state lines, raising serious and  
8   unanswered administrability questions not just  
9   for the federal government but also for the  
10   states.

11           And it would offend the text and  
12   history of the Citizenship Clause itself. Since  
13   the Fourteenth Amendment, our country has never  
14   allowed American citizenship to vary based on  
15   the state in which someone resides because the  
16   post-Civil War nation wrote into our  
17   Constitution that citizens of the United States  
18   and of the states would be one and the same  
19   without variation across state lines.

20           The U.S. has claimed that Article III  
21   establishes a bright-line rule barring such  
22   injunctions no matter the circumstance, even  
23   where the states do need it to meet their own  
24   harms, finds no support in this Court's cases or  
25   in the history of equity.

1           Its argument that a single district  
2   court cannot decide birthright citizenship or  
3   that we need more percolation on that question  
4   for the nation overlooks that this Court already  
5   settled this exact constitutional question 127  
6   years ago and that this EO is contrary to over a  
7   century of executive practice.

8           Finally, the U.S.'s objection that  
9   nationwide PIs have simply become too common in  
10   the last few months, a complaint about other  
11   injunctions sought by other parties, cannot  
12   undermine the extraordinary bases for this one.  
13   The states, who regularly come before this Court  
14   as plaintiff and defendant alike, agree that  
15   nationwide relief can be reserved for narrow  
16   circumstances, but it was needed here.

17           I welcome this Court's questions.

18           JUSTICE THOMAS: Putting the merits  
19   aside, what -- what do you think is the origin  
20   of or at least the pedigree of universal  
21   injunctions, particularly the bill of peace, if  
22   you would discuss that?

23           MR. FEIGENBAUM: Absolutely, Your  
24   Honor. So there's two categories of these broad  
25   injunctions. So, first, although we use the



1 term "nationwide injunction," if the nationwide  
2 injunction is actually about meeting our harm  
3 and the alternatives are not legally or  
4 practically workable, then it isn't even a  
5 universal injunction, as I know this Court's  
6 separate writings has used the term, because  
7 it's about meeting our own Article III injury,  
8 which is our basic submission about this case.

9 But we do agree that there's some  
10 space for universal relief. We trace it back  
11 through the history, from the bill of peace  
12 through Equity Rule 48, which specifically  
13 clarified that in the American equitable  
14 tradition, it was not always the case that  
15 universal relief would bind the nonparties even  
16 as it might benefit the nonparties, continuing  
17 on to the tax collection injunctions in the 19th  
18 century and then continuing on as recently as  
19 this Court's order in AARP.

20 So I do think they've always been in  
21 narrow circumstances. They've never been the  
22 reflexive or norm of how relief should be  
23 granted in this country, but they have been  
24 available.

25 I don't think I need that for my case,

1 but I do think they're available in narrow  
2 circumstances.

3 CHIEF JUSTICE ROBERTS: You say they  
4 should be available only in narrow  
5 circumstances. Why -- why is that?

6 MR. FEIGENBAUM: Yeah. So I could --  
7 I could offer the three that I think make the  
8 most sense, but we're mindful of some of the  
9 concerns that the United States raises.

10 We are states who have benefitted from  
11 federal policies. We are states who have our  
12 own statutes and policies. So sometimes we are  
13 on the other side of the "v" in cases involving  
14 universal relief. So we are sympathetic to some  
15 of the concerns the United States has about  
16 percolation, about running the table in  
17 particular cases.

18 We just don't think that that supports  
19 a bright-line rule that says they're never  
20 available. And we've identified, I think, at  
21 least three circumstances where they would make  
22 sense to be available.

23 The first would be in cases where the  
24 alternative ways of remedying the harm for the  
25 parties are not practically or legally workable.

1     That's this case, and I'll return to that in a  
2     second.

3             The second would be congressional  
4     authorization. So I took my friend on the other  
5     side to try to set aside vacatur, but I do think  
6     their Article III objections would raise serious  
7     questions for remedies like vacatur, for  
8     remedies like the Hobbs Act. Even the Hobbs  
9     Act, which could set a nationwide PI after a  
10    multi- -- multi-circuit lottery, might  
11    ultimately have problems under their view of  
12    Article III.

13            And then the third thing I would say  
14    is there may be cases in which the alternative  
15    forms of getting nonparty relief are not legally  
16    or practically available. So that might be a  
17    case like AARP or even a case like this one,  
18    where district courts could consider the  
19    availability of the class action device, but if  
20    it couldn't move fast enough because Rule 23  
21    doesn't include TROs and PIs, if it couldn't  
22    move fast enough in those contexts, courts might  
23    need to step in anyway.

24            But I think we fit in the first bucket  
25    in this particular case because the alternative

1 ways of remedying our particular significant  
2 pocketbook harms to the tunes of millions of  
3 dollars can't be remedied, as the district court  
4 found below, without granting us this kind of  
5 relief.

6 CHIEF JUSTICE ROBERTS: Well, I mean,  
7 you could benefit through percolation and a  
8 decision from this Court with reasonable  
9 expedition.

10 MR. FEIGENBAUM: So I have no  
11 objections to reasonable expedition --  
12 expedition. We would have no objection to this  
13 Court even setting supplemental briefing on the  
14 merits and hearing the merits directly. I'm  
15 happy to talk about the ways in which I think  
16 the merits do bear on this emergency  
17 application.

18 But, more fundamentally to your  
19 question, Mr. Chief Justice, I would just note  
20 that I don't think the alternatives actually  
21 fully remedy our injuries in a couple of  
22 different respects.

23 So I heard my friend on the other side  
24 to specifically say today that maybe there can  
25 be an instruction to the federal government that

1 at least when you're dealing with the Plaintiff  
2 States, you treat these individuals kind of as  
3 though they're citizens even if they're not  
4 really citizens.

5 And that doesn't work not just for the  
6 federal government. I agree, Justice Gorsuch,  
7 it may well be that the federal government can  
8 decide when to take its own medicine, but I'm  
9 talking about administrability burdens on the  
10 states and I'm talking about administrability  
11 burdens on third parties as well.

12 JUSTICE GORSUCH: Can I ask you a  
13 question about that, counsel? Your three  
14 buckets are very thoughtful. The first one  
15 seems to me kind of consistent with traditional  
16 equity, which is if -- if it's required -- if  
17 you've got to remedy the plaintiffs' harm.  
18 That's your point there, and you're saying we  
19 fall in that bucket. I get that argument.

20 The second bucket is possibly Article  
21 III, okay, that Congress could authorize and  
22 maybe has authorized circumstances, but that  
23 doesn't answer the equity point.

24 So we come to bucket three, and I'm --  
25 I'm struggling to understand what the rule is

1     there.  You seem to suggest, well, if it's -- if  
2     it's really important and if you have to act  
3     expeditiously, then go ahead.  But I think every  
4     district court who enters one of these thinks  
5     that's what they're doing.

6                 So what's the constraint there?  If  
7     you share the government's concerns about the  
8     rise of these things in the last few decades,  
9     what teeth does any of that have?

10                MR. FEIGENBAUM:  So I do feel like  
11     something of an amicus to this question because  
12     nothing in my injunction rises or falls on  
13     this claim bucket.

14                JUSTICE GORSUCH:  Exactly.  So --  
15     so --

16                MR. FEIGENBAUM:  But -- so I'm happy  
17     to answer questions on that.

18                JUSTICE GORSUCH:  -- I -- I need all  
19     the amici I can get.

20                (Laughter.)

21                MR. FEIGENBAUM:  Fair enough, Your  
22     Honor.

23                So I would say two things about that.  
24     The first is it does require reading the history  
25     in a way more like I do, which does not create a

1 single bright-line rule that this is never  
2 available. Obviously, if someone reads the  
3 history as saying --

4 JUSTICE GORSUCH: I'm -- I'm spotting  
5 you that --

6 MR. FEIGENBAUM: Great.

7 JUSTICE GORSUCH: -- for the purposes  
8 of my question.

9 MR. FEIGENBAUM: Great.

10 JUSTICE GORSUCH: I'm not granting --  
11 the -- granting the --

12 MR. FEIGENBAUM: I thought you might  
13 not, Justice Gorsuch.

14 JUSTICE GORSUCH: But I'm spotting it  
15 to you and I'm just saying, well, okay, what  
16 would that look like and how would that be any  
17 different from what we have experienced over the  
18 last few decades.

19 MR. FEIGENBAUM: So this is a way in  
20 which my first bucket and my third bucket are  
21 actually going to relate for a moment, so I  
22 think this is the --

23 JUSTICE GORSUCH: No, no, no, no, no,  
24 no, no.

25 MR. FEIGENBAUM: No, it's helpful. I

1     promise.

2                   JUSTICE GORSUCH:  You don't get to  
3     squiggle out into the first bucket, okay?  We're  
4     in the third bucket.

5                   MR. FEIGENBAUM:  I'll answer for the  
6     third bucket --

7                   JUSTICE GORSUCH:  Thank you.

8                   MR. FEIGENBAUM:  -- which is I think  
9     it requires having district courts consider the  
10    availability of the alternative and explaining  
11    why it's not workable in the case.

12                  JUSTICE GORSUCH:  I think we've told  
13    them to do that and, you know, gosh, how many  
14    times do we have to tell them to do that.  And I  
15    think, in -- in -- in fairness to them, that's  
16    what they think they have.

17                  So let's -- again, would any case over  
18    the last 30 years come out differently under  
19    your -- your view of the -- the -- the rule in  
20    the third bucket than -- than has?

21                  MR. FEIGENBAUM:  Yeah.  So there's a  
22    couple of examples where we don't think  
23    universal relief was appropriate.  I'm most  
24    familiar with the state litigation, so most of  
25    my examples will probably come from there, but I



1     heard my friend on the other side mention the  
2     DACA litigation, where Texas sought the  
3     termination of DACA and, ultimately, the -- the  
4     Fifth Circuit terminated DACA specific to Texas  
5     alone.

6                     And we thought that that decision was  
7     exactly right because of the nature of the harms  
8     in that case meant that Texas could get full  
9     relief for its harms.

10                    JUSTICE GORSUCH:  Well, that -- now  
11     we're back to the first bucket.  We're just  
12     satisfying the --

13                    MR. FEIGENBAUM:  Oh, I -- I take the  
14     point.  I'm so sorry, Your Honor.

15                    JUSTICE GORSUCH:  You see what I'm  
16     saying?

17                    MR. FEIGENBAUM:  I take the point.  
18     Yes.  So I think --

19                    JUSTICE GORSUCH:  I mean, I get that  
20     we're going to always revert back to the first  
21     bucket, but that means the third bucket's empty,  
22     and --

23                    MR. FEIGENBAUM:  I -- I -- I totally  
24     take the point.  I think AARP is a good  
25     illustration of the third bucket that this Court

1       confronted recently where it was the case that  
2       there was this rush just a few hours, not  
3       possible to go through class certification.

4                You heard my friend on the other side  
5       talk about the rigors of class certification,  
6       and I don't think my friend on the other side  
7       would agree it could be done in three hours  
8       through the night, and so there were a necessity  
9       to step in --

10               JUSTICE KAVANAUGH:  Do you -- do you  
11       agree about the rigors of class certification?  
12       It seems to me that 23(b)(2) classes and -- and  
13       you probably, if -- if you have to, are going to  
14       be arguing that they're not so rigorous to meet  
15       for injunctive relief for national policies that  
16       are uniform.

17               MR. FEIGENBAUM:  So the most important  
18       thing that hasn't come up in the discussion this  
19       morning yet is that they're not available for  
20       state litigation.  It talks about persons.  It  
21       talks about appointment of class counsel.  It  
22       talks about going through the certification  
23       process.

24               States -- this Court's precedents are  
25       really clear about parents that try lawsuits.

1 States can't represent those individuals in  
2 class actions, nor would we try to. They can't  
3 represent us and you don't have classes of  
4 states.

5 So the whole framework doesn't apply  
6 to state litigation. So I understood how it  
7 might come up as an alternative for some other  
8 cases you might see in the future, but for the  
9 injunction you have in front of you from the  
10 states, the whole class device doesn't even work  
11 as an alternative. So I don't see how it can be  
12 the answer for us.

13 JUSTICE BARRETT: But -- but why  
14 should you care if the class device doesn't work  
15 as an alternative if you have bucket one?

16 Like, you -- you don't really need the  
17 class device. I think what you're saying is  
18 will it be frustrating for states not to have  
19 the class device when the individuals have it,  
20 but I don't see why that's true if giving you  
21 complete relief in -- in bucket one solves your  
22 problem.

23 MR. FEIGENBAUM: So I should be very  
24 clear, and I'm sorry for the confusion on this.  
25 This goes back to my colloquies with Justice

1 Gorsuch.

2 When states are seeking the relief,  
3 states are seeking it in bucket one and bucket  
4 two. As an amicus to the other injunction --

5 JUSTICE BARRETT: I see.

6 MR. FEIGENBAUM: -- I recognize courts  
7 are looking at, I think bucket three could be  
8 available.

9 We aren't seeking relief when -- when  
10 it falls into bucket three because, as I was  
11 saying earlier, we're not going to be seeking  
12 relief for other parties. This Court's cases  
13 like Brackeen make very clear we aren't suing to  
14 vindicate the injuries that third parties and  
15 our residents are suffering.

16 So, when states come before you, the  
17 questions that you would ask are: Are the  
18 alternative ways of remedying our injury going  
19 to be practically or legally workable? And  
20 you're going to ask did Congress authorize it,  
21 which gets to the vacatur question, which gets  
22 to the Hobbs Act question and so on.

23 And on that first bucket, which I  
24 think describes this case well, I had a hard  
25 time with some of the colloquies earlier today

1     because I think they were missing some really  
2     serious burdens that the states are still going  
3     to have to bear in this case if we get something  
4     less than a nationwide injunction.

5                 I think it's going to hinder the  
6     administration of our benefits programs. I  
7     think it's going to hinder the participation in  
8     our benefits programs. And I think it's going  
9     to produce unprecedented chaos on the ground.  
10    And I -- I might offer examples of each.

11                JUSTICE GORSUCH: Before you do, I'm  
12    sorry, I have one more.

13                MR. FEIGENBAUM: Not at all.

14                JUSTICE GORSUCH: How would you get  
15    this -- how would you get the merits of this  
16    case to us promptly?

17                MR. FEIGENBAUM: So there's two  
18    different ways that this Court could think about  
19    doing it.

20                So the first is I heard a couple  
21    colloquies earlier today to suggest that maybe  
22    the states should sort of have to take some of  
23    the burdens on ourselves because, okay, some  
24    people move in, maybe that's just something that  
25    equity shouldn't care about, and it may be true,

1     this is Hornbook equity, that in some cases,  
2     states don't get complete relief for the harms  
3     that they suffer, we just have to eat some of  
4     the administrability burdens.

5             But the merits have always come into  
6     that because that is just about remedying a  
7     party's own injuries, and the strength of the  
8     ability to remedy our injuries is going to turn  
9     on a peek on the merits.

10            This is partially Ohio versus EPA and  
11     building on Justice Kavanaugh's Labrador  
12     concurrence, where this Court said you might  
13     have some states who really like a policy and  
14     some states who want to get relief from the  
15     policy, and how you reconcile those two things,  
16     who should get relief, who should benefit from  
17     the policy, will turn in part on a peek at the  
18     merits because --

19            JUSTICE GORSUCH:   Yes.

20            MR. FEIGENBAUM:   -- we have a greater  
21     right to relief from it.

22            JUSTICE GORSUCH:   I appreciate that.  
23     How do we get to the merits fast?

24            MR. FEIGENBAUM:   This Court could set  
25     supplemental briefing on the merits by an order

1 tomorrow if it wished specifically to say the  
2 federal government has proposed that states get  
3 less than complete relief in this case. We  
4 could not possibly think about giving the states  
5 less than complete relief without looking at the  
6 merits. We want briefing.

7 JUSTICE GORSUCH: Okay. Put that  
8 aside. Assume we've just got the remedial  
9 question before us and we're going to decide the  
10 remedial question one way or the other. Then  
11 what?

12 MR. FEIGENBAUM: Oh, then I share some  
13 of Justice Kagan's concerns from earlier that it  
14 would -- it would --

15 JUSTICE GORSUCH: So I -- I appreciate  
16 you share those concerns. How would you address  
17 them? How -- how -- how would the states plan  
18 to get this case to the Court promptly?

19 MR. FEIGENBAUM: I think it's very  
20 hard to think about how the states would lose  
21 this case given the state of Supreme Court  
22 precedent. It creates very weird incentives on  
23 the certiorari docket when there's already  
24 binding precedent from this Court.

25 We do suffer harms from the

1 application of this Executive Order beyond our  
2 borders that we need relief from. If we don't  
3 get a full remedy from that, I suppose we could  
4 ultimately seek cert before judgment on the  
5 basis that we still have Article III injuries  
6 that we're suffering, but we'd be asking this  
7 Court to grant review from a circuit precedent  
8 we won on the basis that we have continued  
9 injuries.

10 It's not impossible. This Court knows  
11 best when it grants cert and when it doesn't. I  
12 would think it's not the cleanest way to tee up  
13 a case historically, and so it would raise some  
14 real concerns to the colloquies earlier today  
15 about how this case would ultimately come before  
16 this Court.

17 JUSTICE ALITO: Are -- are you telling  
18 us that we really can't decide the question that  
19 we asked to have briefing and argument on  
20 without taking a -- a peek at the merits?

21 MR. FEIGENBAUM: So I'm not saying  
22 that at all. So there's two different ways to  
23 think about this case, Your Honor.

24 One is to say, absolutely, the states  
25 need to get complete relief for their injuries



1     and then let's figure out the best way to do it,  
2     and we think the alternatives are not workable  
3     and not legal.

4             If this -- if this Court is going to  
5     entertain giving us anything less than full  
6     redress for all of the Article III injuries we  
7     bring before you, I don't see how that can be  
8     entertained without a peek at the merits because  
9     you always look at the merits to decide should  
10    we get a hundred percent or 90 percent of our  
11    own injuries redressed.

12            JUSTICE ALITO: Well, would a decision  
13    in -- on the matter that is I understood to be  
14    before us, the narrow question that I understood  
15    to be before us, make any -- be helpful in any  
16    way if we do not peek at the merits and we also  
17    do not decide whether you have standing?

18            MR. FEIGENBAUM: So I'm not sure how  
19    you could decide whether or not we got an  
20    appropriate scope of relief without figuring out  
21    what our own injuries are because how you  
22    decide -- this is the United States' own  
23    argument -- how you decide whether or not we  
24    should get relief for our own injuries turns on  
25    what our injuries are that require relief.

1                   And so I do think we have pretty  
2     significant pocketbook injuries like in Nebraska  
3     to the tunes of millions of dollars, and whether  
4     we get those remedies or don't get those  
5     remedied is going to turn on the merits, is  
6     going to turn on the nature of the harms, and  
7     then, ultimately, the workability of the  
8     alternatives.

9                   CHIEF JUSTICE ROBERTS: Thank you,  
10    counsel.

11                  Justice Thomas?

12                  Justice Alito?

13                  JUSTICE ALITO: Well, General Sauer  
14    began by outlining problems that he sees being  
15    created by universal injunctions, and he said  
16    that the issue was a -- a nonideological issue  
17    and a nonpartisan issue.

18                  Do you agree with that?

19                  MR. FEIGENBAUM: I do think presidents  
20    of both parties have objected to nationwide  
21    injunctions. I agree.

22                  JUSTICE ALITO: So what do you say  
23    about the -- the practical problem? So put out  
24    of -- let's put out of our minds the merits of  
25    this and just look at the abstract question of

1 universal injunctions.

2           What is your response to what some  
3 people think is the practical problem? And the  
4 practical problem is that there are 680 district  
5 court judges, and they are dedicated and they  
6 are scholarly, and I'm not impugning their  
7 motives in any way. But, you know, sometimes  
8 they're wrong, and all Article III judges are  
9 vulnerable to an occupational disease, which is  
10 the disease of thinking that I am right and I  
11 can do whatever I want.

12           Now, on a multi-member appellate  
13 court, that is restrained by one's colleagues,  
14 but trial judge, the trial judge sitting in the  
15 trial judge's courtroom is the monarch of  
16 that -- of that realm, and there are situations  
17 in which trial judges -- the -- the president  
18 does something, it could be President Trump, it  
19 could be President Biden, it could be President  
20 Obama. The trial judge says this is unlawful  
21 and I'm going to -- I'm going to order -- I'm  
22 going to enjoin it, and I'm so -- I'm convinced  
23 I'm right, so I'm not going to stay the  
24 injunction. And then an application is made to  
25 the court of appeals to stay the injunction.

1 The court of appeals gives it the back of the  
2 hand, and then the case comes immediately to us  
3 in the context of an emergency application.

4 And some of us have said, well, we  
5 don't think we should do anything in those  
6 situations unless the -- unless it is  
7 indisputably clear that the court below was  
8 wrong. So what do you say to that practical  
9 problem?

10 MR. FEIGENBAUM: So we're mindful of  
11 the practical problems. I will say the states  
12 have had a through line as well across  
13 administrations. We have never believed, even  
14 as nationwide injunctions restrained policies  
15 that we favored, that they were categorically  
16 off the table. We've always taken the position  
17 that they are sometimes available in narrow  
18 circumstances, whether we like the policy or  
19 don't like the policy.

20 And so you might have some cases where  
21 the nature of the harm -- this is the DACA  
22 example from my friend on the other side --  
23 where the nature of the harm, which was Texas  
24 saying it had to give benefits to residents in  
25 the state, is actually entirely remedied by a

1 nationwide -- a state-only injunction that  
2 applies just to Texas, because that might  
3 incentivize individuals to leave Texas, and then  
4 Texas doesn't have to give them benefits  
5 anymore. So you might have a case like that.

6 But sometimes you are going to have  
7 cases where it is impossible to remedy the  
8 state's own injuries, and the alternatives are  
9 not practically or legally workable, and that  
10 describes this case perfectly.

11 And so I don't think the answer is a  
12 bright line that means, even in those  
13 situations, it's not possible for the states to  
14 get relief.

15 JUSTICE ALITO: In deciding the -- the  
16 question that is before us here, do you think we  
17 should -- never mind. I withdraw that.

18 I have no further questions.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Let's start with  
22 an answer you've been trying to give and haven't  
23 completed, which are -- the General suggested  
24 there were two ways that your injuries could be  
25 remedied. He claimed they were both presented

1 to the court below. I didn't see that, but  
2 that's a matter that we could check on.

3 Do you agree with me that they were  
4 not presented to the courts below?

5 MR. FEIGENBAUM: I do agree with you.  
6 So I want to be very clear because I think  
7 there's some confusion across the briefing here.

8 JUSTICE SOTOMAYOR: Right.

9 MR. FEIGENBAUM: We agree -- and I  
10 don't think the First Circuit disagreed. They  
11 objected to the nationwide injunction --

12 JUSTICE SOTOMAYOR: They did.

13 MR. FEIGENBAUM: -- in the district  
14 court. And we attached the briefing and we  
15 attached the transcript.

16 What they didn't do is provide some of  
17 the alternatives they've pressed in two  
18 sentences in their emergency application.

19 JUSTICE SOTOMAYOR: That's what I  
20 mean. Okay.

21 MR. FEIGENBAUM: Yes. They did not  
22 press --

23 JUSTICE SOTOMAYOR: So now go through  
24 why their -- why you question whether their two  
25 suggestions now that they've only raised before

1 us are inadequate to remedy all of your harms.

2 MR. FEIGENBAUM: Yeah. So -- so --

3 JUSTICE SOTOMAYOR: Because complete  
4 relief, he says that there is situations in  
5 which you grant relief that will benefit third  
6 parties.

7 Why is your relief necessary to give  
8 you complete relief even though it benefits  
9 these parents in other jurisdictions?

10 MR. FEIGENBAUM: So I don't think  
11 there's any serious dispute that if you limit  
12 the relief to babies born in New Jersey, we  
13 won't get complete relief, because 42 U.S.C.  
14 1396a, the Medicaid statute, requires us, the  
15 states, to do the citizenship verification. So  
16 it's not true that they can simply handle it all  
17 for themselves. Federal law requires us to  
18 undertake those responsibilities.

19 And we have in New Jersey 6,000 babies  
20 born out of state every year when they come into  
21 the state and they need benefits. The Boyle  
22 declaration from Massachusetts suggests that's  
23 going to cover 40 percent of kids. They come  
24 into our state. They need benefits. We have to  
25 do citizenship verifications, which is a burden

1 for us.

2 JUSTICE SOTOMAYOR: That's for you in  
3 New Jersey, but there's I think how many states?

4 MR. FEIGENBAUM: That's just an  
5 example. We have --

6 JUSTICE SOTOMAYOR: Yeah.

7 MR. FEIGENBAUM: -- we have 23  
8 attorneys general in this -- exactly right.

9 JUSTICE SOTOMAYOR: Twenty-three  
10 attorney generals, so 23 states are going to  
11 have babies who were born somewhere else without  
12 a birth certificate that you're now, if they  
13 move into your state, going to have to do  
14 checking on.

15 MR. FEIGENBAUM: And that comes to the  
16 United States' alternative, Justice Sotomayor,  
17 which is they say, okay, maybe their citizenship  
18 turns on when they enter New Jersey, maybe for  
19 some purposes, maybe for all purposes, depending  
20 on which sentence you're looking at in the  
21 emergency application.

22 And there are three problems either  
23 way. The first is it will undermine the  
24 administration of our benefits programs. So  
25 individuals will move in. When they were born,



1     they were treated as noncitizens. They didn't  
2     get Social Security numbers because they  
3     wouldn't have been eligible for the enumeration-  
4     at-birth program in their states, and they're  
5     going to arrive and they're going to seek  
6     benefits that we administer.

7             But federal law requires that they  
8     have Social Security numbers for the  
9     administration of those benefits. This is 7  
10    U.S.C. 2025 for SNAP. This is 42 U.S.C. 1320b-7  
11    for TANF, for Medicaid, and so on. So they're  
12    going to need to have Social Security numbers.  
13    They're going to arrive without them even though  
14    they were under this Court's precedents citizens  
15    who should have been in the enumeration-at-birth  
16    program, who should have had Social Security  
17    numbers. And it's going to be a burden on us  
18    either in delaying the benefits, training county  
19    social service workers in having to administer  
20    benefits without the -- without the SSNs on a  
21    provisional basis.

22            So that's the administration of the  
23    benefits.

24            Let me give you an example on  
25    participation, which we have responsibility for

1 as well. These are babies who were told that  
2 they -- their families were told that the babies  
3 are undocumented, they aren't citizens, they're  
4 not eligible for these federal programs when  
5 they were born.

6 They come into our states, they think  
7 they're now ineligible. They don't realize  
8 their child is a citizen entitled to these  
9 federal benefits. And so what will happen is we  
10 bear the responsibility putting in our own state  
11 Medicaid plans of getting them enrolled, and  
12 that's 42 U.S.C. 1367bb.

13 So we're responsible for putting in  
14 our plan how we're going to enroll them. We  
15 have to incur substantially more costs to get  
16 them enrolled in our programs because they think  
17 they're undocumented, they think they're  
18 ineligible because of where they were born, even  
19 though their citizenship has now turned on when  
20 they cross state lines.

21 And then the last point is we've never  
22 in this country's history since the Civil War  
23 had your citizenship turn on when you cross  
24 state lines. So we don't have answers to these  
25 workability questions, not just because it

1     wasn't presented in the district court, not just  
2     because it's two sentences in an emergency  
3     application, but because, for over a century,  
4     executive practice has been uniformly to the  
5     contrary, building on this Court's decision in  
6     Wong Kim Ark. So we genuinely don't know how  
7     this could possibly work on the ground.

8             And although my friend on the other  
9     side has complained that they weren't able to  
10    give guidance, the states didn't object to  
11    guidance. The states have no quarrel with  
12    internal steps, and if they want to put out  
13    guidance that says, if Wong Kim Ark gets  
14    overruled, this is that we would do, that's  
15    fine. What they can't do is require us to take  
16    any steps or issue guidance that requires  
17    everyone to start planning for something that is  
18    so patently against this Court's own settled  
19    precedent.

20            JUSTICE SOTOMAYOR: Now, going back to  
21    the history question that Justice Thomas started  
22    with, you relied on the bill of peace. You  
23    relied on the tax injunction of the 19th century  
24    and not so far in the 19th century -- 1891 --  
25    just about the time that the Fourteenth

1 Amendment was adopted, okay?

2 At any rate, there are other cases,  
3 one of our amici points out to them, the Pierce  
4 versus Society of Sisters case, the West  
5 Virginia State Board of Education case, those  
6 were earlier than the 1960s. In -- in the  
7 Pierce versus Society of Sisters, the Court  
8 affirmed a universal injunction that wasn't even  
9 sought by the parents, correct?

10 MR. FEIGENBAUM: That's right.

11 JUSTICE SOTOMAYOR: And there, what we  
12 said was -- there, states were imposing criminal  
13 penalties on parents who sent their children to  
14 private school, and just two plaintiff schools  
15 sued against that penalty. They sought and won  
16 an injunction that categorically restrained the  
17 state from enforcing the law. That was 1925,  
18 correct?

19 MR. FEIGENBAUM: That's right.

20 JUSTICE SOTOMAYOR: And similarly,  
21 with West Virginia, saluting the flag by Jehovah  
22 Witnesses, the injunction was universal.

23 So, in answer to Justice Gorsuch's  
24 point, we've had universal injunctions in some  
25 form, correct, since the founding?

1                   MR. FEIGENBAUM: That's right. If I  
2     can make two points on that, Justice Sotomayor?

3                   JUSTICE SOTOMAYOR: In equity,  
4     correct?

5                   MR. FEIGENBAUM: Exactly. So  
6     there's -- so I agree with your reading of the  
7     equitable history, that it goes back from the  
8     English Bill of Peace, through Equity Rule 48,  
9     through the tax collection injunctions, through  
10    Equity Rule X, through the Ex Parte Young period  
11    you're referring to, through AARP just a few  
12    weeks ago. So I agree with your read of the  
13    history.

14                  But I just want to make one quick  
15    point.

16                  JUSTICE SOTOMAYOR: Well, let me -- go  
17    ahead, make your point, but I want to finish  
18    this thought, which is: You started earlier by  
19    saying universal injunctions should not be the  
20    preferred remedy, and it should be limited.  
21    You've suggested three ways to limit it.

22                  I agree with you, those three -- and  
23    yours clearly falls within one, that's your  
24    claim. But the point that I think my two other  
25    colleagues are raising is: How do we ensure

1 district courts are following that?

2 MR. FEIGENBAUM: So -- so if I can  
3 make I point about the history and then make a  
4 point about the guidance.

5 On the history, I understand that the  
6 United States at the podium today tries to make  
7 the history all about what it calls  
8 indivisibility cases, cases where there's just a  
9 unitary on/off switch as it were and either  
10 something happened or it didn't happen. Like a  
11 redistricting plan needs to be completely redone  
12 or a power plant is on or it's off.

13 But if I can give an example that  
14 shows it's not quite so limited and it very much  
15 requires looking more broadly at what's  
16 practically or legally workable on the ground.  
17 I would point to apportionment as an example.

18 So say that there's an Executive Order  
19 that says: We're just not going to count  
20 minors, people under 18, in apportionment  
21 anymore; we're only going to count people who  
22 are voting age. And the State of New York files  
23 a lawsuit, and it wins its lawsuit, and all of  
24 its 17-and-under-year-olds get counted for  
25 apportionment.

1           That isn't indivisible in any way.  
2       It's not a redistricting plan. It's not a power  
3       plant. But it is going to skew apportionment in  
4       a way that is totally unfair practically and  
5       legally to third parties because now  
6       17-year-olds are being counted in New York, but  
7       they're not being counted in Oklahoma.

8           And you would end up messing up  
9       apportionment between states for that very  
10      reason. And that shows as just a broader  
11      insight that we've always looked to the harms  
12      that third parties will suffer as negative  
13      externalities of court orders.

14          And that's our submission here, that  
15      to accept what the United States wants as  
16      against our injunction and to say that it turns  
17      on or off when you cross state lines doesn't  
18      just harm the administration of our benefits,  
19      doesn't just even harm enrollment in our  
20      benefits, also puts chaos on the ground where  
21      people's citizenship turns on and off when you  
22      cross state lines.

23          If ICE has initiated a removal  
24      proceeding when you live in Philly and you move  
25      to Camden, I suppose the ICE removal is supposed

1 to turn off at that point potentially because  
2 your citizenship status has changed.

3 I don't know if you lose it if you  
4 move back to Philly, whether you were born in  
5 New Jersey or born in Philly, moved to Camden  
6 and moved back. It's a very porous part of the  
7 country. I don't know if the ICE removal turns  
8 back on when you cross state lines again.

9 And that sort of chaos on the ground,  
10 those implementation questions we don't know,  
11 are serious third-party harms we've always taken  
12 into account.

13 This is North Carolina versus  
14 Covington, where courts ask what's workable as  
15 an injunction matter. And it's also the Winter  
16 Factors, where Factor 3 looks at the balance of  
17 the equities between the parties and workability  
18 and harm to them, and Winter Factor 4 looks at  
19 public interest and the negative externalities  
20 and workability problems we're imposing on  
21 others.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: General, you had a  
24 chance to talk about your administrative costs  
25 and the workability problems that New Jersey



1 would confront, but how about this magnet  
2 problem?

3 I mean, it strikes me as -- as  
4 completely obvious that if you have two states  
5 and they have different rules for citizenship  
6 and one benefits babies and the other doesn't  
7 that everybody moves to the state where the more  
8 favorable rule exists. But why is it that  
9 preventing that harm from happening should count  
10 as providing you with complete relief?

11 MR. FEIGENBAUM: So I think, actually,  
12 my point is somewhat different. I agree with  
13 you that the incentives could potentially factor  
14 into the calculus because we're ultimately  
15 experiencing some harm we might not -- might not  
16 otherwise to our benefits programs.

17 But my point is different. Even if  
18 you just take normal migration -- for New  
19 Jersey, 6,000 babies born out of state, 8  
20 percent -- or 8 million every year traveling  
21 across state lines -- without worrying about the  
22 incentives, we're going to be looking at that  
23 problem for how we administer benefits programs  
24 because --

25 JUSTICE KAGAN: I got that. Are

1     you -- are you saying we shouldn't consider the  
2     fact --

3                   MR. FEIGENBAUM:  No, I think you can.  
4     I think you can, Your Honor, and it's because of  
5     the nature of three things together.

6                   One is it's the movement, but it's not  
7     just the movement.  Two is it's the fact that  
8     citizenship historically was something you had  
9     at birth or didn't have at birth, and so you  
10    arrived to our state in theory without  
11    birthright citizenship because you would have  
12    been told when you were born in the hospital  
13    what you have or don't.

14                  And then the third, and this is really  
15    important, is the way that citizenship permeates  
16    so much not just for individuals but for what  
17    states are obligated to do, whether it's  
18    citizenship verification eligibility, whether  
19    it's enrollment in our own programs.

20                  Over and over, you see citizenship in  
21    Congress's own laws as the on-or-off switch for  
22    our own administration of benefits.  And that's  
23    actually sort of unique.

24                  So I don't think every time people  
25    move between states you automatically need to

1     have a nationwide injunction. What you need is  
2     a demonstration about how that's going to  
3     contribute to the state's harm.

4             And then -- I think this is really  
5     important to colloquies you were having with the  
6     United States earlier -- a court could, in an  
7     appropriate case, say: Well, sure, state, you  
8     might have to keep some of the harm; we're only  
9     going to remedy 90 percent of your harm because  
10    it's too disruptive to everyone else.

11            But I don't think you can do that in a  
12    case without looking at the merits because  
13    whether we should get to a hundred percent of  
14    our injuries taken care of or 90 percent of our  
15    injuries taken care of will always involve the  
16    strength of our merits showing.

17            And I don't see how you could have a  
18    stronger merits showing than we have here: 127  
19    years of Supreme Court precedent, over a century  
20    of executive practice, and congressional  
21    statutes that codified both into law in 1940 and  
22    1952.

23            And given that strength of the merits  
24    and the settled precedent, combined with our  
25    nature of harm, I don't think this is a close

1 case for why we need national relief to remedy  
2 our injuries.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 Justice Kavanaugh?

7 Justice Barrett?

8 JUSTICE BARRETT: I have a question  
9 about the history.

10 So Grupo tells us that we have to look  
11 back to 1789 and the High -- High Court of  
12 Chancery. So I appreciate that there have been  
13 some cases from later, and you were talking  
14 about some of those with Justice Sotomayor, from  
15 the early 20th century, maybe the late 19th  
16 century.

17 Can you say -- let's say that I think  
18 the bill of peace is more like a  
19 representational suit that is a forerunner to  
20 the class action. What do you think is your  
21 very best example of something that would look  
22 at the period that Grupo tells us is relevant  
23 that would support something that looks like  
24 universal relief?

25 MR. FEIGENBAUM: So I do think, from

1 1789, from English equity, I do think the best  
2 example is the bill of peace, and so I  
3 understand if we see it differently.

4 JUSTICE BARRETT: Right.

5 MR. FEIGENBAUM: It's a fair point.

6 I will just say quickly on Grupo  
7 Mexicano, its own tradition -- and this is sort  
8 of the analogical reasoning you talked about in  
9 Rahimi -- it looks at that period, but in other  
10 times, we've also looked at American tradition  
11 to see analogically how we've liquidated that  
12 tradition or not.

13 And in American equitable tradition,  
14 this is Equity Rule 48, which specifically said  
15 nonparties are not bound by certain relief even  
16 as they may benefit from it.

17 And I take that to be the principal  
18 reason my friend on the other side thinks that  
19 bills of peace look much more like class actions  
20 than they ultimately look like universal  
21 injunctions. And Equity Rule 48 was to the  
22 contrary. Tax collection injunctions in  
23 American history were to the contrary.

24 So I just have a hard time with that  
25 reading even though I agree with you that you

1 would be starting in the founding trying to do  
2 analogical reasoning based on what Grupo  
3 Mexicano says but using American equity to  
4 answer some of the unresolved ambiguities in  
5 this case.

6 JUSTICE BARRETT: Oh, I completely  
7 agree with you need some analogical reasoning,  
8 you know, and I don't think that Grupo  
9 completely rules that out. And, I mean, I  
10 think, even if you talked about the distinction  
11 between a -- a bill of peace and a class action,  
12 you would be looking at something that doesn't  
13 have to be called the same thing.

14 I think the problem is when we have  
15 such a party-centric history, if it has to be  
16 reasoning that fits within the confines, then I  
17 think we have a little bit of trouble.

18 Let me -- let me just ask you one  
19 question about relief. So let's say that I  
20 think that the states do need something broader  
21 in order to have complete relief even if the  
22 universal injunction is too broad and  
23 inconsistent with Grupo.

24 That isn't how the court below  
25 approached the question because that isn't what

1 the court below thought it had to do because the  
2 court below thought it could just enter a  
3 universal injunction.

4 So how would I go about crafting some  
5 sort of holding or to create a language that  
6 would take care of you and the fact that you  
7 need maybe broader complete relief than maybe an  
8 individual plaintiff would, right? Because the  
9 district court didn't go through that analysis,  
10 you know, the kind of -- the analysis that  
11 you're telling us today.

12 So tell me practically what that would  
13 look like.

14 MR. FEIGENBAUM: So I think the  
15 district court in -- in the Massachusetts case  
16 did actually do a very good job of this. It  
17 specifically said New -- I'm saying "New Jersey"  
18 as a stand-in --

19 JUSTICE BARRETT: Yeah, yeah.

20 MR. FEIGENBAUM: -- 23 attorneys  
21 general -- the states need this relief. And --  
22 and he didn't grant universal relief to the  
23 individual plaintiffs in that case, so he  
24 did --- he did actually talk different --

25 JUSTICE BARRETT: Make a distinction.

1                   MR. FEIGENBAUM: -- relief for  
2     different parties, and he said this is necessary  
3     for us.

4                   Part of why we're talking about  
5     alternatives in a different way at the podium  
6     today is because these alternatives were not  
7     presented to the district court.

8                   So the district court just had before  
9     him the idea that maybe we have to eat some  
10    harms or maybe we get universal relief. And, of  
11    course, we need universal relief given the  
12    strength of the merits showing as between those  
13    choices.

14                  I think what you could say is, here,  
15    there were two sentences in an emergency  
16    application that raise new alternative ways to  
17    remedy the harms. Those sorts of things need to  
18    be raised to the district court. And when they  
19    are raised to district courts in appropriate  
20    cases when states file suit, courts should ask  
21    first are those alternatives going to be  
22    practically or legally workable for the  
23    plaintiffs and for third parties?

24                  I agree, to Justice Gorsuch's point,  
25    if the federal government wants to take on its



1 own burdens, it can do so, but it can't just say  
2 that for third parties --

3 JUSTICE BARRETT: But you're talking  
4 about what would happen in the future. I'm  
5 talking about what would happen to you now.

6 MR. FEIGENBAUM: Oh, so I think, if  
7 the United States seriously wanted to press  
8 these alternative with facts about how they  
9 would work and put that before the district  
10 court, parties can always put new alternatives  
11 in a motion to dissolve an injunction before the  
12 district court. That's something that has  
13 happened regularly when there's changed  
14 circumstances or new alternatives. They're  
15 welcome to do that in -- in this case or in any  
16 other. But then they're going to have to put  
17 forward actual facts about how it's practically  
18 or legally workable.

19 I will say, on its face, these two  
20 sentences don't look practically or legally  
21 workable for the reasons I raised. But they'd  
22 have to make that showing in the district court  
23 in the first instance.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So I guess I'm kind  
3 of hung up on the posture in which we find  
4 ourselves looking at these issues. You know,  
5 Justice Alito, I think, focused on this a little  
6 bit, you know, when he says that the district  
7 court makes this initial determination. It  
8 turns out to be wrong. The remedy, I thought,  
9 was to appeal.

10 And I guess, for me, the question is  
11 whether and under what circumstances the  
12 government keeps on doing the thing that the  
13 court has found unlawful while the litigation is  
14 proceeding to determine whether or not the  
15 government's activity violates the law.

16 We're sort of in an interim posture.  
17 I -- many of your arguments, and I appreciate  
18 them, are kind of couched in, you know, the  
19 state is going to need complete relief for their  
20 injury, and that -- and that's true definitely  
21 as a final matter. But here we are at the  
22 beginning of this litigation. No one has  
23 determined whether or not the government's  
24 conduct is actually unlawful. We have a  
25 district court, several district courts and now

1 courts of appeals that say it is, and so, as an  
2 interim matter, we are saying the government has  
3 to stop doing it while we litigate the issue of  
4 the unlawfulness.

5 To me, that kind of puts the whole  
6 thing in a different frame. It's sort of like  
7 why isn't the question in this posture, in this  
8 circumstance, can the government or has the  
9 government shown that it is going to suffer some  
10 sort of harm from being made to completely stop  
11 this activity while we're litigating the  
12 lawfulness of the conduct.

13 I don't understand -- and then you  
14 say, yes, we're going to suffer harm. This is  
15 the balance of the equities that -- you know,  
16 part of the -- the -- the PI and the stay  
17 showing, but I just don't understand why that's  
18 not the focus here. And I don't know what  
19 the -- and I -- I apologize because I didn't get  
20 a chance to ask Mr. Sauer this, but -- and maybe  
21 he can address this on his rebuttal -- but, you  
22 know, what -- what problem is the government  
23 facing as a harm matter from being completely  
24 told it has to stop doing this while we  
25 determine, we, the court system, determine

1     whether or not its conduct is lawful?

2                   MR. FEIGENBAUM:   So we -- I mean, we  
3     included this in our application.  We do think  
4     this case is quite unique in that I do think  
5     it's hard for the government to show in this  
6     particular case that it needs to be able to act  
7     contrary to this Court's settled precedent.  
8     That's obviously come up in a couple of  
9     questions today.  It's something of I realize  
10    the elephant in the room.  I've often been asked  
11    to assume that the merits are put to the side,  
12    and I'm fine assuming that for those questions.

13                   But, to your point, you're not wrong.  
14    It is quite striking, obviously, that it's not  
15    just that district courts are saying this looks  
16    like it might be unlawful.  They're saying Wong  
17    Kim Ark settled this exact issue 127 years ago.  
18    This Court has reaffirmed it since.  Over a  
19    century of executive practice has built on that.  
20    And Congress has codified that directly into  
21    law.

22                   So I do think it's a particularly  
23    unusual case for the government to be saying  
24    that it has been quite so harmed and needs this  
25    kind of relief.  But, at the end of the day, I'm

1 happy to join issue on when relief may or may  
2 not be appropriate, and I just think we're  
3 clearly on the positive side.

4 JUSTICE JACKSON: But you're saying  
5 that at least in some circumstances from your  
6 perspective, in order to even decide whether or  
7 not you are entitled to an interim complete  
8 injunction, the Court's now going to have to  
9 peek at the merits while the merits are being  
10 litigated?

11 MR. FEIGENBAUM: I think the Court  
12 always has to peek at the merits in deciding  
13 whether the party itself should be getting  
14 relief from its harms, including complete  
15 relief, as even the United States accepts. So  
16 those are all four of the Winter factors. You  
17 have to figure out what the irreparable harm is  
18 that you're trying to deal with. You have to  
19 figure out if we have a sufficient merits  
20 showing in order to eliminate that irreparable  
21 harm. And, depending on the strength of the  
22 merits showing, you're also looking at Winters  
23 Factors 3 and 4.

24 So this Court has given four Winter  
25 factors that I think are quite useful in most

1 cases. I took my friends on the other side to  
2 be saying, well, beyond the Winter factors,  
3 there's this bright-line rule from Article III  
4 or the history of equity that just says it can  
5 never get to this point.

6 I obviously disagree a bit with them  
7 on the reading of that history, but I just think  
8 it has no bearing on the case that the states  
9 bring to this Court here.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Ms. Corkran.

14 ORAL ARGUMENT OF KELSI B. CORKRAN  
15 ON BEHALF OF THE PRIVATE RESPONDENTS

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

18 The executive order's stripping of  
19 citizenship from U.S.-born children is contrary  
20 not only to the Fourteenth Amendment's plain  
21 text but also our common law history, this  
22 Court's precedent, a federal statute, and over a  
23 century of executive branch practice.

24 Every court to have considered the  
25 issue agrees that the order is blatantly

1 unlawful, a determination the stay application  
2 does not challenge.

3 The government instead argues that  
4 Article III and equitable tradition  
5 categorically prohibit providing nonparty relief  
6 from the order's enforcement regardless of the  
7 order's illegality or the irreparable harm it  
8 inflicts.

9 The government is wrong. It is well  
10 settled that preliminary injunctions may benefit  
11 nonparties when necessary to provide complete  
12 relief to the plaintiffs or when warranted by  
13 extraordinary circumstances, both of which are  
14 true here.

15 The Court should reject the  
16 government's efforts to stay a preliminary  
17 injunction that maintains a status quo all three  
18 branches of government have ratified and  
19 operated under for over a century and that  
20 prevent the catastrophic consequences that will  
21 result for the plaintiffs and our country if the  
22 government is allowed to execute an  
23 unconstitutional citizenship-stripping scheme  
24 simply because legal challenges take time.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: You say the  
2 government is wrong about the availability of  
3 preliminary injunctions. On what do you base  
4 that?

5 MS. CORKRAN: So I -- I think the two  
6 reasons I identified, one, it is well settled,  
7 and I understood General Sauer to agree today,  
8 that universal injunctive relief is appropriate  
9 when necessary to provide complete relief to the  
10 plaintiffs. That is the case here, and I'm  
11 happy to talk about that.

12 But I also -- you know, this Court has  
13 long recognized the availability of universal  
14 injunctive relief in extraordinary circumstances  
15 where it's -- it's -- it's justified, I  
16 think focused particularly on the public  
17 interest and -- and equities prongs of the  
18 Winter test. And I'm happy to talk about that  
19 as well, but I think those are the -- the two  
20 reasons the government --

21 JUSTICE THOMAS: Do you think that  
22 if -- even if one considers the history not to  
23 support you, that the pragmatic considerations  
24 and the policy considerations should override  
25 that?



1 MS. CORKRAN: So I -- you know, again,  
2 I would put us in the complete relief bucket.  
3 So I'll -- like Mr. Feigenbaum, I'll put on my  
4 amici hat in answering that question.

5 I understand General Sauer's proposal  
6 to be that we channel all of this through Rule  
7 23. I think that is ahistorical. One, it's  
8 consistent with the Rules Committee's  
9 understanding of the rules, both -- if you look  
10 at Rule 23, Rule 65, and Rule 71 together, they  
11 establish that Rule 23 is not the channeling  
12 mechanism that the government's suggesting.

13 I want to -- I'll start with Rule 71  
14 because it's responsive, Justice Barrett, to  
15 your question earlier about whether nonparties  
16 can enforce orders. Rule 71 explicitly  
17 contemplates that and says, if a nonparty  
18 receives relief, they are entitled to enforce  
19 it.

20 I'd point also to Rule 65, the  
21 preliminary injunction rule. In 2017, the Rules  
22 Committee considered a proposal from Professor  
23 Bray to amend the rule to prohibit relief to  
24 nonparties. The committee rejected that  
25 proposal because it found that it ran afoul of

1 the Rules-Enabling Committee.

2 And then I'd end by pointing to Rule  
3 23 itself, which says nothing about it being a  
4 channeling mechanism. In *Principi v.*  
5 *Scarborough*, this Court said, you know, we don't  
6 treat the rules as excluding background  
7 equitable practices. And, here, Rule 23 doesn't  
8 even contemplate preliminary relief. It's  
9 focused on permanent injunctive relief, and I  
10 think that's because, you know, as we've been  
11 discussing, it's very difficult to get class  
12 certification in time to have preliminary  
13 relief, so you're doing putative class relief,  
14 which is the exact same thing as what's  
15 happening here.

16 JUSTICE KAVANAUGH: Well, can't --

17 CHIEF JUSTICE ROBERTS: Is --

18 JUSTICE KAVANAUGH: -- why can't you  
19 get putative class relief in a preliminary  
20 injunction or TRO posture?

21 MS. CORKRAN: You mean -- sorry. In  
22 the multiple state context?

23 JUSTICE KAVANAUGH: Get relief in a --  
24 for a putative class --

25 MS. CORKRAN: Yeah.

1 JUSTICE KAVANAUGH: -- in a TRO or PI  
2 posture.

3 MS. CORKRAN: Oh, I -- I certainly --  
4 I certainly think you can. The Court did that  
5 recently in AARP.

6 My point is, when the Court does that,  
7 it's relying on the equitable authority it has  
8 to enter that sort of relief, not on the Rule 23  
9 mechanism, because the class isn't binding until  
10 after certification, until after final judgment.

11 JUSTICE KAVANAUGH: If that mechanism  
12 is available, whether one way or another,  
13 doesn't that solve a large part of the problem  
14 in a way that complies with the -- the rules --

15 MS. CORKRAN: Yeah. So --

16 JUSTICE KAVANAUGH: -- the problems  
17 with universal injunctions that have been  
18 identified by administrations of both parties?

19 Go through Rule 23 and do what's  
20 needed there, and people are bound then, so  
21 that's a wrinkle, but why doesn't that just  
22 solve the problem?

23 MS. CORKRAN: Right. So they're not  
24 going to be bound until after you get past class  
25 certification, so we're talking about the --

1 JUSTICE KAVANAUGH: I understand that.

2 MS. CORKRAN: And for that reason, I  
3 would go to Justice Alito's point earlier that  
4 all you're doing is taking the -- the non-party  
5 injunctions that are happening now outside of  
6 Rule 23 and shoving them into Rule 23. It  
7 doesn't address the forum selection concerns.  
8 It doesn't address the concerns about the --

9 JUSTICE KAVANAUGH: Right, but it --

10 MS. CORKRAN: -- emergency docket.

11 JUSTICE KAVANAUGH: -- it complies  
12 with the rules. I mean, the law -- we -- we  
13 care about technicalities. And this may all be  
14 a technicality, but it seems to me the  
15 technicality of Rule 23 and the history of that  
16 provides -- 23(b)(2) provides a mechanism to do  
17 what's -- what's needed here in terms of getting  
18 relief to people, and if you have PIs available  
19 for putative classes, that seems to solve --  
20 solve the issue for preliminary relief and the  
21 timing issue as well.

22 MS. CORKRAN: So (b)(2) provides for  
23 permanent injunctive relief. It does not  
24 provide for preliminary injunctive relief.

25 JUSTICE KAVANAUGH: Right.

1                   MS. CORKRAN: Again, Rule 23 does not  
2     purport to be the exclusive channeling  
3     mechanism. And, as I said, the Rules Committee  
4     doesn't think it did, so it would be this Court  
5     kind of projecting its own policy decision to  
6     treat Rule 23 that way.

7                   And I would come back again to Justice  
8     Alito's concerns. That is not actually  
9     addressing the Court's emergency docket. It's  
10    just now we're slapping a label of class  
11    certification on it.

12                  So I would -- and -- and I'll make a  
13    second point on that and then say what I think  
14    the better -- the better way of approaching the  
15    problem is, which is I think that General Sauer  
16    and I are in agreement that the Venn diagram of  
17    cases that are appropriate for class  
18    certification and where injunctive relief I  
19    think would be appropriate is not coterminous.  
20    I think we could pursue successfully class  
21    certification here.

22                  I heard General Sauer to disagree, and  
23    I think it's because they're -- they're just  
24    different circumstances. If you look at the  
25    class certification requirements, commonality,

1     typicality, they were actually added to Rule 23  
2     in 1966 mostly to address the expansion of class  
3     certification to include damages suits. That  
4     makes sense there, but those were never  
5     requirements prior to 1966.

6             JUSTICE GORSUCH: Ms. Corkran, on --  
7     on the class certification point you've been  
8     developing, one response might be -- and I just  
9     want to get your reaction to it -- that by  
10    proceeding through the class mechanism, even a  
11    putative class mechanism, a court is making a  
12    preliminary assessment about who are the parties  
13    going to be before it and issuing interim relief  
14    so that it preserves its jurisdiction to issue  
15    final relief with respect to those parties.

16            And that's very different, the  
17    argument would go, than simply saying everybody  
18    everywhere nationwide, universally or perhaps --  
19    perhaps cosmically, stands to benefit from this  
20    decision without ever having to suffer being  
21    bound by it. Thoughts?

22            MS. CORKRAN: So I would say again  
23    that's an ahistorical approach. You haven't had  
24    that sort of Rule 20(b)(3) --

25            JUSTICE GORSUCH: Well, assume --

1     assume for the moment that we read bills of  
2     peace, which I understand to be your -- your --  
3     your best set of cases, to be prototypical of  
4     what is now Rule 23.

5             MS. CORKRAN: Right. And so the --  
6     the bills of peace and kind of going through, as  
7     Mr. Feigenbaum was talking about, Equity Rule 48  
8     and then 38, in none of those circumstances were  
9     we doing this ex ante class certification  
10    determination.

11            So the modern class action device  
12    actually looks quite different than it was for  
13    representative suits historically. So it would  
14    be putting on an ahistorical constraint.

15            JUSTICE GORSUCH: I appreciate that  
16    argument, okay, but now we're haggling over the  
17    history, which -- which we have to do, I -- I  
18    accept, but if -- if -- if bills of peace are  
19    understood -- again, accept the premise --

20            MS. CORKRAN: I will.

21            JUSTICE GORSUCH: -- to -- to be  
22    predecessors of Rule 23, then respond to the  
23    point that there is something fundamentally  
24    different about a preliminary injunction to a  
25    putative class that you've found is likely to be

1     certified and likely to succeed on the merits in  
2     order to preserve that court's jurisdiction to  
3     award ultimate relief to those parties before it  
4     and that that's categorically different than a  
5     universal injunction.

6             MS. CORKRAN: So starting with the  
7     presumption that was different about the bills  
8     of peace is that they were binding, I think  
9     sometimes it's not clear always, at the end when  
10    they were getting to final judgment. I would go  
11    back to Grupo Mexicano to Justice Barrett's  
12    point, although that -- you know, that was a  
13    high watermark of this equitable originalism.  
14    The way the Court articulated the test, it -- it  
15    focused on 1789. But the actual analysis in  
16    Grupo Mexicano focused on 1890 through 1942.

17            And what the Court found there is that  
18    there were numerous cases expressly rejecting  
19    the Mareva injunction, and that was confirmed in  
20    the 1970s when England adopted it and said, no,  
21    we've never done this before.

22            We are in an entirely different world  
23    here. One, the cases that Justice Sotomayor  
24    laid out earlier all come from between 1890 and  
25    1942, and they suggest that nonparty relief was



1 provided for outside of the class action  
2 context.

3 But the fact that we have, I think,  
4 these very, you know, studied scholars in this  
5 rigorous debate about what the bills of peace  
6 meant, what the railroad cases meant, I think  
7 shows that this is very different in Grupo  
8 Mexicano, and for the Court to kind of delve  
9 into that and adopt the categorical rule that  
10 the government is suggesting, I think, is  
11 certainly an overcorrection. It's a hornet's  
12 nest on Article III, right? It calls into  
13 concern EPA class action, a whole sort of  
14 things. I would suggest that the Court instead  
15 focus on providing limiting principles within  
16 the confines of the Nken factors or the Winter  
17 factors.

18 JUSTICE KAVANAUGH: And is there a  
19 practical problem? So I want to put aside the  
20 history, and I take your points on that and why  
21 you don't think Rule 23 fits, and I take your  
22 point on that, but if putative class actions and  
23 preliminary relief are an option, what then is  
24 the practical problem you see as distinct from  
25 the current regime?

1 MS. CORKRAN: Well, if General Sauer  
2 is right and that there are class certification  
3 problems here, then, in this particular case,  
4 you're going to have thousands of individual  
5 suits.

6 JUSTICE KAVANAUGH: Okay. I think you  
7 would be arguing that the class should be  
8 certified here.

9 MS. CORKRAN: Right, but I'm saying  
10 the government is suggesting --

11 JUSTICE KAVANAUGH: So more -- more  
12 generally taking it out of this case if you  
13 could, do you see practical problems?

14 MS. CORKRAN: Yeah. It would  
15 eliminate the associational standing trade  
16 cases, you know, the cases brought by the  
17 Chamber of Commerce, the NRA, other associations  
18 that aren't suitable for class certification.

19 I think also the questions again that  
20 the --

21 JUSTICE KAVANAUGH: Why? Can you  
22 explain that?

23 MS. CORKRAN: Well, they wouldn't --  
24 so, if we -- if we were to seek cert, it would  
25 be on behalf of our individual --

1 JUSTICE KAVANAUGH: Mm-hmm.

2 MS. CORKRAN: -- plaintiffs. You  
3 know, for the same reason that the government  
4 would have difficulty seeking class  
5 certification, the state government, I think,  
6 associations are -- are not necessarily a good  
7 fit for that -- for that framework.

8 Again, that's also not solving the  
9 Court's problem. It's just channeling the  
10 problems through a different mechanism.

11 JUSTICE KAVANAUGH: I don't think that  
12 can be solved just to be honest, but that's a  
13 separate issue --

14 MS. CORKRAN: Well --

15 JUSTICE KAVANAUGH: -- from what the  
16 right rule is as to how things transpire in the  
17 district courts.

18 MS. CORKRAN: Could I perhaps try to  
19 solve it in a different way?

20 JUSTICE KAVANAUGH: Mm-hmm.

21 MS. CORKRAN: What I would suggest,  
22 you know, we spent some time trying to catalog  
23 the cases in which this Court has approved  
24 universal injunctive relief and the cases in  
25 which it's rejected it, with the aim of giving

1 the Court maybe a suggestion how it might, you  
2 know, affirmatively articulate some limiting  
3 principles such that you would not be getting  
4 the injunctions that the Court thinks are  
5 inappropriate but the ones that the Court has  
6 approved would still be able to proceed. Again,  
7 that's not the categorical rule that the -- the  
8 government is suggesting.

9 I think roughly what the Court has  
10 been doing is saying that universal injunctions  
11 are appropriate only in facial challenges  
12 involving fundamental constitutional rights  
13 where there are real concerns about whether --  
14 just the legal and practical availability of  
15 relief to similarly situated parties who are  
16 also going to experience irreparable harm.

17 I think that maybe explains AARP.  
18 Most recently, IRAP would fall into that  
19 category. Chrysafis, the New York eviction  
20 case, would fall in that category.

21 On the other side of the ledger, the  
22 Court seems to disapprove quite a bit of -- of  
23 nationwide injunctions involving discretionary  
24 benefits. So that's some of the recent ones  
25 that you have undone or stayed.

1           So I think what the Court could do is  
2   kind of identify limiting principles that would  
3   provide guidance to the lower courts on when  
4   it's appropriate to issue these injunctions.  
5   The natural home for that is the public interest  
6   prong of the Winter test, right?

7           If you're going to issue an injunction  
8   that's going to have an impact on other peoples,  
9   you need to be doing a really muscular public  
10   interest assessment before doing that.

11           So that's -- that's what I would urge  
12   the Court --

13           JUSTICE KAVANAUGH: I mean --

14           JUSTICE KAGAN: Ms. Corkran, are --  
15   are you pushing back on the class certification  
16   idea because you're worried that there are cases  
17   where there will be no certification but in  
18   which broad relief is, in fact, appropriate --

19           MS. CORKRAN: Yes.

20           JUSTICE KAGAN: -- so that the two  
21   categories don't line up?

22           And if that's why you're pushing back,  
23   why are you worried about that? What are the  
24   cases you're worried won't line up properly in  
25   that way?

1 MS. CORKRAN: I mean, the government  
2 has suggested it's going to argue that here --  
3 again, I think the commonality -- so thinking  
4 about questions like common injury make a lot of  
5 sense when you're talking about class-wide  
6 damages, less so when you're talking about a  
7 facial challenge to a constitutional violation.

8 So I just -- I think it's a bit of a  
9 mismatch. And, again, it's not -- it's not what  
10 Rule 23 was ever intended to do and it doesn't  
11 solve any of the Court's policy problems. So I  
12 think it's a -- you know, it's a lose-lose-lose  
13 proposal that the government is offering.

14 I'm -- I'm a little concerned that I  
15 have focused a lot on my amici hat and haven't  
16 actually explained to the Court why the  
17 injunction is necessary for complete relief  
18 here, but I don't want to pivot too quickly, but  
19 I want to make sure I address our -- our primary  
20 argument as well.

21 JUSTICE KAGAN: Tell us why it's  
22 necessary for complete relief.

23 MS. CORKRAN: Yes.

24 (Laughter.)

25 MS. CORKRAN: Thank you. For two

1 reasons. The first is that a plaintiff-specific  
2 injunction would not be administratively  
3 workable. I'll explain that in a second.

4 But I want to note the second one is  
5 that even if it were workable, it would require  
6 the association members to identify and disclose  
7 to the government an association that puts them  
8 at great risk of adverse consequences, detention  
9 or deportation, even if they're here lawfully.  
10 And so it's not complete relief to require the  
11 plaintiffs to make dangerous disclosures in  
12 order to claim the constitutional right.

13 And then maybe I'll pivot back to the  
14 workability unless there are questions about  
15 that. Yeah. So I'll -- oh, sorry.

16 CHIEF JUSTICE ROBERTS: Very briefly,  
17 and then we'll move on to the next stage of our  
18 questioning.

19 MS. CORKRAN: So the government's  
20 workability argument with respect to the -- the  
21 individual plaintiffs, the private plaintiffs,  
22 is wholly tethered to its argument that the  
23 injunction should be limited to the 16 named  
24 plaintiffs. It has offered no argument for how  
25 it would administer -- how state and local

1 agencies could administer an injunction that was  
2 narrowed to the ASAP and CASA members. So I  
3 think that's probably the end of the road.

4 Mr. Feigenbaum made the point that the  
5 district -- they can always go back to the  
6 district court and ask for the injunction to be  
7 dissolved if they present some sort of workable  
8 proposal. They haven't, and I don't -- I don't  
9 think they can. I don't want to talk for too  
10 long, but I -- if anyone is interested, I'm  
11 happy to answer questions about why I think it's  
12 unworkable.

13 CHIEF JUSTICE ROBERTS: Well, I'm sure  
14 someone will be.

15 MS. CORKRAN: Yeah.

16 CHIEF JUSTICE ROBERTS: Thank -- thank  
17 you, though, counsel.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: Should we decide or  
21 make up our -- make up our minds on the  
22 underlying birthright citizenship question  
23 without briefing and argument and deliberation?

24 MS. CORKRAN: I -- I think that we  
25 would be very eager to do supplemental briefing



1 on that. General Sauer noted that none of the  
2 parties had asked for cert before judgment. We  
3 couldn't because we keep winning. I will ask  
4 right now for cert before judgment.

5 (Laughter.)

6 JUSTICE ALITO: What was the -- what's  
7 the answer to my -- what's the answer to my  
8 question?

9 MS. CORKRAN: Yes, I think you can  
10 grant cert before judgment. I also think --

11 JUSTICE ALITO: No, that wasn't my  
12 question.

13 MS. CORKRAN: Yeah. But I will say I  
14 think --

15 JUSTICE ALITO: All right. That's all  
16 right.

17 MS. CORKRAN: Yeah. No --

18 JUSTICE ALITO: That's all right. You  
19 don't want to answer it. That's fine.

20 MS. CORKRAN: Oh, no, no, I will. I  
21 have an -- if I could give an answer, which is  
22 that I think it's very difficult if -- or not  
23 impossible for the Court to do a meaningful Nken  
24 analysis without taking into account the fact  
25 that the government is asking the Court to allow

1     it to ignore this Court's precedent, to ignore a  
2     duly enacted statute, and to upend a hundred  
3     years of executive branch practice.

4             So I think, you know, although the  
5     Court -- the government has attempted to  
6     separate them, that, really, the merits are  
7     embedded in the Nken factors.

8             CHIEF JUSTICE ROBERTS: Justice  
9     Sotomayor?

10            JUSTICE SOTOMAYOR: I find it hard to  
11     understand how a district court, in looking at a  
12     preliminary injunction under the Winter factors,  
13     where we said that the likelihood of success on  
14     the merits is the keystone, how we could  
15     separate that out and say the keystone of  
16     whether you're entitled to universal injunction  
17     is the only merits question because the other  
18     factors are not eliminated by Winter. You have  
19     to balance the equities, and you can't balance  
20     the equities without the merits, correct?

21            MS. CORKRAN: I think that's right. I  
22     think also I don't -- you know, irreparable harm  
23     is going to be very difficult for the government  
24     to prove if it's not contesting that the -- or  
25     not contesting -- or at least not defending the

1     constitutionality of the order because the  
2     government has no interest in enforcing an  
3     unconstitutional order.

4             I'd also note there's a -- there's a  
5     quote from Professor Bray in Justice Gorsuch's  
6     Texas concurrence, and it's: "In equity, it all  
7     connects. The broader and deeper the relief the  
8     plaintiff seeks, the stronger the plaintiff's  
9     story has to be." So I think there really is  
10    kind of an equitable consideration here of the  
11    merits as well that just can't be extracted from  
12    the --

13            JUSTICE SOTOMAYOR: Now the state has  
14    explained why it can't pursue class actions. So  
15    it really -- it admits it's limited to whether  
16    it's entitled to complete relief.

17            But how about your organization?  
18    You --

19            MS. CORKRAN: I -- I --

20            JUSTICE SOTOMAYOR: -- you sort of  
21    answered it, but I wanted to pin you down on  
22    that.

23            MS. CORKRAN: No, I --

24            JUSTICE SOTOMAYOR: Do you believe  
25    that associational organizations can seek class

1 action?

2 MS. CORKRAN: I believe our individual  
3 plaintiffs certainly can. I am --

4 JUSTICE SOTOMAYOR: Yes, there's no  
5 question there.

6 MS. CORKRAN: Yeah. I am -- I am  
7 nervous about the government's suggestion that  
8 it's going to oppose our class certification  
9 motion if we were to file one. I think class  
10 certification can be -- can be very  
11 discovery-intensive. It could be the sort of  
12 thing that really delays the -- our plaintiffs  
13 from getting the relief that they seek.

14 JUSTICE SOTOMAYOR: Okay. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: I guess what I worry  
17 about here, Ms. Corkran, is that this case is  
18 very different from a lot of our nationwide  
19 injunction cases in which many of us have  
20 expressed frustration at the way district courts  
21 are doing their business.

22 And, you know, our -- our -- the  
23 typical way in which that frustration emerges is  
24 that questions, legal questions, are hard, and  
25 they're come complicated, and different courts

1 would decide them differently. And, instead,  
2 because of the forum selection process, a party  
3 goes to one place. You know, in the first Trump  
4 administration, it was all done in  
5 San Francisco, and then, in the next  
6 administration, it was all done in Texas.

7 MS. CORKRAN: Right.

8 JUSTICE KAGAN: And -- and -- and  
9 there is a big problem that is created by that  
10 mechanism, and that leads to the questions to  
11 you and to General Feigenbaum, which is, like,  
12 you know, your third buckets, which are, oh, if  
13 it's, like, super-important or if it's  
14 quintessentially national or whatever the way --  
15 you know, is not going to solve our problem for  
16 that set of cases, which is not this case.

17 This case, what's problematic about it  
18 is that the courts keep deciding the same way,  
19 and nobody really thinks that the lower courts  
20 are going to do anything different.

21 MS. CORKRAN: Right.

22 JUSTICE KAGAN: And it -- you know,  
23 for that reason, it does present the "catch me  
24 if you can" problem that Justice Jackson said  
25 and the problem of how are we ever going to get

1 a case here.

2 But -- but our general case is not  
3 like that, and I just want you to sort of  
4 comment on it.

5 MS. CORKRAN: Yeah. I'd say first  
6 that the government's proposal of channeling  
7 through Rule 23 does nothing to solve anything  
8 you just described.

9 I think the limiting principles that I  
10 was proposing, which, again, was just me trying  
11 to reflect back to the Court kind of the through  
12 lines that it's been identifying, are  
13 sufficiently concrete that if this Court were to  
14 articulate them, it would cut back on the number  
15 of universal injunctions. Is it a facial  
16 challenge? Does it involve a fundamental  
17 constitutional right? Right? Those are --  
18 those are concrete questions.

19 And then I would point to, you know,  
20 Justice Kavanaugh's Poe concurrence. I think,  
21 you know, vertical stare decisis is going to be  
22 important here. When courts enter these sorts  
23 of district -- these sorts of injunctions, they  
24 are immediately appealable to the courts of  
25 appeals. So, if there are any district courts

1     that are kind of getting over their skis on  
2     these, it's correctable by the courts of  
3     appeals.

4                 CHIEF JUSTICE ROBERTS:   Justice  
5     Gorsuch?

6                 Justice Kavanaugh?

7                 JUSTICE KAVANAUGH:   Some of your  
8     concerns about this Court being involved, I  
9     guess I'm not sure I really understand that.  
10    When the -- when a president or an  
11    administration enacts some major new rule, the  
12    question ultimately -- and it's legally  
13    challenged -- ultimately will be a year or two  
14    from now, it'll get here and we'll make a final  
15    judgment, but the interim status of that rule,  
16    as this case illustrates and many others --  
17    vaccine mandate, eviction moratorium, go down  
18    the list -- they're really important whether  
19    they're in effect for that year or two.

20                And I guess I don't know why we --  
21    we -- you should be concerned or we should be  
22    concerned about this Court playing a role in  
23    those.

24                MS. CORKRAN:   Oh, I don't have  
25    concerns about that.   I was responding to

1 General Sauer's point that this has become  
2 pathological in the number of universal  
3 injunctions that are making its way onto the  
4 Court's emergency docket, but my --

5 JUSTICE KAVANAUGH: Just because there  
6 are more significant executive actions over the  
7 last three decades --

8 MS. CORKRAN: Yeah. I certainly agree  
9 with that. And I -- you know, I --

10 JUSTICE KAVANAUGH: -- that are --  
11 that are, you know, at the -- Loper Bright and  
12 our West Virginia versus EPA are arguably some  
13 part of that story as well.

14 MS. CORKRAN: I agree completely. And  
15 to answer the question you asked General Sauer  
16 earlier about why we've seen this proliferation  
17 of these universal injunctions, I think it's  
18 directly -- I would say first that the  
19 government, I think, pretty dramatically  
20 overstates them. It's double-counting TROs and  
21 PIs in the same case.

22 But, if you look at the number of  
23 executive actions in the first six weeks of this  
24 administration, it's more than any other  
25 president issued in a year dating back to 1951



1 during the Korean War.

2 JUSTICE KAVANAUGH: But I don't want  
3 to -- I mean, it's --

4 MS. CORKRAN: Yeah.

5 JUSTICE KAVANAUGH: You know, it's  
6 going back. It's a bipartisan phenomenon --

7 MS. CORKRAN: Agree.

8 JUSTICE KAVANAUGH: -- completely  
9 bipartisan, and completely, in my view, well  
10 intentioned because presidents want to get  
11 things done.

12 MS. CORKRAN: Right.

13 JUSTICE KAVANAUGH: And I -- I get  
14 that.

15 MS. CORKRAN: Yeah. I -- I agree with  
16 that. I think it's -- it's directly correlated  
17 to the number of unilateral executive actions  
18 we've seen over the last few years --  
19 administrations.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 JUSTICE BARRETT: Ms. Corkran, I just  
23 have one question. You said that you're in  
24 bucket one.

25 MS. CORKRAN: Yes.

1 JUSTICE BARRETT: So you felt like you  
2 were --

3 MS. CORKRAN: Oh, yeah.

4 JUSTICE BARRETT: -- playing kind of  
5 the amici role. I understand why you might  
6 think you're in bucket one for the associational  
7 point. Do you think you're in bucket one for  
8 individual plaintiffs?

9 MS. CORKRAN: So I don't know that I  
10 would extract them because the universal --

11 JUSTICE BARRETT: Well, named  
12 plaintiff. Like, let's imagine you had  
13 individual plaintiffs that are named members of  
14 the association. So let's -- I guess what I'm  
15 saying is let's take the association outside of  
16 it and let's just say that we're talking about  
17 individual plaintiffs.

18 MS. CORKRAN: So, there, I --

19 JUSTICE BARRETT: Would you put that  
20 in bucket one?

21 MS. CORKRAN: So, there, I would go to  
22 the second injury I -- I had identified earlier,  
23 which is if you're asking -- our -- our  
24 individual plaintiffs have pseudo names right  
25 now. That would be contemplating a scenario

1     where they would have to identify themselves to  
2     the federal government and say I am an ace -- or  
3     I -- I am the plaintiff in this case, at which  
4     point they are immediately vulnerable to  
5     deportation, even, again, if they're here  
6     lawfully.

7                 We've seen the government removing  
8     visa holders and -- and asylum seekers.

9                 CHIEF JUSTICE ROBERTS: Justice  
10     Jackson?

11                JUSTICE JACKSON: So I think I  
12     understand your argument. There's just one  
13     little piece of it that is confusing to me, and  
14     I hope you can clarify.

15                So, if we view the relief in this case  
16     and others like it to be a judgment ordering the  
17     defendant not to do something that the court has  
18     found to be likely -- because we're in the  
19     interim stage -- unlawful, are nonparties in  
20     that situation actually getting relief, or are  
21     they just incidental beneficiaries of an order  
22     requiring the government not to do this harmful  
23     thing?

24                I thought it was the latter.

25                MS. CORKRAN: Yeah.

1 JUSTICE JACKSON: And that just -- you  
2 know, the government is told by the Court:  
3 Don't do X. And, of course, anybody who would  
4 have been harmed by the government doing X is  
5 benefitted by that, but they're not really, I  
6 thought, getting relief.

7 But here -- here's where I get  
8 confused, because I thought they're not getting  
9 relief because they can't come into court  
10 independently and seek a contempt ruling if the  
11 government continues to do the thing.

12 They weren't parties. They don't have  
13 the judgment. That's what differentiates them  
14 from, say, the class action people or the  
15 plaintiff people.

16 The reason why we have the rules for  
17 class action, et cetera, is because, at the end  
18 of the day, the members of the class are getting  
19 a judgment that they can then use to enforce  
20 this obligation as against the government,  
21 whereas the people in the universal injunction  
22 world are just benefitting if the government  
23 actually, you know, follows the order.

24 MS. CORKRAN: Yeah, I -- I think that  
25 what you're articulating is consistent with a

1 long history of precedent and practice. I mean,  
2 it's the classic rem case, right, making a  
3 declaration about property. I think Professor  
4 Pfander's amicus brief is really helpful on  
5 that. He talks about the -- the patent laws.

6 And I think you can see that same  
7 instinct in the Court's cases that Justice  
8 Sotomayor was talking about earlier, right, the  
9 railroad rates, Barnett, Pierce v. Society of  
10 Sisters.

11 JUSTICE JACKSON: And I guess my point  
12 is that's why we don't need Rule 23, because  
13 we're actually doing, conceptually, a different  
14 thing.

15 We're not trying to give all these  
16 people, everyone in the world, some sort of  
17 enforceable right as against the government. We  
18 are simply just doing what courts do, I thought,  
19 which is telling the defendant over whom they  
20 have personal jurisdiction that they have to  
21 stop doing something unlawful, and, of course,  
22 that benefits people.

23 But the thing that confuses me about  
24 your argument is that you alluded at the  
25 beginning to Rule 71 and suggested that the

1 nonbene- -- or the nonparties could somehow  
2 enforce this universal injunction. I didn't  
3 understand that.

4 MS. CORKRAN: I think Rule 71  
5 contemplates that. It would be very onerous. I  
6 mean, I -- I think, when General Sauer, he was  
7 kind of contemplating the idea that, you know,  
8 tens of thousands of people were going to have  
9 to come to court individually --

10 JUSTICE JACKSON: Right. But I think,  
11 if you're right about that, it undermines the  
12 point that I'm making because it -- it puts  
13 people in the same place as the class action  
14 folks and the -- the parties in a way that --  
15 that I think raises legitimate concerns that  
16 some of my colleagues have put forward with  
17 respect to universal injunctions.

18 So the thing that distinguishes them  
19 is that universal injunctions are not  
20 benefitting or giving relief to nonparties in  
21 any meaningful sense, is my theory.

22 MS. CORKRAN: I think both have always  
23 been true, and maybe they're in tension with  
24 each other. But Rule 71's originated in Equity  
25 Rule X, which was enacted in -- or was put in

1 place in 1842, which had this same idea of,  
2 quite apart from representative suits,  
3 nonparties enforcing orders that provided them  
4 with relief.

5 Although maybe this -- as I'm talking,  
6 I think maybe -- I'm talking about, under Rule  
7 71, orders that --

8 JUSTICE JACKSON: Let me just --

9 MS. CORKRAN: -- provide relief.

10 JUSTICE JACKSON: But let me just ask  
11 you this --

12 MS. CORKRAN: You're talking about  
13 injunctions.

14 JUSTICE JACKSON: Yes, right.

15 MS. CORKRAN: Yes. Those are  
16 different things.

17 JUSTICE JACKSON: What I'm asking you  
18 is: In this very case, if we have a -- a series  
19 of non -- of plaintiffs, of actually named  
20 people, and they get an injunction, as the  
21 government says, against -- sorry. If they get  
22 a universal injunction or what they call a  
23 universal injunction, the -- the government  
24 cannot enforce this executive order, can someone  
25 who is not a nonplaintiff come into court to

1       enforce that if the government violates it?

2               MS. CORKRAN:   So -- so I'm hesitant to  
3       say no both because Rule 71 exists and those  
4       aren't my -- my -- my clients or my plaintiffs  
5       and we needed this universal injunction --

6               JUSTICE JACKSON:   Yes, I understand.

7               MS. CORKRAN:   -- for the purposes of  
8       our relief.

9               JUSTICE JACKSON:   I'm just trying to  
10      figure this out.

11              MS. CORKRAN:   But I think both -- you  
12      know, I -- I think both what you said is true.  
13      If we look at cases like Barnett and Pierce and  
14      we go all the way back -- I would -- I think  
15      Justice Story's dissent that he signed onto in  
16      Cherokee Nation v. Georgia is terrific on this  
17      point.

18              He was the preeminent scholar on  
19      equitable remedies, and he certainly thought in  
20      the way that you're articulating we're going to  
21      make a declaration about whether Georgia can  
22      enforce its laws on Cherokee Nation property,  
23      and that is just a declaration of the law that  
24      will have an impact on -- on everyone.

25              But I would -- I'm hesitant to say



1       that Rule 71 doesn't have any application.

2                       JUSTICE JACKSON:   Thank you.

3                       CHIEF JUSTICE ROBERTS:   Thank you,  
4       counsel.

5                       Rebuttal, General Sauer?

6                       REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

7                               ON BEHALF OF THE APPLICANTS

8                       GENERAL SAUER:   Thank you,  
9       Mr. Chief Justice.

10                      The original meaning of the  
11       Citizenship Clause extended citizenship to the  
12       children of former slaves, not to people who are  
13       unlawfully or temporarily present in the  
14       United States.

15                      The merits arguments we are presenting  
16       to the lower courts are compelling.   We cite,  
17       for example, a host of 19th century authorities  
18       that point out that domicile was the touchstone  
19       of noncitizens being treated as -- having their  
20       offspring treated as -- as citizens in that  
21       context.

22                      That is consistent with Wong Kim Ark  
23       as well as with the slaughterhouse cases in Elk  
24       against Wilkins.   And the suggestion that our  
25       position on the merits is weak is profoundly

1 mistaken.

2           And that kind of snap judgment on the  
3 merits that was presented in the lower courts is  
4 exactly the problem with the issue of racing to  
5 issue these nationwide injunctions.

6           The Chief Justice correctly pointed  
7 out that this Court, if it wishes to address the  
8 merits expeditiously, has many tools to do so.  
9 Cert before judgment is one possible tool.  
10 There are also others.

11           But this Court should also address the  
12 scope of remedy, the remedial question that's  
13 presented in the application. That is an  
14 extremely urgent question.

15           And one of the reasons an extremely  
16 urgent question is the limiting principles that  
17 my friends on the other side have been offering  
18 have all proven to be completely ineffective to  
19 slowing the essentially slaughter -- flood or  
20 cascade of universal injunctions that we see in  
21 these cases.

22           The states here have a unique issue  
23 that hasn't come up yet, but for the reasons we  
24 state in our application, they lack third-party  
25 standing very clearly under cases like Murthy

1     and Haaland and Katzenbach and Kowalski. So no  
2     injunctive relief should run to the states in  
3     this particular case anyway.

4             And, most fundamentally, the vision of  
5     the district courts that's reflected in the  
6     issuance of these nationwide injunctions is a  
7     vision of them as a roving commission to correct  
8     every legal wrong that they -- that they can  
9     consider and to exercise general legal oversight  
10    over the executive branch, which is what this  
11    Court rejected in TransUnion.

12            And, for those reasons, we ask the  
13    Court to grant the applications.

14            CHIEF JUSTICE ROBERTS: Thank you,  
15    counsel.

16            The case is submitted.

17            (Whereupon, at 12:29 p.m., the case  
18    was submitted.)

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## Official

<p><b>1</b></p> <p><b>10:12</b> [2] 2:4 4:2  <b>12:29</b> [1] 162:17  <b>125</b> [1] 3:11  <b>127</b> [3] 79:5 114:18 123:17  <b>1320b-7</b> [1] 104:10  <b>1367bb</b> [1] 105:12  <b>1396a</b> [1] 102:14  <b>14,160</b> [1] 4:13  <b>15</b> [1] 1:25  <b>16</b> [1] 142:23  <b>160</b> [1] 3:14  <b>1600</b> [1] 59:25  <b>17-and-under-year-olds</b> [1] 109:24  <b>17-year-olds</b> [1] 110:6  <b>1789</b> [7] 26:9 27:11,21 30:19 115:11 116:1 135:15  <b>18</b> [1] 109:20  <b>1842</b> [1] 158:1  <b>1890</b> [2] 135:16,24  <b>1891</b> [1] 106:24  <b>1925</b> [1] 107:17  <b>1940</b> [2] 37:23 114:21  <b>1942</b> [2] 135:16,25  <b>1951</b> [1] 151:25  <b>1952</b> [1] 114:22  <b>1955</b> [1] 62:6  <b>1960s</b> [3] 38:18,21 107:6  <b>1963</b> [1] 37:20  <b>1966</b> [2] 133:2,5  <b>1970s</b> [1] 135:20  <b>19th</b> [6] 26:12 80:17 106:23,24 115:15 160:17</p> <p><b>2</b></p> <p><b>2</b> [1] 56:14  <b>20</b> [2] 4:12,23  <b>20(b)(3)</b> [1] 133:24  <b>2007</b> [1] 38:22  <b>2017</b> [1] 128:21  <b>2025</b> [3] 1:25 4:12 104:10  <b>20th</b> [1] 115:15  <b>21</b> [1] 23:20  <b>22</b> [1] 54:25  <b>23</b> [45] 5:15 6:25 11:3,4 12:13,19 16:5 22:3,7 29:6,16,17,20 30:1,4 31:25 40:23 41:1 50:7 52:4 53:8 69:9 82:20 103:7,10 118:20 128:7,10,11 129:3,7 130:8,19 131:6,6,15 132:1,6 133:1 134:4,22 136:21 141:10 149:7 156:12  <b>23(b)(2)</b> [8] 8:18 53:3,22,25 54:4,15 89:12 131:16  <b>24A884</b> [1] 4:4  <b>25</b> [1] 53:23  <b>25-807</b> [1] 14:2</p> <p><b>3</b></p> <p><b>3</b> [2] 111:16 124:23  <b>30</b> [4] 55:20 57:15,17 87:18  <b>30-day</b> [3] 55:17,23 56:2</p>	<p><b>35</b> [1] 4:25  <b>38</b> [1] 134:8  <b>39</b> [1] 45:19</p> <p><b>4</b></p> <p><b>4</b> [3] 3:4 111:18 124:23  <b>40</b> [6] 4:23 27:24 54:24 60:10 74:3 102:23  <b>42</b> [3] 102:13 104:10 105:12  <b>48</b> [5] 80:12 108:8 116:14,21 134:7</p> <p><b>5</b></p> <p><b>50</b> [1] 23:18</p> <p><b>6</b></p> <p><b>6,000</b> [3] 77:24 102:19 112:19  <b>64</b> [1] 55:1  <b>65</b> [2] 128:10,20  <b>680</b> [1] 98:4</p> <p><b>7</b></p> <p><b>7</b> [1] 104:9  <b>71</b> [8] 128:10,13,16 156:25 157:4 158:7 159:3 160:1  <b>71's</b> [1] 157:24  <b>77</b> [1] 3:8</p> <p><b>8</b></p> <p><b>8</b> [2] 112:19,20</p> <p><b>9</b></p> <p><b>90</b> [3] 96:10 114:9,14  <b>93</b> [1] 20:19</p> <p><b>A</b></p> <p><b>a)(C)(3)</b> [1] 8:13  <b>a.m</b> [2] 2:4 4:2  <b>Aaron</b> [1] 63:1  <b>AARP</b> [6] 80:19 82:17 88:24 108:11 130:5 139:17  <b>abatement</b> [1] 15:2  <b>abiding</b> [1] 35:11  <b>ability</b> [5] 48:18 58:16 72:12 77:3 93:8  <b>able</b> [6] 29:18 36:20 41:23 106:9 123:6 139:6  <b>above-entitled</b> [1] 2:2  <b>absent</b> [2] 8:12,20  <b>absolutely</b> [9] 32:16,19 37:11 44:21 51:6 64:22 68:5 79:23 95:24  <b>abstract</b> [1] 97:25  <b>abuses</b> [1] 31:1  <b>accept</b> [5] 56:15 62:25 110:15 134:18,19  <b>accepts</b> [1] 124:15  <b>according</b> [1] 36:6  <b>account</b> [2] 111:12 144:24  <b>ace</b> [1] 154:2  <b>achieve</b> [2] 25:9,19  <b>across</b> [6] 17:7 23:19 78:19 99:12 101:7 112:21  <b>Act</b> [13] 26:9 27:11 30:19</p>	<p><b>37:9 41:11 42:13 44:24,25 82:8,9 85:2 91:22 123:6</b>  <b>action</b> [29] 6:25 7:5 8:18  <b>10:12,13 12:14,16,20 20:16 34:19,23 40:21 42:4,8 45:12 66:11 67:1 68:9,12 82:19 115:20 117:11 134:11 136:1,13 147:1 155:14,17 157:13</b>  <b>actions</b> [16] 8:15,16 10:8 13:5,21 40:14 46:6 59:7,10 90:2 116:19 136:22 146:14 151:6,23 152:17  <b>activity</b> [4] 70:20,23 121:15 122:11  <b>actual</b> [3] 60:17 120:17 135:15  <b>actually</b> [21] 59:19 76:17,22 77:1 80:2 83:20 86:21 99:25 112:11 113:23 118:16,24 121:24 132:8 133:1 134:12 141:16 154:20 155:23 156:13 158:19  <b>added</b> [1] 133:1  <b>addition</b> [1] 36:1  <b>additional</b> [1] 71:12  <b>address</b> [20] 5:6 14:19 22:6 26:13 34:18 36:13 49:13 50:8,22,22 65:24 73:3 94:16 122:21 131:7,8 133:2 141:19 161:7,11  <b>addressed</b> [6] 24:16 38:9,13 59:22 66:2,5  <b>addresses</b> [2] 24:24 63:23  <b>addressing</b> [2] 19:18 132:9  <b>Adequacy</b> [1] 52:24  <b>administer</b> [5] 104:6,19 112:23 142:25 143:1  <b>administrability</b> [4] 78:8 84:9,10 93:4  <b>administration</b> [15] 27:25 54:25 55:1,1 59:21 92:6 103:24 104:9,22 110:18 113:22 148:4,6 150:11 151:24  <b>administration's</b> [2] 61:11,17  <b>administrations</b> [7] 5:3 58:2,19 60:8 99:13 130:18 152:19  <b>administrative</b> [2] 24:22 111:24  <b>administratively</b> [1] 142:2  <b>admits</b> [1] 146:15  <b>adopt</b> [3] 24:6 46:2 136:9  <b>adopted</b> [2] 107:1 135:20  <b>adversarial</b> [1] 47:20  <b>adverse</b> [1] 142:8  <b>affect</b> [1] 40:20  <b>affected</b> [4] 8:25 9:24 28:24 52:18  <b>affirmatively</b> [2] 19:21 139:2</p>	<p><b>affirmed</b> [1] 107:8  <b>afford</b> [1] 49:9  <b>afoul</b> [1] 128:25  <b>afraid</b> [1] 42:2  <b>age</b> [1] 109:22  <b>agencies</b> [2] 57:13 143:1  <b>agency</b> [1] 73:21  <b>ago</b> [3] 79:6 108:12 123:17  <b>agree</b> [27] 26:1 35:15 54:11 55:13 58:19 79:14 80:9 84:6 89:7,11 97:18,21 101:3,5,9 108:6,12,22 112:12 116:25 117:7 119:24 127:7 151:8,14 152:7,15  <b>agreed</b> [1] 39:9  <b>agreement</b> [1] 132:16  <b>agrees</b> [1] 125:25  <b>ahead</b> [4] 7:15 33:2 85:3 108:17  <b>ahistorical</b> [3] 128:7 133:23 134:14  <b>aim</b> [1] 138:25  <b>air</b> [1] 18:13  <b>AL</b> [6] 1:4,7,11,14,18,21  <b>Alabama</b> [1] 54:16  <b>aliens</b> [2] 4:18 8:6  <b>alike</b> [1] 79:14  <b>Alito</b> [18] 39:2,3,21 40:8 66:8 95:17 96:12 97:12,13,22 100:15 121:5 143:19,20 144:6,11,15,18  <b>Alito's</b> [3] 67:24 131:3 132:8  <b>allegedly</b> [2] 70:19,22  <b>alleging</b> [1] 14:11  <b>allow</b> [4] 50:4,21 76:5 144:25  <b>allowed</b> [4] 39:10 74:24 78:14 126:22  <b>alluded</b> [1] 156:24  <b>almost</b> [1] 56:1  <b>alone</b> [1] 88:5  <b>already</b> [2] 79:4 94:23  <b>alter</b> [1] 42:19  <b>alternative</b> [12] 78:1 81:24 82:14,25 87:10 90:7,11,15 91:18 103:16 119:16 120:8  <b>alternatives</b> [13] 28:25 78:3 80:3 83:20 96:2 97:8 100:8 101:17 119:5,6,21 120:10,14  <b>although</b> [5] 79:25 106:8 135:12 145:4 158:5  <b>ambiguities</b> [1] 117:4  <b>amend</b> [1] 128:23  <b>Amendment</b> [7] 4:16 43:20 44:4,5,9 78:13 107:1  <b>Amendment's</b> [1] 125:20  <b>American</b> [7] 4:14 78:14 80:13 116:10,13,23 117:3  <b>amici</b> [5] 85:19 107:3 128:4 141:15 153:5  <b>amicus</b> [3] 85:11 91:4 156:2</p>	<p><b>4</b>  <b>among</b> [3] 8:23 46:9 68:7  <b>analogical</b> [3] 116:8 117:2,7  <b>analogically</b> [1] 116:11  <b>analogous</b> [2] 6:24 75:12  <b>analogue</b> [3] 8:19 11:4 27:21  <b>analogues</b> [1] 6:11  <b>analogy</b> [1] 59:17  <b>analysis</b> [5] 59:16 118:9,10 135:15 144:24  <b>Andrew</b> [1] 44:12  <b>animal</b> [1] 7:10  <b>announced</b> [2] 16:12,13  <b>another</b> [8] 11:18,20,24 20:13 42:12 56:3,5 130:12  <b>answer</b> [23] 12:18 20:8 30:25 31:22,25 34:1 36:23 39:21 64:7 84:23 85:17 87:5 90:12 100:11,22 107:23 117:4 143:11 144:7,7,19,21 151:15  <b>answered</b> [2] 40:11 146:21  <b>answering</b> [1] 128:4  <b>answers</b> [2] 60:18 105:24  <b>ante</b> [1] 134:9  <b>anybody</b> [2] 72:9 155:3  <b>anyway</b> [2] 82:23 162:3  <b>APA</b> [4] 54:5,6 71:2 73:18  <b>apart</b> [1] 158:2  <b>apologize</b> [1] 122:19  <b>appeal</b> [3] 47:9 76:20 121:9  <b>appealable</b> [1] 149:24  <b>appeals</b> [6] 49:21 98:25 99:1 122:1 149:25 150:3  <b>appear</b> [1] 13:3  <b>APPEARANCES</b> [1] 2:6  <b>appearing</b> [1] 38:15  <b>appellate</b> [2] 5:21 98:12  <b>applicable</b> [1] 48:24  <b>Applicants</b> [8] 1:5,12,19 2:9 3:4,14 4:9 160:7  <b>application</b> [20] 53:1 63:23 64:13,24 65:11 77:18,23 83:17 95:1 98:24 99:3 101:18 103:21 106:3 119:16 123:3 126:1 160:1 161:13,24  <b>applications</b> [1] 162:13  <b>applied</b> [2] 23:17 29:4  <b>applies</b> [3] 50:6 71:7 100:2  <b>apply</b> [2] 33:15 90:5  <b>applying</b> [1] 33:14  <b>appointment</b> [1] 89:21  <b>apportionment</b> [5] 109:17,20,25 110:3,9  <b>appreciate</b> [8] 16:2 17:18 75:7 93:22 94:15 115:12 121:17 134:15  <b>approach</b> [4] 47:12 62:21 78:4 133:23</p>
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## Official

<p><b>approached</b> <sup>[1]</sup> 117:25  <b>approaches</b> <sup>[1]</sup> 78:2  <b>approaching</b> <sup>[1]</sup> 132:14  <b>appropriate</b> <sup>[26]</sup> 12:13 13:4,20 17:16 26:2,4,5,6 29:15 31:9,11 32:10,13 51:1 55:3 87:23 96:20 114:7 119:19 124:2 127:8 132:17,19 139:11 140:4,18  <b>appropriately</b> <sup>[1]</sup> 29:22  <b>approved</b> <sup>[2]</sup> 138:23 139:6  <b>aren't</b> <sup>[5]</sup> 91:9,13 105:3 137:18 159:4  <b>arguably</b> <sup>[1]</sup> 151:12  <b>argue</b> <sup>[4]</sup> 9:4,8,10 141:2  <b>argued</b> <sup>[4]</sup> 7:1 27:9 44:3,5  <b>argues</b> <sup>[1]</sup> 126:3  <b>arguing</b> <sup>[4]</sup> 9:4 40:15 89:14 137:7  <b>argument</b> <sup>[37]</sup> 2:3 3:2,5,9,12 4:4,8 8:23,25 9:7,21 11:9 17:3 18:17 21:15 25:11 39:24 44:1 53:2 74:15 75:1 77:13 79:1 84:19 95:19 96:23 125:14 133:17 134:16 141:20 142:20,22,24 143:23 154:12 156:24 160:6  <b>arguments</b> <sup>[4]</sup> 32:9 49:21 121:17 160:15  <b>arising</b> <sup>[1]</sup> 72:24  <b>Ark</b> <sup>[6]</sup> 11:13 14:4 106:6,13 123:17 160:22  <b>arrive</b> <sup>[2]</sup> 104:5,13  <b>arrived</b> <sup>[1]</sup> 113:10  <b>Article</b> <sup>[41]</sup> 5:5 9:5 16:5,11,16,21 17:4,8,23 18:2,4,6 19:4,6 26:15,25 27:8 34:16 40:3,13,19,22,25 42:21,22 45:16,25 59:18 72:25 77:20 78:20 80:7 82:6,12 84:20 95:5 96:6 98:8 125:3 126:4 136:12  <b>articulate</b> <sup>[2]</sup> 139:2 149:14  <b>articulated</b> <sup>[1]</sup> 135:14  <b>articulating</b> <sup>[2]</sup> 155:25 159:20  <b>ASAP</b> <sup>[1]</sup> 143:2  <b>aside</b> <sup>[10]</sup> 30:4 44:22 54:6,8 71:4 73:19 79:19 82:5 94:8 136:19  <b>asks</b> <sup>[1]</sup> 64:21  <b>assess</b> <sup>[1]</sup> 51:12  <b>assessment</b> <sup>[2]</sup> 133:12 140:10  <b>assets</b> <sup>[1]</sup> 27:17  <b>Association</b> <sup>[5]</sup> 54:16 142:6,7 153:14,15  <b>associational</b> <sup>[3]</sup> 137:15 146:25 153:6  <b>associations</b> <sup>[2]</sup> 137:17 138:6  <b>Assume</b> <sup>[16]</sup> 21:14 22:23 28:7,8,13,22 46:10 67:2,9,</p>	<p>14,19 74:22 94:8 123:11 133:25 134:1  <b>assuming</b> <sup>[4]</sup> 29:7 67:11 73:19 123:12  <b>assumption</b> <sup>[3]</sup> 28:9 30:8 67:10  <b>asylum</b> <sup>[1]</sup> 154:8  <b>asymmetrically</b> <sup>[1]</sup> 5:17  <b>at-birth</b> <sup>[1]</sup> 104:4  <b>attached</b> <sup>[2]</sup> 101:14,15  <b>attempt</b> <sup>[1]</sup> 28:17  <b>attempted</b> <sup>[1]</sup> 145:5  <b>attention</b> <sup>[1]</sup> 74:13  <b>attorney</b> <sup>[1]</sup> 103:10  <b>attorneys</b> <sup>[2]</sup> 103:8 118:20  <b>authorities</b> <sup>[1]</sup> 160:17  <b>authority</b> <sup>[14]</sup> 5:8 9:17 18:3 26:8 27:5 40:4 45:17 58:10,11 59:8,12 72:23 73:1 130:7  <b>authorization</b> <sup>[1]</sup> 82:4  <b>authorize</b> <sup>[2]</sup> 84:21 91:20  <b>authorized</b> <sup>[1]</sup> 84:22  <b>automatically</b> <sup>[1]</sup> 113:25  <b>availability</b> <sup>[5]</sup> 82:19 87:10 127:2,13 139:14  <b>available</b> <sup>[12]</sup> 80:24 81:1,4,20,22 82:16 86:2 89:19 91:8 99:17 130:12 131:18  <b>avenue</b> <sup>[1]</sup> 50:8  <b>avenues</b> <sup>[1]</sup> 39:11  <b>award</b> <sup>[1]</sup> 135:3  <b>away</b> <sup>[2]</sup> 13:14 42:9</p> <p style="text-align: center;"><b>B</b></p> <p><b>b)(2)</b> <sup>[1]</sup> 131:22  <b>B-1</b> <sup>[1]</sup> 57:7  <b>babies</b> <sup>[8]</sup> 77:24 102:12,19 103:11 105:1,2 112:6,19  <b>back</b> <sup>[32]</sup> 13:16 26:12 37:23 38:7 44:17,20 54:22 67:24 75:8,10 80:10 88:11,20 90:25 99:1 106:20 108:7 111:4,6,8 115:11 132:7 135:11 140:15,22 142:13 143:5 149:11,14 151:25 152:6 159:14  <b>background</b> <sup>[1]</sup> 129:6  <b>bad</b> <sup>[1]</sup> 77:7  <b>balance</b> <sup>[4]</sup> 111:16 122:15 145:19,19  <b>balancing</b> <sup>[2]</sup> 6:3 30:14  <b>bare</b> <sup>[1]</sup> 69:11  <b>Barnett</b> <sup>[2]</sup> 156:9 159:13  <b>BARRETT</b> <sup>[58]</sup> 19:12 20:9,11,22 21:5,12,17,23 22:2,9,16 31:18,21 32:2,12,17 60:14,15 61:10,20 62:3,15,18,24 63:4,16,21,24 64:2,18,25 65:14,21 66:6 67:2,8,14 68:6,17,23 69:2 90:13 91:5 115:7,8 116:4 117:6 118:19,25 120:3,24 128:14 152:21,22 153:1,4,11,19</p>	<p><b>Barrett's</b> <sup>[1]</sup> 135:11  <b>barring</b> <sup>[1]</sup> 78:21  <b>base</b> <sup>[1]</sup> 127:3  <b>based</b> <sup>[4]</sup> 14:14 78:5,14 117:2  <b>bases</b> <sup>[2]</sup> 51:25 79:12  <b>basic</b> <sup>[1]</sup> 80:8  <b>basis</b> <sup>[11]</sup> 13:22 25:23 36:13 51:22 52:5,13 60:9,10 95:5,8 104:21  <b>bear</b> <sup>[3]</sup> 83:16 92:3 105:10  <b>bearing</b> <sup>[1]</sup> 125:8  <b>become</b> <sup>[2]</sup> 79:9 151:1  <b>began</b> <sup>[2]</sup> 39:3 97:14  <b>begin</b> <sup>[1]</sup> 19:23  <b>beginning</b> <sup>[3]</sup> 53:15 121:22 156:25  <b>behalf</b> <sup>[12]</sup> 2:8,11,13 3:4,7,11,14 4:9 77:14 125:15 137:25 160:7  <b>behavior</b> <sup>[2]</sup> 71:10 73:8  <b>believe</b> <sup>[7]</sup> 10:18 37:18 42:5,6 63:20 146:24 147:2  <b>believed</b> <sup>[1]</sup> 99:13  <b>below</b> <sup>[9]</sup> 32:6 78:4 83:4 99:7 101:1,4 117:24 118:1,2  <b>beneficiaries</b> <sup>[3]</sup> 18:24 72:6 154:21  <b>beneficiary</b> <sup>[1]</sup> 21:19  <b>benefit</b> <sup>[11]</sup> 15:12 20:25 43:6 67:15 80:16 83:7 93:16 102:5 116:16 126:10 133:19  <b>benefits</b> <sup>[27]</sup> 5:15 15:11 41:20 72:10 74:1 92:6,8 99:24 100:4 102:8,21,24 103:24 104:6,9,18,20,23 105:9 110:18,20 112:6,16,23 113:22 139:24 156:22  <b>benefitted</b> <sup>[3]</sup> 20:2 81:10 155:5  <b>benefitting</b> <sup>[2]</sup> 155:22 157:20  <b>best</b> <sup>[6]</sup> 37:19 95:11 96:1 115:21 116:1 134:3  <b>better</b> <sup>[4]</sup> 50:14 54:17 132:14,14  <b>between</b> <sup>[10]</sup> 6:1 60:23 66:14 68:3 110:9 111:17 113:25 117:11 119:12 135:24  <b>beyond</b> <sup>[2]</sup> 95:1 125:2  <b>Biden</b> <sup>[2]</sup> 54:13 98:19  <b>big</b> <sup>[1]</sup> 148:9  <b>bigger</b> <sup>[1]</sup> 7:24  <b>bill</b> <sup>[19]</sup> 6:12,18,19 7:3,6,9,23 8:10,11 10:20 11:4 41:5 79:21 80:11 106:22 108:8 115:18 116:2 117:11  <b>bills</b> <sup>[7]</sup> 8:16 116:19 134:1,6,18 135:7 136:5  <b>bind</b> <sup>[5]</sup> 8:12,15 35:18 37:6 80:15  <b>binding</b> <sup>[9]</sup> 6:22 8:12,20 9:</p>	<p>17 20:1 31:14 94:24 130:9 135:8  <b>binds</b> <sup>[2]</sup> 45:11,12  <b>bipartisan</b> <sup>[3]</sup> 5:1 152:6,9  <b>birth</b> <sup>[3]</sup> 103:12 113:9,9  <b>birthright</b> <sup>[4]</sup> 57:8 79:2 113:11 143:22  <b>bit</b> <sup>[5]</sup> 117:17 121:6 125:6 139:22 141:8  <b>blatantly</b> <sup>[1]</sup> 125:25  <b>blocking</b> <sup>[1]</sup> 4:21  <b>blowing</b> <sup>[1]</sup> 53:19  <b>board</b> <sup>[2]</sup> 17:7 107:5  <b>boiled</b> <sup>[1]</sup> 69:11  <b>border</b> <sup>[1]</sup> 11:22  <b>borders</b> <sup>[1]</sup> 95:2  <b>born</b> <sup>[17]</sup> 7:18 11:19,22 41:13,17 77:24 78:6 102:12,20 103:11,25 105:5,18 111:4,5 112:19 113:12  <b>both</b> <sup>[20]</sup> 9:5,8,10 12:7 18:1 52:21 58:13 59:10 64:21 65:1 97:20 100:25 114:21 126:13 128:9 130:18 157:22 159:3,11,12  <b>bottom</b> <sup>[1]</sup> 69:6  <b>bound</b> <sup>[12]</sup> 19:14 41:10 68:8,10,14,15,25 75:14 116:15 130:20,24 133:21  <b>bounds</b> <sup>[1]</sup> 5:8  <b>Boyle</b> <sup>[1]</sup> 102:21  <b>Brackeen</b> <sup>[1]</sup> 91:13  <b>Branch</b> <sup>[4]</sup> 24:25 125:23 145:3 162:10  <b>branches</b> <sup>[3]</sup> 6:2 58:8 126:18  <b>Bray</b> <sup>[3]</sup> 59:18 128:23 146:5  <b>brief</b> <sup>[2]</sup> 55:6 156:4  <b>briefed</b> <sup>[5]</sup> 14:1 22:14 32:6 52:1 53:17  <b>briefing</b> <sup>[11]</sup> 44:13 49:20 50:23 83:13 93:25 94:6 95:19 101:7,14 143:23,25  <b>briefly</b> <sup>[1]</sup> 142:16  <b>briefs</b> <sup>[1]</sup> 30:21  <b>bright</b> <sup>[2]</sup> 100:12 151:11  <b>bright-line</b> <sup>[4]</sup> 78:21 81:19 86:1 125:3  <b>bring</b> <sup>[11]</sup> 20:16,20 21:2,19 22:3 28:24 48:18,20 50:1 96:7 125:9  <b>brings</b> <sup>[2]</sup> 18:15 35:13  <b>broad</b> <sup>[5]</sup> 16:20 39:20 79:24 117:22 140:18  <b>broader</b> <sup>[7]</sup> 14:10 22:21 24:14 110:10 117:20 118:7 146:7  <b>broadly</b> <sup>[2]</sup> 7:25 109:15  <b>brought</b> <sup>[5]</sup> 34:15 35:19 48:17 73:8 137:16  <b>brunt</b> <sup>[1]</sup> 49:24  <b>bucket</b> <sup>[26]</sup> 82:24 84:19,20,24 85:13 86:20,20 87:3,4,6,</p>	<p>20 88:11,21,25 90:15,21 91:3,3,7,10,23 128:2 152:24 153:6,7,20  <b>bucket's</b> <sup>[1]</sup> 88:21  <b>buckets</b> <sup>[2]</sup> 84:14 148:12  <b>bug</b> <sup>[2]</sup> 26:15 35:8  <b>building</b> <sup>[2]</sup> 93:11 106:5  <b>built</b> <sup>[1]</sup> 123:19  <b>bunch</b> <sup>[3]</sup> 15:12 38:25 46:18  <b>burden</b> <sup>[2]</sup> 102:25 104:17  <b>burdens</b> <sup>[7]</sup> 5:16 84:9,11 92:2,23 93:4 120:1  <b>business</b> <sup>[1]</sup> 147:21  <b>buying</b> <sup>[1]</sup> 11:1</p> <p style="text-align: center;"><b>C</b></p> <p><b>calculus</b> <sup>[1]</sup> 112:14  <b>call</b> <sup>[6]</sup> 14:22 20:3 21:6 42:15 69:7 158:22  <b>called</b> <sup>[2]</sup> 73:16 117:13  <b>calls</b> <sup>[3]</sup> 55:24 109:7 136:12  <b>Camden</b> <sup>[2]</sup> 110:25 111:5  <b>came</b> <sup>[2]</sup> 2:2 11:21  <b>candidate</b> <sup>[2]</sup> 53:3 54:17  <b>cannot</b> <sup>[4]</sup> 73:11 79:2,11 158:24  <b>capacity</b> <sup>[1]</sup> 41:10  <b>care</b> <sup>[7]</sup> 66:20 90:14 92:25 114:14,15 118:6 131:13  <b>careful</b> <sup>[1]</sup> 6:3  <b>Carolina</b> <sup>[1]</sup> 111:13  <b>CASA</b> <sup>[3]</sup> 1:7 4:5 143:2  <b>cascade</b> <sup>[2]</sup> 4:21 161:20  <b>Case</b> <sup>[113]</sup> 4:4 11:13,18,20,24 12:13 14:2,9,12,17 15:18 16:3 18:21 23:20 24:7,8,12 26:5 27:19 28:21 29:9 30:1 31:3,8 32:8,9 33:18,25 36:21 38:10 39:23 42:15 43:5 45:19 46:7,22,25 47:7,11,13,24 48:3,7,18 49:4,25 50:1,17,20 53:2 59:24 61:25 62:5 65:10,17,24 70:19 73:16 74:2 80:8,14,25 82:1,17,17,25 87:11,17 88:8 89:1 91:24 92:3,16 94:3,18,21 95:13,15,23 99:2 100:5,10 107:4,5 114:7,12 115:1 117:5 118:15,23 120:15 123:4,6,23 125:8 127:10 137:3,12 139:20 147:17 148:16,17 149:1,2 150:16 151:21 154:3,15 156:2 158:18 162:3,16,17  <b>cases</b> <sup>[61]</sup> 4:6 7:2 13:4,20,22 15:4,8 26:2,6 31:9 38:2,4,9,25 46:18 48:15 50:4,24 52:21 53:22 54:12 65:15,16 66:2,25 72:23 74:3 78:24 81:13,17,23 82:14 90:8 91:12 93:1 99:20 100:7 107:2 109:8,8 115:13 119:</p>
---	---	---	---	--

## Official

<p>20 125:1 132:17 134:3  135:18,23 136:6 137:16,16  138:23,24 140:16,24 147:  19 148:16 156:7 159:13  160:23 161:21,25  <b>Casey</b> [3] 16:14 18:9 72:22  <b>catalog</b> [1] 138:22  <b>catastrophic</b> [1] 126:20  <b>catch</b> [3] 74:17 75:19 148:  23  <b>categorical</b> [4] 61:7 63:13  136:9 139:7  <b>categorically</b> [4] 99:15  107:16 126:5 135:4  <b>categories</b> [2] 79:24 140:  21  <b>category</b> [2] 139:19,20  <b>cause</b> [1] 24:22  <b>cease</b> [3] 70:19,22,25  <b>central</b> [1] 65:20  <b>century</b> [13] 26:12 79:7 80:  18 106:3,23,24 114:19 115:  15,16 123:19 125:23 126:  19 160:17  <b>cert</b> [12] 38:22 41:25 42:11,  24 51:4 95:4,11 137:24  144:2,4,10 161:9  <b>Certain</b> [5] 15:8 26:2 51:25  61:25 116:15  <b>certainly</b> [10] 21:25 26:6  39:14 60:7 130:3,4 136:11  147:3 151:8 159:19  <b>certificate</b> [1] 103:12  <b>certification</b> [39] 5:16 9:1  25:6,10 32:8,10,13 35:6  39:8,19 53:4,6,12,15,20 66:  21,24 67:13 89:3,5,11,22  129:12 130:10,25 132:11,  18,21,25 133:3,7 134:9  137:2,18 138:5 140:15,17  147:8,10  <b>certified</b> [8] 13:21 29:8 51:  13 66:15 67:15,16 135:1  137:8  <b>certify</b> [2] 13:4 29:18  <b>certiorari</b> [1] 94:23  <b>cetera</b> [2] 75:4 155:17  <b>challenge</b> [4] 48:13 126:2  141:7 149:16  <b>challenged</b> [5] 34:24 45:  22 55:9 62:7 150:13  <b>challenges</b> [3] 59:20 126:  24 139:11  <b>Chamber</b> [1] 137:17  <b>chance</b> [2] 111:24 122:20  <b>Chancery</b> [5] 27:22 54:23  75:8,10 115:12  <b>changed</b> [2] 111:2 120:13  <b>channel</b> [1] 128:6  <b>channeled</b> [1] 53:9  <b>channeling</b> [5] 128:11 129:  4 132:2 138:9 149:6  <b>chaos</b> [3] 92:9 110:20 111:  9</p>	<p><b>characterization</b> [2] 13:  25 14:3  <b>characterized</b> [1] 69:24  <b>characterizing</b> [1] 70:6  <b>check</b> [1] 101:2  <b>checking</b> [1] 103:14  <b>Cherokee</b> [2] 159:16,22  <b>CHIEF</b> [48] 4:3,10 7:8,13,15  11:7 12:17 13:8 14:8 18:  22 24:4,16,23 36:17 37:12,  13 39:2 40:9 46:3 50:11  51:7 60:13 69:3 77:10,15  81:3 83:6,19 97:9 100:19  111:22 115:4 120:25 125:  11,16 129:17 142:16 143:  13,16 145:8 147:15 150:4  152:20 154:9 160:3,9 161:  6 162:14  <b>child</b> [2] 11:17 105:8  <b>children</b> [13] 4:17 8:6 15:  24 29:13 41:13,16,17,24  43:21,21 107:13 125:19  160:12  <b>choices</b> [1] 119:13  <b>Chrysafis</b> [1] 139:19  <b>Circuit</b> [38] 7:9 14:2 19:17  23:8 24:5,20 33:12,14,16,  19,19 34:6,11 36:3 38:1,24  44:13 45:8 47:22,23,24,25  48:24 60:22 61:3,14,15,16,  24 62:2,5,10 63:2 76:4,4  88:4 95:7 101:10  <b>Circuit's</b> [2] 24:8 35:11  <b>circuit-wide</b> [2] 36:2 51:20  <b>circuits</b> [5] 34:7,12 48:2 50:  25 63:12  <b>circumstance</b> [4] 30:2 67:  22 78:22 122:8  <b>circumstances</b> [17] 17:21  34:3 61:7 79:16 80:21 81:  2,5,21 84:22 99:18 120:14  121:11 124:5 126:13 127:  14 132:24 134:8  <b>circumvent</b> [1] 5:15  <b>cite</b> [3] 38:3,4 160:16  <b>cited</b> [1] 44:13  <b>cites</b> [1] 59:23  <b>citizen</b> [7] 11:20,23 12:1  42:10 44:25 52:22 105:8  <b>citizens</b> [9] 15:24 36:8 46:  20 78:17 84:3,4 104:14  105:3 160:20  <b>Citizenship</b> [36] 4:14,17 7:  18 8:5 11:17,25 29:3 41:  14 42:5,18 43:20 44:7,20  56:16 57:8 78:5,12,14 79:  2 102:15,25 103:17 105:19,  23 110:21 111:2 112:5  113:8,11,15,18,20 125:19  143:22 160:11,11  <b>citizenship-stripping</b> [1]  126:23  <b>City</b> [3] 2:11 3:8 77:14  <b>Civil</b> [1] 105:22</p>	<p><b>claim</b> [8] 7:20 22:18 41:20  44:21 73:9 85:13 108:24  142:12  <b>claimant</b> [2] 14:11,11  <b>claimed</b> [2] 78:20 100:25  <b>claiming</b> [2] 12:6,11  <b>claims</b> [4] 6:21 11:2 39:1  53:8  <b>clarified</b> [1] 80:13  <b>clarify</b> [1] 154:14  <b>class</b> [106] 5:16 6:23,24,25  7:5 8:7,12,14,15,18,20 9:1  10:12,13 12:13,15,16,19  13:4,21 25:6,9 29:7,12,15,  18 32:4,7,10,13,13 33:11  34:19,22 35:5 39:9,18 40:  14,21,23,24 43:23 45:12  51:12,23 52:6 53:6,12,14,  19 54:15 66:11,14,25 67:  14,15 68:4,8,8,12 82:19 89:  3,5,11,21 90:2,10,14,17,19  115:20 116:19 117:11 129:  11,13,19,24 130:9,24 132:  10,17,20,25 133:2,7,10,11  134:9,11,24 136:1,13,22  137:2,7,18 138:4 140:15  146:14,25 147:8,9 155:14,  17,18 157:13  <b>class-wide</b> [7] 25:20,22 29:  23 36:12 51:10,19 141:5  <b>classes</b> [6] 51:19,20,20 89:  12 90:3 131:19  <b>classic</b> [1] 156:2  <b>classwide</b> [1] 66:16  <b>Clause</b> [3] 8:5 78:12 160:  11  <b>clean</b> [1] 47:3  <b>cleanest</b> [1] 95:12  <b>clear</b> [10] 21:13 31:4 60:3  75:23 89:25 90:24 91:13  99:7 101:6 135:9  <b>clear-cut</b> [2] 65:18,22  <b>clearly</b> [4] 44:24 108:23  124:3 161:25  <b>clients</b> [1] 159:4  <b>close</b> [1] 114:25  <b>codified</b> [2] 114:21 123:20  <b>collateral</b> [3] 15:6 16:21  19:11  <b>collaterally</b> [1] 20:1  <b>colleagues</b> [3] 98:13 108:  25 157:16  <b>collect</b> [1] 27:18  <b>collection</b> [3] 80:17 108:9  116:22  <b>colloquies</b> [5] 90:25 91:25  92:21 95:14 114:5  <b>combined</b> [1] 114:24  <b>come</b> [25] 22:8 36:10 58:1  65:10 70:21 79:13 84:24  87:18,25 89:18 90:7 91:16  93:5 95:15 102:20,23 105:  6 123:8 132:7 135:24 147:  25 155:9 157:9 158:25</p>	<p>161:23  <b>comes</b> [10] 13:13,18 23:18  24:9 64:20 70:16 71:19 72:  2 99:2 103:15  <b>coming</b> [2] 59:13,14  <b>comment</b> [1] 149:4  <b>Commerce</b> [1] 137:17  <b>commission</b> [1] 162:7  <b>commit</b> [3] 33:13 34:14 35:  11  <b>Committee</b> [4] 128:22,24  129:1 132:3  <b>Committee's</b> [1] 128:8  <b>common</b> [6] 38:3 71:8 75:  8 79:9 125:21 141:4  <b>commonality</b> [5] 8:23 52:  16 67:19 132:25 141:3  <b>compelling</b> [2] 49:21 160:  16  <b>complained</b> [1] 106:9  <b>complaining</b> [5] 5:7 16:18  18:7 38:15 73:2  <b>complaint</b> [1] 79:10  <b>complete</b> [26] 15:22 23:5  24:1 31:15 66:12 90:21 93:  2 94:3,5 95:25 102:3,8,13  112:10 117:21 118:7 121:  19 124:7,14 126:11 127:9  128:2 141:17,22 142:10  146:16  <b>completed</b> [1] 100:23  <b>completely</b> [14] 64:1 70:11  76:19 77:1 109:11 112:4  117:6,9 122:10,23 151:14  152:8,9 161:18  <b>complex</b> [1] 65:13  <b>compliance</b> [1] 25:14  <b>complicated</b> [1] 147:25  <b>complies</b> [2] 130:14 131:  11  <b>concede</b> [7] 22:2 26:4 32:  7,14,17 55:22 65:20  <b>conceding</b> [1] 12:12  <b>concept</b> [1] 71:8  <b>conceptually</b> [1] 156:13  <b>concern</b> [3] 74:10,14 136:  13  <b>concerned</b> [3] 141:14 150:  21,22  <b>concerns</b> [15] 17:19 50:9  81:9,15 85:7 94:13,16 95:  14 131:7,8 132:8 139:13  150:8,25 157:15  <b>conclusion</b> [2] 24:9 42:19  <b>concrete</b> [2] 149:13,18  <b>concurrence</b> [3] 93:12  146:6 149:20  <b>condition</b> [1] 73:21  <b>conduct</b> [7] 71:4,25 72:13  75:17 121:24 122:12 123:  1  <b>confidence</b> [1] 30:6  <b>confines</b> [2] 117:16 136:16  <b>confirmed</b> [1] 135:19</p>	<p><b>conflicting</b> [2] 5:22 37:1  <b>confront</b> [1] 112:1  <b>confrontations</b> [1] 5:25  <b>confronted</b> [1] 89:1  <b>confused</b> [1] 155:8  <b>confuses</b> [1] 156:23  <b>confusing</b> [1] 154:13  <b>confusion</b> [2] 90:24 101:7  <b>Congress</b> [10] 27:4 40:21  42:4 44:3 58:5 60:5 73:20  84:21 91:20 123:20  <b>Congress's</b> [1] 113:21  <b>congressional</b> [2] 82:3  114:20  <b>connects</b> [1] 146:7  <b>consequences</b> [5] 15:6  16:21 19:11 126:20 142:8  <b>consider</b> [4] 82:18 87:9  113:1 162:9  <b>consideration</b> [1] 146:10  <b>considerations</b> [2] 127:23,  24  <b>considered</b> [4] 38:9,12  125:24 128:22  <b>considering</b> [1] 31:11  <b>considers</b> [2] 17:19 127:  22  <b>consistent</b> [6] 26:7 75:6  84:15 128:8 155:25 160:  22  <b>consistently</b> [1] 38:13  <b>consolidated</b> [1] 4:5  <b>constantly</b> [1] 47:8  <b>constitute</b> [1] 55:8  <b>Constitution</b> [4] 42:17 43:  15 74:25 78:17  <b>Constitution's</b> [1] 6:3  <b>constitutional</b> [9] 17:23  43:8 44:22 77:6 79:5 139:  12 141:7 142:12 149:17  <b>constitutionality</b> [1] 146:  1  <b>constrain</b> [1] 70:9  <b>constraint</b> [2] 85:6 134:14  <b>contemplate</b> [1] 129:8  <b>contemplates</b> [2] 128:17  157:5  <b>contemplating</b> [2] 153:25  157:7  <b>contempt</b> [5] 19:22 20:16  21:2,19 155:10  <b>contend</b> [1] 22:1  <b>contention</b> [2] 8:4 30:17  <b>contest</b> [1] 22:22  <b>contesting</b> [2] 145:24,25  <b>context</b> [11] 16:12,16,22  18:4 68:9 70:16 71:2 99:3  129:22 136:2 160:21  <b>contexts</b> [2] 68:21 82:22  <b>continue</b> [3] 33:15 34:5 56:  21  <b>continued</b> [1] 95:8  <b>continues</b> [1] 155:11  <b>continuing</b> [2] 80:16,18</p>
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## Official

<p><b>contrary</b> [6] 79:6 106:5  116:22,23 123:7 125:19  <b>contribute</b> [1] 114:3  <b>controlling</b> [1] 55:8  <b>convinced</b> [1] 98:22  <b>Cooper</b> [1] 62:25  <b>CORKRAN</b> [73] 2:13 3:10  125:13,14,16 127:5 128:1  129:21,25 130:3,15,23 131:2,10,22 132:1 133:6,22  134:5,20 135:6 137:1,9,14,23 138:2,14,18,21 140:14,19 141:1,23,25 142:19 143:15,24 144:9,13,17,20 145:21 146:19,23 147:2,6,17 148:7,21 149:5 150:24  151:8,14 152:4,7,12,15,22,25 153:3,9,18,21 154:25  155:24 157:4,22 158:9,12,15 159:2,7,11  <b>correct</b> [15] 9:7 19:1,4 27:7 38:20 51:13,14 54:2 63:19 107:9,18,25 108:4 145:20 162:7  <b>correctable</b> [1] 150:2  <b>correctly</b> [3] 40:12 60:25 161:6  <b>correlated</b> [1] 152:16  <b>cosmically</b> [1] 133:19  <b>costs</b> [2] 105:15 111:24  <b>coterminous</b> [1] 132:19  <b>couched</b> [1] 121:18  <b>couldn't</b> [6] 9:19 45:1 75:11 82:20,21 144:3  <b>counsel</b> [12] 13:9 14:8 19:12 36:18 77:11 84:13 89:21 97:10 125:12 143:17 160:4 162:15  <b>count</b> [4] 11:11 109:19,21 112:9  <b>counted</b> [3] 109:24 110:6,7  <b>countless</b> [1] 42:7  <b>countries</b> [1] 41:18  <b>country</b> [9] 13:12 39:18 54:22 57:5 76:7 78:13 80:23 111:7 126:21  <b>country's</b> [1] 105:22  <b>county</b> [1] 104:18  <b>couple</b> [5] 25:17 83:21 87:22 92:20 123:8  <b>course</b> [9] 20:4 25:11 28:10 37:23 47:3 55:7 119:11 155:3 156:21  <b>COURT</b> [201] 1:1 2:3 4:11 7:2 9:14,16,18,24 10:3,7,24 11:11 12:3,7,8,10,21 13:1,19 14:23,24 15:5,19 16:2,15,22 17:4,10,15,19,21 18:4,24 19:8 20:4 25:22 26:9 27:2,5,7,8,15,19,22 28:11 30:13 31:13 32:6,24 34:2,11 35:6 36:7 37:3,5 38:9,12,15 42:13,25 43:6</p>	<p>45:10,13,17 46:1 47:1,4,12 49:10,17 50:2,19,21 51:1 54:22 55:9 63:1,6,8,15,18 65:24 66:1 67:6 68:24 70:3,4,9,21 71:9,12 72:4,6,8,12,20,24 73:6,15 75:9,14,16 76:7,14,21,25 77:4,16,17 78:4 79:2,4,13 83:3,8,13 85:4 88:25 92:18 93:12,24 94:18,21,24 95:7,10,16 96:4 98:5,13,25 99:1,7 101:1,14 106:1 107:7 110:13 114:6,19 115:11 117:24 118:1,2,9,15 119:7,8,18 120:10,12,22 121:7,13,25 122:25 123:18 124:11,24 125:9,17,24 126:15 127:12 129:5 130:4,6 132:4 133:11 135:14,17 136:8,14 138:23 139:1,4,5,9,22 140:1,12 141:16 143:6 144:23,25 145:5,11 149:11,13 150:8,22 154:17 155:2,9 157:9 158:25 161:7,11 162:11,13  <b>Court's</b> [28] 5:23 6:5 17:9 25:15 37:24 47:22 55:7 69:25 78:24 79:17 80:5,19 89:24 91:12 104:14 106:5,18 123:7 124:8 125:22 126:25 132:9 135:2 138:9 141:11 145:1 151:4 156:7  <b>courtroom</b> [1] 98:15  <b>courts</b> [58] 4:19,23 9:6 13:1,4,16,21 25:19 26:16,20 27:12 31:11,12,17 34:6,11 43:7,11,11,17 45:20 46:9,11 47:15 48:21 49:20 50:21 51:11 52:1 53:25 75:10,12 82:18,22 87:9 91:6 101:4 109:1 111:14 119:19,20 121:25 122:1 123:15 138:17 140:3 147:20,25 148:18,19 149:22,24,25 150:2 156:18 160:16 161:3 162:5  <b>courts'</b> [1] 34:17  <b>cover</b> [3] 39:16,17 102:23  <b>covered</b> [1] 23:10  <b>Covington</b> [1] 111:14  <b>Cox</b> [1] 64:23  <b>crafting</b> [1] 118:4  <b>create</b> [5] 5:9,21,24 85:25 118:5  <b>created</b> [3] 39:5 97:15 148:9  <b>creates</b> [1] 94:22  <b>cries</b> [1] 50:20  <b>criminal</b> [1] 107:12  <b>criteria</b> [1] 11:3 22:7 29:21,22 35:5 44:11 53:1  <b>critical</b> [1] 8:11  <b>cross</b> [5] 105:20,23 110:17,22 111:8  <b>crosses</b> [1] 78:7  <b>crucial</b> [1] 69:1</p>	<p><b>cure-all</b> [1] 52:5  <b>curious</b> [1] 58:20  <b>current</b> [2] 40:6 136:25  <b>currently</b> [4] 21:1,17 23:1 50:23  <b>cut</b> [1] 149:14</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> [6] 1:24 2:8,13 37:25 76:4,4  <b>DACA</b> [5] 24:8 88:2,3,4 99:21  <b>damages</b> [2] 133:3 141:6  <b>dangerous</b> [1] 142:11  <b>dating</b> [1] 151:25  <b>day</b> [8] 37:4,5 51:17 56:7 62:12 67:6 123:25 155:18  <b>days</b> [4] 36:15 55:20 57:15,17  <b>DDC</b> [1] 76:3  <b>dead</b> [1] 28:22  <b>deal</b> [3] 46:8 59:17 124:18  <b>dealing</b> [1] 84:1  <b>debate</b> [2] 73:18 136:5  <b>debtor's</b> [1] 27:17  <b>decades</b> [4] 6:8 85:8 86:18 151:7  <b>decide</b> [15] 27:3 47:10 76:14 79:2 84:8 94:9 95:18 96:9,17,19,22,23 124:6 143:20 148:1  <b>decides</b> [2] 31:13 42:4  <b>deciding</b> [3] 100:15 124:12 148:18  <b>decision</b> [16] 9:23 14:15 24:9,21 26:10 34:2 37:6 39:19 43:1 65:12 83:8 88:6 96:12 106:5 132:5 133:20  <b>decisions</b> [9] 5:14 12:21 14:4 25:22 26:11 37:1 44:16 55:7 65:8  <b>decisis</b> [2] 55:13 149:21  <b>declaration</b> [4] 102:22 156:3 159:21,23  <b>dedicated</b> [1] 98:5  <b>deep</b> [1] 20:5  <b>deeper</b> [1] 146:7  <b>defeat</b> [2] 11:15,16  <b>defendant</b> [12] 17:14 19:1 69:25 70:4,9,19,22 71:9 73:7 79:14 154:17 156:19  <b>defending</b> [1] 145:25  <b>definitely</b> [1] 121:20  <b>degree</b> [1] 39:13  <b>delaying</b> [1] 104:18  <b>delays</b> [2] 77:3 147:12  <b>delegation</b> [1] 73:21  <b>deliberately</b> [1] 46:25  <b>deliberation</b> [1] 143:23  <b>delve</b> [1] 136:8  <b>demonstration</b> [1] 114:2  <b>deny</b> [2] 43:6 77:17  <b>Department</b> [2] 2:7 61:22</p>	<p><b>depend</b> [1] 34:2  <b>depending</b> [2] 103:19 124:21  <b>depends</b> [1] 46:6  <b>deportation</b> [2] 142:9 154:5  <b>describe</b> [1] 14:2  <b>described</b> [4] 5:24 7:2 20:17 149:8  <b>describes</b> [2] 91:24 100:10  <b>desegregation</b> [1] 15:4  <b>deserves</b> [1] 44:1  <b>designation</b> [1] 56:16  <b>designed</b> [1] 77:19  <b>detention</b> [1] 142:8  <b>determination</b> [3] 121:7 126:1 134:10  <b>determine</b> [4] 17:11 121:14 122:25,25  <b>determined</b> [1] 121:23  <b>developed</b> [1] 7:4  <b>developing</b> [1] 133:8  <b>device</b> [6] 82:19 90:10,14,17,19 134:11  <b>diagram</b> [1] 132:16  <b>difference</b> [3] 66:14 68:1,2  <b>differences</b> [1] 8:11  <b>different</b> [42] 7:22 11:5 14:9 15:14 22:18 28:7 50:24 52:17 56:13 65:17 67:18,23 68:22,22 74:4 75:9 83:22 86:17 92:18 95:22 112:5,12,17 118:24 119:2,5 122:6 132:24 133:16 134:12,24 135:4,7,22 136:7 138:10,19 147:18,25 148:20 156:13 158:16  <b>differentiates</b> [1] 155:13  <b>differently</b> [4] 36:23 87:18 116:3 148:1  <b>difficult</b> [6] 5:11 22:20 28:16 129:11 144:22 145:23  <b>difficulty</b> [2] 60:4 138:4  <b>direction</b> [1] 75:21  <b>directly</b> [9] 7:4 24:17,24 63:23 73:24 83:14 123:20 151:18 152:16  <b>disagree</b> [9] 13:25 17:25 40:16 45:2,21 47:18 61:4 125:6 132:22  <b>disagreed</b> [2] 51:2 101:10  <b>disagreement</b> [2] 46:9 60:4  <b>disapprove</b> [1] 139:22  <b>disclose</b> [1] 142:6  <b>disclosures</b> [1] 142:11  <b>discovery-intensive</b> [1] 147:11  <b>discrete</b> [6] 6:20,21 7:17 8:1,7 43:23  <b>discretionary</b> [1] 139:23  <b>discrimination</b> [1] 14:13  <b>discuss</b> [2] 6:9 79:22</p>	<p><b>discussing</b> [1] 129:11  <b>discussion</b> [1] 89:18  <b>disease</b> [2] 98:9,10  <b>dispute</b> [8] 21:9 22:6 29:8,11 32:20 37:22 56:1 102:11  <b>disregarding</b> [1] 55:2  <b>disrupt</b> [1] 6:2  <b>disruptive</b> [1] 114:10  <b>dissent</b> [1] 159:15  <b>dissolve</b> [1] 120:11  <b>dissolved</b> [1] 143:7  <b>distinct</b> [2] 6:18 136:24  <b>distinction</b> [6] 19:14 66:19 68:16 70:18 117:10 118:25  <b>distinguishes</b> [1] 157:18  <b>distinguishing</b> [1] 60:23  <b>district</b> [51] 4:19,23 14:14,24 15:2,17 22:13 23:6 25:21 31:17 34:5 45:20 48:21 51:11 53:16 58:23 59:2,5 68:24 76:6 78:3 79:1 82:18 83:3 85:4 87:9 98:4 101:13 106:1 109:1 118:9,15 119:7,8,18,19 120:9,12,22 121:6,25,25 123:15 138:17 143:5,6 145:11 147:20 149:23,25 162:5  <b>districting</b> [1] 14:12  <b>districts</b> [2] 5:1 20:20  <b>divisible</b> [3] 15:16 16:3 17:2  <b>docket</b> [5] 5:23 94:23 131:10 132:9 151:4  <b>documentation</b> [1] 57:4  <b>documents</b> [1] 56:15  <b>doing</b> [30] 14:23 38:25 56:4 59:6 70:4 71:9,14,25 73:7,11 75:2,18 76:19 77:2 85:5 92:19 121:12 122:3,24 129:13 131:4 134:9 139:10 140:9,10 147:21 155:4 156:13,18,21  <b>dollars</b> [2] 83:3 97:3  <b>domesticated</b> [1] 7:10  <b>domicile</b> [2] 44:11 160:18  <b>DONALD</b> [4] 1:3,10,17 38:8  <b>done</b> [12] 13:23 16:22 22:13 29:15 48:6 58:7 65:15 89:7 135:21 148:4,6 152:11  <b>double-counting</b> [1] 151:20  <b>down</b> [3] 19:20 146:21 150:17  <b>dragon</b> [1] 7:11  <b>dramatically</b> [1] 151:19  <b>draw</b> [1] 59:16  <b>drawn</b> [2] 14:14 15:2  <b>drop</b> [1] 21:15  <b>duly</b> [1] 145:2  <b>during</b> [2] 59:21 152:1</p>
--	---	--	--	---

## Official

<p><b>E</b></p> <p><b>each</b> [2] 92:10 157:24</p> <p><b>eager</b> [1] 143:25</p> <p><b>earlier</b> [16] 25:21 65:18 91:11,25 92:21 94:13 95:14 107:6 108:18 114:6 128:15 131:3 135:24 151:16 153:22 156:8</p> <p><b>early</b> [2] 26:12 115:15</p> <p><b>Earth</b> [1] 38:23</p> <p><b>easier</b> [1] 47:23</p> <p><b>easily</b> [3] 40:7 69:24 70:7</p> <p><b>eat</b> [2] 93:3 119:9</p> <p><b>Education</b> [1] 107:5</p> <p><b>effect</b> [4] 55:17 56:8 76:6 150:19</p> <p><b>effectively</b> [2] 24:3 66:10</p> <p><b>efforts</b> [1] 126:16</p> <p><b>Eighth</b> [1] 19:17</p> <p><b>either</b> [4] 38:3 103:22 104:18 109:9</p> <p><b>elephant</b> [1] 123:10</p> <p><b>eligibility</b> [1] 113:18</p> <p><b>eligible</b> [3] 23:11 104:3 105:4</p> <p><b>eliminate</b> [2] 124:20 137:15</p> <p><b>eliminated</b> [1] 145:18</p> <p><b>Elk</b> [1] 160:23</p> <p><b>embedded</b> [1] 145:7</p> <p><b>emergency</b> [17] 5:23 13:22 25:23 26:13 29:23 39:8,18 77:17 83:16 99:3 101:18 103:21 106:2 119:15 131:10 132:9 151:4</p> <p><b>emerges</b> [1] 147:23</p> <p><b>emphasized</b> [2] 25:8 44:10</p> <p><b>Employees</b> [1] 16:24</p> <p><b>Employment</b> [1] 38:5</p> <p><b>empty</b> [1] 88:21</p> <p><b>enacted</b> [2] 145:2 157:25</p> <p><b>enacts</b> [1] 150:11</p> <p><b>encourage</b> [1] 5:12</p> <p><b>end</b> [8] 27:18 37:4 110:8 123:25 129:2 135:9 143:3 155:17</p> <p><b>endow</b> [1] 27:4</p> <p><b>enforce</b> [12] 9:20 50:4 55:11 72:5 73:11 128:16,18 155:19 157:2 158:24 159:1,22</p> <p><b>enforceable</b> [1] 156:17</p> <p><b>enforced</b> [1] 66:17</p> <p><b>enforcement</b> [1] 126:6</p> <p><b>enforcing</b> [3] 107:17 146:2 158:3</p> <p><b>engaging</b> [1] 30:13</p> <p><b>England</b> [1] 135:20</p> <p><b>English</b> [5] 54:22 75:8,10 108:8 116:1</p> <p><b>enjoin</b> [5] 23:8 71:9 75:11 77:1 98:22</p>	<p><b>enjoined</b> [6] 28:1 56:4 57:23 66:11 76:3,19</p> <p><b>enough</b> [3] 82:20,22 85:21</p> <p><b>enroll</b> [1] 105:14</p> <p><b>enrolled</b> [2] 105:11,16</p> <p><b>enrollment</b> [2] 110:19 113:19</p> <p><b>ensure</b> [2] 77:19 108:25</p> <p><b>enter</b> [5] 35:6 103:18 118:2 130:8 149:22</p> <p><b>entered</b> [2] 23:1 29:13</p> <p><b>enters</b> [1] 85:4</p> <p><b>entertain</b> [1] 96:5</p> <p><b>entertained</b> [1] 96:8</p> <p><b>entire</b> [3] 28:3 33:14 70:23</p> <p><b>entirely</b> [2] 99:25 135:22</p> <p><b>entitled</b> [7] 22:24 76:15 105:8 124:7 128:18 145:16 146:16</p> <p><b>entitlement</b> [2] 11:15,17</p> <p><b>enumeration</b> [1] 104:3</p> <p><b>enumeration-at-birth</b> [1] 104:15</p> <p><b>environmental</b> [3] 15:8 18:13 39:1</p> <p><b>EO</b> [13] 28:12,24 29:5 30:9 31:4 33:12,14 34:13 35:17 50:4 66:11 77:23 79:6</p> <p><b>EPA</b> [3] 93:10 136:13 151:12</p> <p><b>equitable</b> [20] 5:8 18:3 26:7,8 29:21 30:14 34:17 40:4 45:4,17 54:21 80:13 108:7 116:13 126:4 129:7 130:7 135:13 146:10 159:19</p> <p><b>equitably</b> [1] 73:1</p> <p><b>equities</b> [6] 42:15 111:17 122:15 127:17 145:19,20</p> <p><b>equity</b> [22] 9:5 17:16 27:12 30:18 54:21 78:25 80:12 84:16,23 92:25 93:1 108:3,8,10 116:1,14,21 117:3 125:4 134:7 146:6 157:24</p> <p><b>equivalently</b> [1] 48:17</p> <p><b>especially</b> [1] 17:16</p> <p><b>ESQ</b> [4] 3:3,6,10,13</p> <p><b>ESQUIRE</b> [1] 2:13</p> <p><b>essence</b> [1] 69:11</p> <p><b>essentially</b> [3] 5:25 56:22 161:19</p> <p><b>establish</b> [1] 128:11</p> <p><b>established</b> [2] 11:10,11</p> <p><b>establishes</b> [1] 78:21</p> <p><b>ET</b> [8] 1:4,7,11,14,18,21 75:4 155:17</p> <p><b>evaluate</b> [1] 17:15</p> <p><b>even</b> [52] 6:22 8:7 9:14 10:23 11:18,21,24 16:20 27:2 33:10 34:9,12 38:21 40:14 41:9 42:2,23 43:22 45:9 55:21 56:4,4 57:23 78:6,22 80:4,15 82:8,17 83:13 84:3 90:10 99:13 100:12 102:8 104:13 105:18 107:</p>	<p>8 110:19 112:17 116:15,25 117:10,21 124:6,15 127:22 129:8 133:10 142:5,9 154:5</p> <p><b>everybody</b> [5] 23:22 33:16 74:18 112:7 133:17</p> <p><b>everyone</b> [9] 13:14 52:4 70:23 72:7 75:2 106:17 114:10 156:16 159:24</p> <p><b>everyone's</b> [1] 13:15</p> <p><b>everything</b> [2] 34:10 37:6</p> <p><b>everywhere</b> [3] 5:18 66:11 133:18</p> <p><b>Eviction</b> [3] 54:2 139:19 150:17</p> <p><b>evolved</b> [1] 7:3</p> <p><b>Ex</b> [2] 108:10 134:9</p> <p><b>exact</b> [3] 79:5 123:17 129:14</p> <p><b>exactly</b> [8] 27:7 38:19 64:24 85:14 88:7 103:8 108:5 161:4</p> <p><b>example</b> [28] 14:23 15:3,9 18:5 20:14 23:6 24:19 26:8 27:4 47:21 52:8,16,17 54:13 57:6 59:23 64:23 65:17 73:17 75:25 99:22 103:5 104:24 109:13,17 115:21 116:2 160:17</p> <p><b>examples</b> [4] 61:25 87:22,25 92:10</p> <p><b>exceed</b> [3] 5:4 40:2,3</p> <p><b>exceeded</b> [1] 59:11</p> <p><b>exceeding</b> [1] 59:8</p> <p><b>exceeds</b> [1] 30:17</p> <p><b>exception</b> [1] 45:16</p> <p><b>exceptions</b> [1] 33:20</p> <p><b>exclude</b> [1] 57:8</p> <p><b>excluding</b> [1] 129:6</p> <p><b>exclusive</b> [1] 132:2</p> <p><b>execute</b> [1] 126:22</p> <p><b>Executive</b> [38] 4:13 12:8 23:11 24:25 36:15 42:3,5,8,9 52:18 55:16,23 56:13,17 57:20 58:8 62:10 66:16 67:17 71:1 73:9 74:18 75:13 77:22 79:7 95:1 106:4 109:18 114:20 123:19 125:18,23 145:3 151:6,23 152:17 158:24 162:10</p> <p><b>exercise</b> [1] 162:9</p> <p><b>existing</b> [3] 58:11 59:8,11</p> <p><b>exists</b> [4] 5:6 18:6 112:8 159:3</p> <p><b>expansion</b> [1] 133:2</p> <p><b>expect</b> [1] 46:7</p> <p><b>expedition</b> [4] 46:5 83:9,11,12</p> <p><b>expeditiously</b> [7] 31:23 36:20 37:10 42:13 50:17 85:3 161:8</p> <p><b>experience</b> [1] 139:16</p> <p><b>experienced</b> [1] 86:17</p> <p><b>experiencing</b> [1] 112:15</p>	<p><b>explain</b> [2] 137:22 142:3</p> <p><b>explained</b> [2] 141:16 146:14</p> <p><b>explaining</b> [1] 87:10</p> <p><b>explains</b> [1] 139:17</p> <p><b>explanation</b> [1] 58:24</p> <p><b>explicitly</b> [1] 128:16</p> <p><b>exploded</b> [1] 38:22</p> <p><b>explore</b> [1] 52:5</p> <p><b>expressed</b> [1] 147:20</p> <p><b>expressly</b> [1] 135:18</p> <p><b>extended</b> [2] 39:15 160:11</p> <p><b>extends</b> [1] 7:24</p> <p><b>extent</b> [2] 18:19 70:8</p> <p><b>externalities</b> [2] 110:13 111:19</p> <p><b>extract</b> [1] 153:10</p> <p><b>extracted</b> [1] 146:11</p> <p><b>extraordinary</b> [4] 58:25 79:12 126:13 127:14</p> <p><b>extremely</b> [2] 161:14,15</p>	<p><b>F</b></p> <p><b>face</b> [1] 120:19</p> <p><b>facial</b> [3] 139:11 141:7 149:15</p> <p><b>facilitate</b> [1] 76:17</p> <p><b>facing</b> [1] 122:23</p> <p><b>fact</b> [9] 7:1 38:20 75:10 113:2,7 118:6 136:3 140:18 144:24</p> <p><b>Factor</b> [3] 111:16,18 112:13</p> <p><b>factors</b> [11] 30:14 111:16 124:16,23,25 125:2 136:16,17 145:7,12,18</p> <p><b>facts</b> [3] 42:19 120:8,17</p> <p><b>fair</b> [3] 33:4 85:21 116:5</p> <p><b>fairly</b> [1] 37:1</p> <p><b>fairness</b> [1] 87:15</p> <p><b>fall</b> [3] 84:19 139:18,20</p> <p><b>falls</b> [3] 85:12 91:10 108:23</p> <p><b>familiar</b> [1] 87:24</p> <p><b>families</b> [1] 105:2</p> <p><b>far</b> [3] 12:2 69:5 106:24</p> <p><b>fast</b> [3] 82:20,22 93:23</p> <p><b>fast-and-furious</b> [1] 65:8</p> <p><b>father</b> [1] 52:22</p> <p><b>favorable</b> [1] 112:8</p> <p><b>favor</b> [1] 99:15</p> <p><b>fealty</b> [2] 11:14,15</p> <p><b>feature</b> [3] 26:15 35:7 77:8</p> <p><b>features</b> [1] 7:6</p> <p><b>federal</b> [29] 4:24 9:6 15:23 23:9 24:17,19 27:12 41:20 48:21 56:14,21,25 61:12 62:20 66:4 72:23 78:9 81:11 83:25 84:6,7 94:2 102:17 104:7 105:4,9 119:25 125:22 154:2</p> <p><b>feel</b> [1] 85:10</p> <p><b>FEIGENBAUM</b> [63] 2:10 3:6 77:12,13,15 79:23 81:6 83:10 85:10,16,21 86:6,9,</p>	<p>12,19,25 87:5,8,21 88:13,17,23 89:17 90:23 91:6 92:13,17 93:20,24 94:12,19 95:21 96:18 97:19 99:10 101:5,9,13,21 102:2,10 103:4,7,15 107:10,19 108:1,5 109:2 112:11 113:3 115:25 116:5 118:14,20 119:1 120:6 123:2 124:11 128:3 134:7 143:4 148:11</p> <p><b>felt</b> [1] 153:1</p> <p><b>few</b> [6] 79:10 85:8 86:18 89:2 108:11 152:18</p> <p><b>Fifth</b> [2] 24:8 88:4</p> <p><b>figure</b> [6] 56:22 58:17 96:1 124:17,19 159:10</p> <p><b>figures</b> [1] 75:3</p> <p><b>figuring</b> [1] 96:20</p> <p><b>file</b> [5] 10:7 74:19 75:3 119:20 147:9</p> <p><b>filed</b> [2] 51:18 53:15</p> <p><b>files</b> [1] 109:22</p> <p><b>filibuster</b> [1] 58:6</p> <p><b>fill</b> [1] 30:5</p> <p><b>final</b> [8] 45:7,9 76:10 121:21 130:10 133:15 135:10 150:14</p> <p><b>finally</b> [3] 10:21 35:23 79:8</p> <p><b>financial</b> [1] 22:18</p> <p><b>find</b> [2] 121:3 145:10</p> <p><b>finding</b> [2] 59:7,10</p> <p><b>finds</b> [1] 78:24</p> <p><b>fine</b> [3] 106:15 123:12 144:19</p> <p><b>finish</b> [1] 108:17</p> <p><b>fire</b> [1] 75:3</p> <p><b>firm</b> [1] 42:25</p> <p><b>first</b> [33] 6:16 8:4 18:1 23:4,7 24:19,25 25:18 37:17,21 50:24 65:25 69:23 79:25 81:23 82:24 84:14 85:24 86:20 87:3 88:11,20 91:23 92:20 101:10 103:23 119:21 120:23 142:1 148:3 149:5 151:18,23</p> <p><b>fit</b> [2] 82:24 138:7</p> <p><b>fits</b> [2] 117:16 136:21</p> <p><b>five</b> [6] 4:25 5:2 35:14 58:2,19 60:8</p> <p><b>flag</b> [1] 107:21</p> <p><b>flood</b> [1] 161:19</p> <p><b>focus</b> [4] 17:5 69:19 122:18 136:15</p> <p><b>focused</b> [7] 16:23 121:5 127:16 129:9 135:15,16 141:15</p> <p><b>focusing</b> [1] 69:24</p> <p><b>folks</b> [1] 157:14</p> <p><b>follow</b> [5] 61:2 62:13 66:18 72:7,8</p> <p><b>follow-up</b> [1] 64:3</p> <p><b>followed</b> [1] 4:22</p> <p><b>following</b> [2] 72:10 109:1</p> <p><b>follows</b> [1] 155:23</p>
--	---	---	--	--	---



## Official

<p><b>force</b> <sup>[2]</sup> 65:7,7  <b>forcing</b> <sup>[1]</sup> 5:17  <b>forecast</b> <sup>[1]</sup> 47:18  <b>foreign</b> <sup>[2]</sup> 11:14,16  <b>forerunner</b> <sup>[1]</sup> 115:19  <b>form</b> <sup>[2]</sup> 32:4 107:25  <b>former</b> <sup>[4]</sup> 4:17 8:6 31:25 160:12  <b>forms</b> <sup>[1]</sup> 82:15  <b>formulate</b> <sup>[1]</sup> 57:14  <b>formulating</b> <sup>[1]</sup> 56:5  <b>forth</b> <sup>[2]</sup> 60:5 62:2  <b>forum</b> <sup>[3]</sup> 5:12 131:7 148:2  <b>forward</b> <sup>[3]</sup> 36:10 120:17 157:16  <b>found</b> <sup>[9]</sup> 13:22 25:21 70:5 83:4 121:13 128:25 134:25 135:17 154:18  <b>founding</b> <sup>[2]</sup> 107:25 117:1  <b>four</b> <sup>[14]</sup> 11:11 12:3 13:22 25:21 35:14,16,24 36:5,19 58:2,18 60:11 124:16,24  <b>Fourteenth</b> <sup>[7]</sup> 4:16 43:14,19 44:9 78:13 106:25 125:20  <b>fourth</b> <sup>[3]</sup> 31:25 50:24 61:14  <b>frame</b> <sup>[3]</sup> 28:7 31:6 122:6  <b>framework</b> <sup>[2]</sup> 90:5 138:7  <b>Francisco</b> <sup>[1]</sup> 148:5  <b>frankly</b> <sup>[1]</sup> 24:13  <b>friend</b> <sup>[8]</sup> 82:4 83:23 88:1 89:4,6 99:22 106:8 116:18  <b>friends</b> <sup>[3]</sup> 25:7 125:1 161:17  <b>front</b> <sup>[2]</sup> 26:17 90:9  <b>Frothingham</b> <sup>[1]</sup> 38:6  <b>froze</b> <sup>[1]</sup> 27:17  <b>frustrating</b> <sup>[1]</sup> 90:18  <b>frustration</b> <sup>[2]</sup> 147:20,23  <b>full</b> <sup>[3]</sup> 88:8 95:3 96:5  <b>fully</b> <sup>[4]</sup> 14:1 23:15 49:20 83:21  <b>fundamental</b> <sup>[4]</sup> 12:20 43:19 139:12 149:16  <b>fundamentally</b> <sup>[11]</sup> 6:22 8:9,22 13:24 25:24 26:14 49:22 65:5 83:18 134:23 162:4  <b>further</b> <sup>[1]</sup> 100:18  <b>future</b> <sup>[2]</sup> 90:8 120:4</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gather</b> <sup>[2]</sup> 36:22 37:3  <b>gave</b> <sup>[2]</sup> 60:18 65:17  <b>GEN</b> <sup>[5]</sup> 2:7 3:3,13 4:8 160:6  <b>General</b> <sup>[169]</sup> 2:7,10 4:7,10 6:6,15 8:2,17 9:8,12,16,22 10:2,9,13,17,22 11:2 12:4,11,19,25 13:20 14:21 16:8,11 17:25 19:2,5,10,25 20:18 21:4,8,16,21,25 22:5,12 23:2 24:11,15 25:4,16 26:</p>	<p>3,22 27:6 28:2,3,16,19 29:6,20 30:10 31:8,18,24 32:5,16,19 33:17 34:1,16,25 35:4,20 36:1,9 37:11,16,18 38:19 39:14 40:1,16,22 41:4,9 42:11 43:4,16,25 44:8,16 45:2,14,25 46:4,24 47:17 48:9,20 49:12,18 50:7,18 51:5,14,24 52:8,15 53:13 54:7,11 55:14,22 56:12,20,24 57:3,12,19 58:22 59:15 60:15 61:5,5,18,21 62:13,17,22 63:3,9,19,22,25 64:10,22 65:4,16,23 66:23 67:5,11 68:5,7,19,24 69:13,16 70:17 72:14,16,18 73:15 74:6,9 75:19 77:5 97:13 100:23 103:8 111:23 118:21 127:7 128:5 132:15,22 137:1 144:1 148:11 149:2 151:1,15 157:6 160:5,8 162:9  <b>Generally</b> <sup>[8]</sup> 33:18,21 61:22,23 62:13,16,19 137:12  <b>generals</b> <sup>[1]</sup> 103:10  <b>genuinely</b> <sup>[1]</sup> 106:6  <b>Georgia</b> <sup>[2]</sup> 159:16,21  <b>gets</b> <sup>[11]</sup> 13:17 33:11 34:24,24 35:2,13,24 59:9 91:21,21 106:13  <b>getting</b> <sup>[13]</sup> 60:4 82:15 105:11 124:13 131:17 135:10 139:3 147:13 150:1 154:20 155:6,8,18  <b>Gill</b> <sup>[4]</sup> 14:25 16:13 18:8 72:21  <b>give</b> <sup>[17]</sup> 15:20 18:11 40:21 42:23 44:6 65:11 69:7 72:1 99:24 100:4,22 102:7 104:24 106:10 109:13 144:21 156:15  <b>given</b> <sup>[9]</sup> 15:22 25:23 26:18 57:13 60:9 94:21 114:23 119:11 124:24  <b>gives</b> <sup>[1]</sup> 99:1  <b>giving</b> <sup>[8]</sup> 43:20 69:22 71:21 90:20 94:4 96:5 138:25 157:20  <b>global</b> <sup>[1]</sup> 55:4  <b>GORSUCH</b> <sup>[42]</sup> 24:10 25:2,5 26:1,21,24 32:23 33:1 40:12 50:12,13,16 51:3 84:6,12 85:14,18 86:4,7,10,13,14,23 87:2,7,12 88:10,15,19 91:1 92:11,14 93:19,22 94:7,15 115:5 133:6,25 134:15,21 150:5  <b>Gorsuch's</b> <sup>[3]</sup> 107:23 119:24 146:5  <b>gosh</b> <sup>[1]</sup> 87:13  <b>got</b> <sup>[13]</sup> 23:20,21 30:5 33:3,3 44:14,15,18 54:9 84:17 94:8 96:19 112:25  <b>government</b> <sup>[78]</sup> 4:25 5:18</p>	<p>6:2 24:13,15,19 33:13 35:21 47:8,21,25 48:22,23 49:25 53:5 55:11 60:21 61:1,12 62:20 64:20 65:22 66:20 67:23 68:14 70:19,22 74:20,24 75:21 76:15,19,25 77:2 78:9 83:25 84:6,7 94:2 119:25 121:12 122:2,8,9,22 123:5,23 126:3,9,18,22 127:2,20 136:10 137:10 138:3,5 139:8 141:1,13 142:7 144:25 145:5,23 146:2 151:19 154:2,7,22 155:2,4,11,20,22 156:17 158:21,23 159:1  <b>government's</b> <sup>[12]</sup> 24:18 46:6 65:14 66:4 85:7 121:15,23 126:16 128:12 142:19 147:7 149:6  <b>grant</b> <sup>[14]</sup> 16:16,17 26:8,16 39:19 41:25 42:24 43:2 58:24 95:7 102:5 118:22 144:10 162:13  <b>granted</b> <sup>[8]</sup> 5:5 53:7,12 55:25 73:24 80:23  <b>granting</b> <sup>[4]</sup> 78:2 83:4 86:10,11  <b>grants</b> <sup>[1]</sup> 95:11  <b>grave</b> <sup>[1]</sup> 68:11  <b>great</b> <sup>[7]</sup> 19:25 30:5 46:8 75:25 86:6,9 142:8  <b>greater</b> <sup>[1]</sup> 93:20  <b>gridlock</b> <sup>[1]</sup> 60:4  <b>ground</b> <sup>[5]</sup> 92:9 106:7 109:16 110:20 111:9  <b>group</b> <sup>[3]</sup> 6:21 7:17,25  <b>groups</b> <sup>[1]</sup> 52:18  <b>Grupo</b> <sup>[11]</sup> 26:10 27:15 115:10,22 116:6 117:2,8,23 135:11,16 136:7  <b>guaranteed</b> <sup>[1]</sup> 4:16  <b>guess</b> <sup>[16]</sup> 15:25 16:6 17:1 21:5 53:21 58:3 69:20 71:17,17 121:2,10 147:16 150:9,20 153:14 156:11  <b>guidance</b> <sup>[8]</sup> 56:4 57:14 106:10,11,13,16 109:4 140:3  <b>gun</b> <sup>[3]</sup> 13:12,18 44:25  <b>guns</b> <sup>[3]</sup> 13:14,16 42:9  <b>guy</b> <sup>[3]</sup> 34:15 35:19 46:19  <b>gypsies</b> <sup>[1]</sup> 44:7</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>Haaland</b> <sup>[1]</sup> 162:1  <b>haggling</b> <sup>[1]</sup> 134:16  <b>hand</b> <sup>[1]</sup> 99:2  <b>handle</b> <sup>[1]</sup> 102:16  <b>happen</b> <sup>[8]</sup> 47:15 55:19,19 66:10 105:9 109:10 120:4,5  <b>happened</b> <sup>[4]</sup> 7:23 58:16 109:10 120:13  <b>happening</b> <sup>[5]</sup> 49:16 54:23</p>	<p>112:9 129:15 131:5  <b>happens</b> <sup>[1]</sup> 15:12  <b>happy</b> <sup>[6]</sup> 83:15 85:16 124:1 127:11,18 143:11  <b>hard</b> <sup>[10]</sup> 28:7 54:13 58:9 59:15 91:24 94:20 116:24 123:5 145:10 147:24  <b>harder</b> <sup>[1]</sup> 58:5  <b>harm</b> <sup>[24]</sup> 18:20 22:18 80:2 81:24 84:17 99:21,23 110:18,19 111:18 112:9,15 114:3,8,9,25 122:10,14,23 124:17,21 126:7 139:16 145:22  <b>harmed</b> <sup>[4]</sup> 18:16 75:3 123:24 155:4  <b>harmful</b> <sup>[1]</sup> 154:22  <b>harms</b> <sup>[14]</sup> 77:22 78:24 83:2 88:7,9 93:2 94:25 97:6 102:1 110:11 111:11 119:10,17 124:14  <b>hat</b> <sup>[2]</sup> 128:4 141:15  <b>Hawaii</b> <sup>[3]</sup> 6:17 27:10 37:20  <b>head-on</b> <sup>[1]</sup> 5:25  <b>hear</b> <sup>[3]</sup> 4:3 12:17,18  <b>heard</b> <sup>[5]</sup> 83:23 88:1 89:4 92:20 132:22  <b>hearing</b> <sup>[1]</sup> 83:14  <b>heart</b> <sup>[1]</sup> 21:10  <b>hedging</b> <sup>[1]</sup> 63:17  <b>held</b> <sup>[1]</sup> 59:24  <b>help</b> <sup>[1]</sup> 19:11  <b>helpful</b> <sup>[3]</sup> 86:25 96:15 156:4  <b>hesitant</b> <sup>[2]</sup> 159:2,25  <b>hierarchal</b> <sup>[1]</sup> 5:20  <b>hierarchy</b> <sup>[1]</sup> 5:20  <b>High</b> <sup>[3]</sup> 115:11,11 135:13  <b>high-stakes</b> <sup>[1]</sup> 5:14  <b>highlights</b> <sup>[1]</sup> 20:5  <b>hinder</b> <sup>[2]</sup> 92:5,7  <b>hire</b> <sup>[1]</sup> 75:4  <b>historical</b> <sup>[3]</sup> 6:11,12 59:16  <b>historically</b> <sup>[4]</sup> 29:4 95:13 113:8 134:13  <b>history</b> <sup>[26]</sup> 44:9,19 60:2 78:12,25 80:11 85:24 86:3 105:22 106:21 108:7,13 109:3,5,7 115:9 116:23 117:15 125:4,7,21 127:22 131:15 134:17 136:20 156:1  <b>Hobbs</b> <sup>[3]</sup> 82:8,8 91:22  <b>hold</b> <sup>[4]</sup> 19:22 39:6 55:9 71:3  <b>holders</b> <sup>[1]</sup> 154:8  <b>holding</b> <sup>[5]</sup> 12:9 14:3 15:17 72:20 118:5  <b>holdings</b> <sup>[1]</sup> 12:10  <b>holds</b> <sup>[1]</sup> 62:10  <b>home</b> <sup>[1]</sup> 140:5  <b>homes</b> <sup>[1]</sup> 41:16  <b>honest</b> <sup>[1]</sup> 138:12</p>	<p><b>honestly</b> <sup>[1]</sup> 26:11  <b>Honor</b> <sup>[6]</sup> 8:2 79:24 85:22 88:14 95:23 113:4  <b>hope</b> <sup>[1]</sup> 154:14  <b>hopefully</b> <sup>[1]</sup> 57:21  <b>Hornbook</b> <sup>[1]</sup> 93:1  <b>hornet's</b> <sup>[1]</sup> 136:11  <b>hospital</b> <sup>[1]</sup> 113:12  <b>hospitals</b> <sup>[1]</sup> 56:10  <b>host</b> <sup>[3]</sup> 5:9 44:16 160:17  <b>hour</b> <sup>[1]</sup> 76:6  <b>hours</b> <sup>[2]</sup> 89:2,7  <b>Houston</b> <sup>[1]</sup> 36:25  <b>However</b> <sup>[1]</sup> 25:24  <b>hundred</b> <sup>[3]</sup> 96:10 114:13 145:2  <b>hundreds</b> <sup>[2]</sup> 10:5,25  <b>hung</b> <sup>[1]</sup> 121:3  <b>hurdles</b> <sup>[1]</sup> 25:9  <b>hurt</b> <sup>[1]</sup> 72:9  <b>hypothesis</b> <sup>[1]</sup> 40:24  <b>hypothetical</b> <sup>[9]</sup> 18:11 28:17 47:22 48:1,11 49:16 52:9 57:22 73:25  <b>hypotheticals</b> <sup>[1]</sup> 49:13</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>ICE</b> <sup>[3]</sup> 110:23,25 111:7  <b>idea</b> <sup>[5]</sup> 70:15 119:9 140:16 157:7 158:1  <b>identifiable</b> <sup>[1]</sup> 7:25  <b>identified</b> <sup>[5]</sup> 7:17 81:20 127:6 130:18 153:22  <b>identify</b> <sup>[4]</sup> 69:9 140:2 142:6 154:1  <b>identifying</b> <sup>[1]</sup> 149:12  <b>ignore</b> <sup>[4]</sup> 43:18 45:25 145:1,1  <b>ignoring</b> <sup>[1]</sup> 47:6  <b>Ill</b> <sup>[39]</sup> 5:5 9:5 16:5,11,16,22 17:4,8,23 18:2,4,6 19:4,6 26:15,25 27:8 34:16 40:3,13,19,25 42:21,22 45:16 46:1 72:25 77:20 78:20 80:7 82:6,12 84:21 95:5 96:6 98:8 125:3 126:4 136:12  <b>illegal</b> <sup>[12]</sup> 4:18 8:6 30:9 31:5 33:12 34:13,14 35:17 40:14 43:22 59:7,24  <b>illegality</b> <sup>[1]</sup> 126:7  <b>illegally</b> <sup>[4]</sup> 11:19,25 29:14 52:21  <b>illustrates</b> <sup>[2]</sup> 65:5 150:16  <b>illustration</b> <sup>[1]</sup> 88:25  <b>imagine</b> <sup>[3]</sup> 51:24 56:24 153:12  <b>immediate</b> <sup>[1]</sup> 25:12  <b>immediately</b> <sup>[4]</sup> 56:1 99:2 149:24 154:4  <b>immigrants</b> <sup>[1]</sup> 43:22  <b>impact</b> <sup>[3]</sup> 14:10 140:8 159:24  <b>imperative</b> <sup>[1]</sup> 66:3  <b>implement</b> <sup>[1]</sup> 75:23</p>
---	---	--	--	---

## Official

<b>implementation</b> [2] 77:22 111:10 <b>implicate</b> [1] 14:16 <b>import</b> [1] 47:6 <b>important</b> [14] 28:21 36:22 43:8 64:9,11 67:7 68:16 69:17 85:2 89:17 113:15 114:5 149:22 150:18 <b>impose</b> [1] 23:22 <b>imposing</b> [3] 73:16 107:12 111:20 <b>impossible</b> [3] 95:10 100: 7 144:23 <b>impugning</b> [1] 98:6 <b>inadequate</b> [1] 102:1 <b>inappropriate</b> [2] 65:10 139:5 <b>inapt</b> [1] 30:1 <b>INC</b> [1] 1:7 <b>incentive</b> [1] 50:1 <b>incentives</b> [3] 94:22 112: 13,22 <b>incentivize</b> [1] 100:3 <b>incidental</b> [3] 18:24 72:5 154:21 <b>include</b> [2] 82:21 133:3 <b>included</b> [1] 123:3 <b>including</b> [5] 4:25 34:18 45:3 77:23 124:14 <b>inconsistent</b> [1] 117:23 <b>Incorporated</b> [1] 4:5 <b>incorrect</b> [1] 14:5 <b>increase</b> [1] 5:22 <b>incur</b> [1] 105:15 <b>independent</b> [1] 9:9 <b>independently</b> [1] 155:10 <b>indicates</b> [1] 64:15 <b>indicative</b> [1] 75:12 <b>indisputably</b> [2] 44:24 99: 7 <b>individual</b> [31] 10:8 15:18, 21 22:4 30:3 32:3 33:10, 18 42:18 48:15,16,17 49:7, 7,8 50:3 54:19 58:23 60:1 66:15 67:4 118:8,23 137:4, 25 142:21 147:2 153:8,13, 17,24 <b>individually</b> [1] 157:9 <b>individuals</b> [8] 15:21 49:8 84:2 90:1,19 100:3 103:25 113:16 <b>indivisibility</b> [1] 109:8 <b>indivisible</b> [5] 14:22 17:3 73:17 74:1 110:1 <b>ineffective</b> [1] 161:18 <b>ineligible</b> [2] 105:7,18 <b>inflicts</b> [1] 126:8 <b>initial</b> [1] 121:7 <b>initiated</b> [1] 110:23 <b>injunction</b> [75] 6:19 7:11 15:20,23 20:13,15,23 21:1, 14 22:25 23:8,17 24:7,21 27:16 31:7 34:20 36:14 37: 21,25 39:15 42:21,23 43:3	46:16 48:14,22 55:25 68:3 70:7 76:5 77:18 80:1,2,5 85:12 90:9 91:4 92:4 98: 24,25 100:1 101:11 106:23 107:8,16,22 110:16 111:15 114:1 117:22 118:3 120: 11 124:8 126:17 128:21 129:20 134:24 135:5,19 140:7 141:17 142:2,23 143:1,6 145:12,16 147:19 155:21 157:2 158:20,22,23 159:5 <b>injunctions</b> [67] 4:20,22, 24 5:4,10 6:7,10 9:7 13:2 15:15 20:24 31:2,16 32:1 37:17 38:18 39:5,10,25 40: 2,13,19 45:21 53:19,24 54: 24 56:6 59:6,23,25 65:6 69:7,21 70:16 76:17 78:22 79:11,21,25 80:17 97:15, 21 98:1 99:14 107:24 108: 9,19 116:21,22 126:10 127: 3 130:17 131:5 139:4,10, 23 140:4 149:15,23 151:3, 17 157:17,19 158:13 161:5, 20 162:6 <b>injunctive</b> [12] 35:7 36:11 38:11 89:15 127:8,14 129: 9 131:23,24 132:18 138:24 162:2 <b>injuries</b> [24] 13:2 23:12,16 73:2 74:9 77:20 83:21 91: 14 93:7,8 95:5,9,25 96:6, 11,21,24,25 97:2 100:8,24 114:14,15 115:2 <b>injury</b> [15] 5:6 15:1,5 16:18 18:7 19:6 25:12 41:1 73:7, 25 80:7 91:18 121:20 141: 4 153:22 <b>insight</b> [1] 110:11 <b>insolvent</b> [1] 27:17 <b>instance</b> [2] 25:1 120:23 <b>instances</b> [1] 63:10 <b>instead</b> [4] 54:5 126:3 136: 14 148:1 <b>instinct</b> [1] 156:7 <b>Institute</b> [1] 38:23 <b>instruction</b> [1] 83:25 <b>instructs</b> [1] 57:20 <b>intend</b> [1] 51:4 <b>intended</b> [1] 141:10 <b>intentioned</b> [1] 152:10 <b>intentions</b> [3] 58:8,12,14 <b>interest</b> [5] 111:19 127:17 140:5,10 146:2 <b>interested</b> [2] 6:11 143:10 <b>interim</b> [6] 121:16 122:2 124:7 133:13 150:15 154: 19 <b>internal</b> [1] 106:12 <b>interpreted</b> [1] 26:9 <b>interrupt</b> [1] 33:2 <b>interstate</b> [1] 24:2 <b>inversion</b> [1] 31:15	<b>invert</b> [2] 5:19,20 <b>invite</b> [1] 10:25 <b>involve</b> [2] 114:15 149:16 <b>involved</b> [2] 6:20 150:8 <b>involving</b> [4] 38:25 81:13 139:12,23 <b>IRAP</b> [1] 139:18 <b>irreparable</b> [5] 124:17,20 126:7 139:16 145:22 <b>Island</b> [1] 38:23 <b>Isn't</b> [10] 10:15 20:7 40:15 65:21 80:4 110:1 117:24, 25 122:7 130:9 <b>issuance</b> [1] 162:6 <b>issue</b> [40] 7:17 8:10 9:17 13:1,2 17:12,15,16 19:18 27:16 37:6 38:11 42:1 43: 12 46:12 50:22 52:25 54:6, 8 65:25 66:3 76:14 77:4 97:16,16,17 106:16 122:3 123:17 124:1 125:25 131: 20,21 133:14 138:13 140:4, 7 161:4,5,22 <b>issued</b> [7] 4:13,20,23 36: 14,15 37:25 151:25 <b>issues</b> [4] 22:7 52:23 77:6 121:4 <b>issuing</b> [5] 9:6 40:6 45:20 59:22 133:13 <b>it'll</b> [1] 150:14 <b>itself</b> [5] 55:24 56:5 78:12 124:13 129:3	161:2,9 <b>judgments</b> [6] 5:22 43:18 49:19 60:23 63:5,15 <b>judicial</b> [5] 5:1,5 14:15 18: 6 20:20 <b>Judiciary</b> [3] 26:9 27:11 30:19 <b>jurisdiction</b> [12] 17:10,12, 13 69:25 70:1,2,10 75:22, 22 133:14 135:2 156:20 <b>jurisdictions</b> [1] 102:9 <b>Justice</b> [390] 2:8 4:3,10 5: 24 6:6,15 7:12,13,14,15,16 8:14 9:3,10,13,19 10:1,4, 11,15,19,23 11:6,7,8 12:5, 15,17,23 13:6,8,10 14:6,8 15:25 16:10 17:1 18:10,23 19:3,9,12 20:7,9,10,11,22 21:5,12,17,23 22:2,9,16 24: 10 25:2,5,13 26:1,21,24 27: 9 28:2,5,18,20 29:10,24 30: 23 31:18,20,21,22 32:2,3, 12,17,22,23,25 33:1,5,7,21, 24 34:8,22 35:2,9,16,23 36: 4,17 37:12,13,15,16 38:17 39:2,2,3,21 40:8,9,9,11,12, 18 41:2,7,11 42:14 43:10, 24 44:2,14,18 45:5 46:3,3, 4 47:5 48:3,12 49:1,6,15, 23 50:10,11,11,13,13,16 51:3,7,7,9,15 52:3,12 53: 10,21 54:9 55:5,15 56:7,18, 23 57:2,10,16,25 59:3 60: 12,13,13,15,19,19,20 61:1, 10,20,22 62:3,15,18,24 63: 4,16,21,24 64:2,18,25 65: 14,21 66:6,8 67:2,8,14,24 68:6,17,23 69:2,3,3,5,15, 18 70:25 72:15,17 73:5 74: 5,8,12,16,22 76:9,11,24 77: 9,10,15 79:18 81:3 83:6,19 84:6,12 85:14,18 86:4,7,10, 13,14,23 87:2,7,12 88:10, 15,19 89:10 90:13,25 91:5 92:11,14 93:11,19,22 94:7, 13,15 95:17 96:12 97:9,11, 12,13,22 100:15,19,19,21 101:8,12,19,23 102:3 103: 2,6,9,16 106:20,21 107:11, 20,23 108:2,3,16 111:22, 22,23 112:25 115:3,4,4,6,7, 8,14 116:4 117:6 118:19, 25 119:24 120:3,24,25,25 121:2,5 124:4 125:10,11, 16 127:1,21 128:14 129:16, 17,18,23 130:1,11,16 131: 1,3,9,11,25 132:7 133:6,25 134:15,21 135:11,23 136: 18 137:6,11,21 138:1,11, 15,20 140:13,14,20 141:21 142:16 143:13,16,18,19,20 144:6,11,15,18 145:8,8,10 146:5,13,20,24 147:4,14, 15,15,16 148:8,22,24 149:	20 150:4,4,6,7 151:5,10 152:2,5,8,13,20,20,22 153: 1,4,11,19 154:9,9,11 155:1 156:7,11 157:10 158:8,10, 14,17 159:6,9,15 160:2,3,9 161:6 162:14 <b>justified</b> [1] 127:15 <b>justifies</b> [1] 24:6 <b>justify</b> [1] 24:14
<b>K</b>				
<b>KAGAN</b> [50] 28:2,5,18,20 29:10,24 30:23 31:20,22 32:3,22,25 33:5,7,21,24 34: 8,22 35:2,9,23 36:4 46:3,4 47:5 48:3,12 49:1,6,15,23 50:10,13 60:19,20 61:1 74: 22 76:11,24 111:22,23 112: 25 115:3 140:14,20 141:21 147:15,16 148:8,22 <b>Kagan's</b> [1] 94:13 <b>Katzenbach</b> [1] 162:1 <b>Kavanaugh</b> [49] 51:8,9,15 52:3,12 53:10,21 54:9 55: 5,15 56:7,18,23 57:2,10,16, 25 59:3 60:12,19 89:10 115:6 129:16,18,23 130:1, 11,16 131:1,9,11,25 136: 18 137:6,11,21 138:1,11, 15,20 140:13 150:6,7 151: 5,10 152:2,5,8,13 <b>Kavanaugh's</b> [2] 93:11 149:20 <b>keep</b> [6] 47:14 66:24 75:1 114:8 144:3 148:18 <b>keeps</b> [2] 77:2 121:12 <b>KELSI</b> [3] 2:13 3:10 125:14 <b>key</b> [2] 44:11 69:19 <b>keystone</b> [1] 145:14,15 <b>kids</b> [1] 102:23 <b>Kim</b> [5] 14:4 106:6,13 123: 17 160:22 <b>kind</b> [30] 16:3 22:7,18 25: 23 29:23 42:14 55:3 57:8, 9 62:8 63:1 74:17 83:4 84: 2,15 118:10 121:2,18 122: 5 123:25 132:5 134:6 136: 8 140:2 146:10 149:11 150:1 153:4 157:7 161:2 <b>kinds</b> [3] 31:1 67:18 69:21 <b>king</b> [2] 75:11,13 <b>knows</b> [2] 30:4 95:10 <b>Korean</b> [1] 152:1 <b>Kowalski</b> [1] 162:1				
<b>L</b>				
<b>label</b> [1] 132:10 <b>Labrador</b> [3] 30:12 64:15 93:11 <b>lack</b> [1] 161:24 <b>laid</b> [1] 135:24 <b>language</b> [2] 27:14 118:5 <b>large</b> [1] 130:13 <b>last</b> [21] 5:2 6:8 22:11,16				

## Official

<p>26:21,21,24 54:25 57:25 58:2,18 60:8,10 66:6 79: 10 85:8 86:18 87:18 105: 21 151:7 152:18 late <sup>[1]</sup> 115:15 later <sup>[2]</sup> 76:6 115:13 latter <sup>[1]</sup> 154:24 laughed <sup>[1]</sup> 22:15 Laughter <sup>[8]</sup> 33:6,23 49:5 50:15 54:10 85:20 141:24 144:5 law <sup>[20]</sup> 16:1 27:20 36:7 72: 7,8,10 75:6,8,14,15 76:16 102:17 104:7 107:17 114: 21 121:15 123:21 125:21 131:12 159:23 lawful <sup>[2]</sup> 52:22 123:1 lawfully <sup>[2]</sup> 142:9 154:6 lawfulness <sup>[1]</sup> 122:12 laws <sup>[3]</sup> 113:21 156:5 159: 22 lawsuit <sup>[7]</sup> 18:15 20:21 48: 21 74:19 75:4 109:23,23 lawsuits <sup>[2]</sup> 10:25 89:25 lawyer <sup>[2]</sup> 74:19 75:4 leads <sup>[1]</sup> 148:10 least <sup>[8]</sup> 13:22 54:25 74:16 79:20 81:21 84:1 124:5 145:25 leave <sup>[1]</sup> 100:3 ledger <sup>[1]</sup> 139:21 legal <sup>[11]</sup> 5:11 10:21 17:15 42:16 57:5 96:3 126:24 139:14 147:24 162:8,9 legally <sup>[11]</sup> 80:3 81:25 82: 15 91:19 100:9 109:16 110:5 119:22 120:18,20 150:12 legislation <sup>[2]</sup> 58:5,17 legitimate <sup>[1]</sup> 157:15 less <sup>[6]</sup> 58:16 92:4 94:3,5 96:5 141:6 letter <sup>[1]</sup> 44:12 Lewis <sup>[3]</sup> 16:14 18:9 72:22 life-tenured <sup>[1]</sup> 6:1 light <sup>[1]</sup> 55:12 likelihood <sup>[1]</sup> 145:13 likely <sup>[7]</sup> 27:17 30:20 34:25 51:17 134:25 135:1 154: 18 limit <sup>[5]</sup> 17:22 38:14 72:12 102:11 108:21 limitation <sup>[3]</sup> 71:13,19 72: 2 limited <sup>[5]</sup> 38:21 108:20 109:14 142:23 146:15 limiting <sup>[6]</sup> 17:9 136:15 139:2 140:2 149:9 161:16 line <sup>[6]</sup> 26:11 69:6 99:12 100:12 140:21,24 lines <sup>[11]</sup> 14:24 23:19 78:7, 19 105:20,24 110:17,22 111:8 112:21 149:12 liquidated <sup>[1]</sup> 116:11</p>	<p>list <sup>[1]</sup> 150:18 litigate <sup>[5]</sup> 34:5 36:23 68: 21 73:10 122:3 litigated <sup>[1]</sup> 124:10 litigating <sup>[3]</sup> 39:16 62:1 122:11 litigation <sup>[8]</sup> 37:9 76:1 87: 24 88:2 89:20 90:6 121:13, 22 little <sup>[4]</sup> 117:17 121:5 141: 14 154:13 live <sup>[2]</sup> 18:14 110:24 lives <sup>[1]</sup> 18:14 loans <sup>[1]</sup> 54:3 local <sup>[2]</sup> 15:10 142:25 logic <sup>[1]</sup> 24:6 long <sup>[6]</sup> 28:25 37:5,5 127: 13 143:10 156:1 longstanding <sup>[4]</sup> 61:11,17, 19 62:19 look <sup>[19]</sup> 31:1 38:2 47:4,25 60:2 73:10 86:16 96:9 97: 25 115:10,21 116:19,20 118:13 120:20 128:9 132: 24 151:22 159:13 looked <sup>[2]</sup> 110:11 116:10 looking <sup>[11]</sup> 15:18 91:7 94: 5 103:20 109:15 112:22 114:12 117:12 121:4 124: 22 145:11 looks <sup>[7]</sup> 7:10 111:16,18 115:23 116:9 123:15 134: 12 Loper <sup>[1]</sup> 151:11 lose <sup>[12]</sup> 46:10 49:3,3,11 51:3,5 67:12 68:10,14,15 94:20 111:3 lose-lose-lose <sup>[1]</sup> 141:12 losing <sup>[6]</sup> 46:12,18 47:8,14 50:2,3 loss <sup>[1]</sup> 68:3 lot <sup>[10]</sup> 30:24 50:3 53:22 54: 1 58:4 69:14 72:16 141:4, 15 147:18 lots <sup>[1]</sup> 29:17 lottery <sup>[1]</sup> 82:10 low-information <sup>[1]</sup> 5:14 lower <sup>[20]</sup> 12:8 13:1,3 31: 10,12 34:2 43:7,17 46:9,11 47:15 50:21 52:1 53:25 63: 8 76:25 140:3 148:19 160: 16 161:3 loyal <sup>[2]</sup> 7:20,21 Lukens <sup>[3]</sup> 16:25 37:22 38: 6</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p>made <sup>[5]</sup> 8:25 36:7 98:24 122:10 143:4 magnet <sup>[1]</sup> 112:1 maintains <sup>[1]</sup> 126:17 major <sup>[1]</sup> 150:11 majority <sup>[2]</sup> 50:5 63:10 mandate <sup>[2]</sup> 54:3 150:17</p>	<p>manufacturing <sup>[1]</sup> 18:12 many <sup>[16]</sup> 15:6 17:20,20,20 19:8 24:22 31:9 66:1,25 68:7 87:13 103:3 121:17 147:19 150:16 161:8 Mareva <sup>[1]</sup> 135:19 Massachusetts <sup>[6]</sup> 15:17 23:7 36:24 38:7 102:22 118:15 matter <sup>[11]</sup> 2:2 17:11,23 70: 2 78:22 96:13 101:2 111: 15 121:21 122:2,23 mean <sup>[37]</sup> 7:18,19 15:16 16: 2 17:3 20:10 22:6 27:1 29: 11,11 30:23 32:20 42:17 46:5,10,14,17 49:2 53:25 67:5 69:10 71:2,23 72:7 83:6 88:19 101:20 112:3 117:9 123:2 129:21 131: 12 140:13 141:1 152:3 156:1 157:6 Meaning <sup>[4]</sup> 4:14,15 43:14 160:10 meaningful <sup>[2]</sup> 144:23 157: 21 means <sup>[9]</sup> 9:14 10:1 34:8 68:9 73:19,19 77:1 88:21 100:12 meant <sup>[3]</sup> 88:8 136:6,6 meantime <sup>[1]</sup> 36:9 mechanism <sup>[10]</sup> 128:12 129:4 130:9,11 131:16 132:3 133:10,11 138:10 148:10 Medicaid <sup>[3]</sup> 102:14 104: 11 105:11 medicine <sup>[1]</sup> 84:8 meet <sup>[3]</sup> 35:5 78:23 89:14 meeting <sup>[2]</sup> 80:2,7 Mellon <sup>[1]</sup> 38:7 member <sup>[2]</sup> 40:23,24 members <sup>[8]</sup> 6:23 8:13,20 68:8 142:6 143:2 153:13 155:18 mention <sup>[1]</sup> 88:1 mentioned <sup>[1]</sup> 58:1 merit <sup>[1]</sup> 77:6 merits <sup>[65]</sup> 14:1 17:15 28: 10,11 30:16,20 31:14 35:1 43:18 47:1,18 49:19,20 50: 17,22 54:19 64:5,12 65:2,9, 12,19,22,25 66:2 74:24 76: 13 79:18 83:14,14,16 92: 15 93:5,9,18,23,25 94:6 95: 20 96:8,9,16 97:5,24 114: 12,16,18,23 119:12 123:11 124:9,9,12,19,22 135:1 145:6,14,17,20 146:11 160: 15,25 161:3,8 messing <sup>[1]</sup> 110:8 met <sup>[1]</sup> 25:9 method <sup>[1]</sup> 41:3 Mexicano <sup>[7]</sup> 26:10 27:15 116:7 117:3 135:11,16</p>	<p>136:8 might <sup>[35]</sup> 14:22 15:8 25: 13 29:8,10 39:19 52:23,24 54:14,15,16 58:4,20,25 61: 4,25 80:16 82:10,16,22 86: 12 90:7,8 92:10 93:12 99: 20 100:2,5 112:15,15 114: 8 123:16 133:8 139:1 153: 5 migration <sup>[1]</sup> 112:18 military <sup>[3]</sup> 13:15 76:1,2 million <sup>[1]</sup> 112:20 millions <sup>[2]</sup> 83:2 97:3 mind <sup>[4]</sup> 27:13 28:7 66:24 100:17 mindful <sup>[2]</sup> 81:8 99:10 minds <sup>[2]</sup> 97:24 143:21 minors <sup>[1]</sup> 109:20 mischarac <sup>[1]</sup> 70:14 mismatch <sup>[1]</sup> 141:9 missing <sup>[1]</sup> 92:1 mistaken <sup>[1]</sup> 161:1 Mm-hmm <sup>[2]</sup> 138:1,20 modern <sup>[4]</sup> 6:25 7:5 11:4 134:11 moment <sup>[3]</sup> 69:20 86:21 134:1 monarch <sup>[1]</sup> 98:15 month <sup>[1]</sup> 36:21 months <sup>[2]</sup> 60:11 79:10 moratorium <sup>[2]</sup> 54:2 150: 17 morning <sup>[2]</sup> 4:4 89:19 most <sup>[7]</sup> 81:8 87:23,24 89: 17 124:25 139:18 162:4 mostly <sup>[1]</sup> 133:2 mother <sup>[1]</sup> 52:20 mothers <sup>[1]</sup> 52:19 motion <sup>[3]</sup> 53:15 120:11 147:9 motions <sup>[1]</sup> 9:1 motivations <sup>[1]</sup> 58:23 motives <sup>[1]</sup> 98:7 move <sup>[12]</sup> 23:19 36:20 76: 13 82:20,22 92:24 103:13, 25 110:24 111:4 113:25 142:17 moved <sup>[2]</sup> 111:5,6 movement <sup>[2]</sup> 113:6,7 moves <sup>[2]</sup> 76:20 112:7 Ms <sup>[70]</sup> 125:13,16 127:5 128:1 129:21,25 130:3,15, 23 131:2,10,22 132:1 133: 6,22 134:5,20 135:6 137:1, 9,14,23 138:2,14,18,21 140:14,19 141:1,23,25 142: 19 143:15,24 144:9,13,17, 20 145:21 146:19,23 147:2, 6,17 148:7,21 149:5 150: 24 151:8,14 152:4,7,12,15, 22,25 153:3,9,18,21 154: 25 155:24 157:4,22 158:9, 12,15 159:2,7,11 much <sup>[7]</sup> 6:24 13:11 36:20</p>	<p>54:17 109:14 113:16 116: 19 multi <sup>[1]</sup> 82:10 multi-circuit <sup>[1]</sup> 82:10 multi-member <sup>[1]</sup> 98:12 Multiple <sup>[8]</sup> 4:19 31:10 32: 1 43:7,11 48:1 50:22 129: 22 Murthy <sup>[1]</sup> 161:25 muscular <sup>[1]</sup> 140:9 must <sup>[1]</sup> 10:24</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p>named <sup>[7]</sup> 13:17 20:15 21: 18 142:23 153:11,13 158: 19 names <sup>[1]</sup> 153:24 narrow <sup>[8]</sup> 16:4 18:18 79: 15 80:21 81:1,4 96:14 99: 17 narrowed <sup>[1]</sup> 143:2 narrower <sup>[1]</sup> 24:20 nation <sup>[5]</sup> 55:9 78:16 79:4 159:16,22 National <sup>[5]</sup> 16:23 38:4 89: 15 115:1 148:14 nationals <sup>[1]</sup> 41:17 nationwide <sup>[32]</sup> 4:20 9:18 31:2,7,14,16 34:19,20,22 35:21 46:16 48:13 51:20 53:18 59:20 65:6 79:9,15 80:1,1 82:9 92:4 97:20 99: 14 100:1 101:11 114:1 133:18 139:23 147:18 161: 5 162:6 natural <sup>[3]</sup> 29:7 53:3 140:5 nature <sup>[6]</sup> 88:7 97:6 99:21, 23 113:5 114:25 near <sup>[1]</sup> 18:14 Nebraska <sup>[2]</sup> 54:14 97:2 necessarily <sup>[8]</sup> 10:9 15:6 18:21 53:7 60:6 61:24 63: 7 138:6 necessary <sup>[10]</sup> 23:4 66:12 69:8 74:7 102:7 119:2 126: 11 127:9 141:17,22 necessity <sup>[1]</sup> 89:8 need <sup>[26]</sup> 26:25 49:2 55:19 78:23 79:3 80:25 82:23 85: 18 90:16 95:2,25 102:21, 24 104:12 113:25 114:1 115:1 117:7,20 118:7,21 119:11,17 121:19 140:9 156:12 needed <sup>[4]</sup> 79:16 130:20 131:17 159:5 needs <sup>[5]</sup> 19:16 65:2 109: 11 123:6,24 negative <sup>[2]</sup> 110:12 111:19 neighbor <sup>[1]</sup> 19:21 neither <sup>[1]</sup> 52:22 nervous <sup>[1]</sup> 147:7 nest <sup>[1]</sup> 136:12 net <sup>[1]</sup> 37:4</p>
---	---	---	--	---

## Official

<p><b>never</b> <sup>[20]</sup> 9:1 22:14 27:4  <b>29:18 32:5 46:12 53:17 55:</b>  <b>24 57:13 78:3,13 80:21 81:</b>  <b>19 86:1 99:13 100:17 105:</b>  <b>21 125:5 133:4 135:21</b>  <b>NEW</b> <sup>[28]</sup> 1:21 2:10 13:6,10  <b>58:10 59:17 60:6,7 61:3,8</b>  <b>75:23 77:24 102:12,19</b>  <b>103:3,18 109:22 110:6</b>  <b>111:5,25 112:18 118:17,17</b>  <b>119:16 120:10,14 139:19</b>  <b>150:11</b>  <b>newborn</b> <sup>[2]</sup> 56:10,11  <b>newborns</b> <sup>[1]</sup> 57:11  <b>next</b> <sup>[6]</sup> 29:25 62:12,12 64:  <b>2 142:17 148:5</b>  <b>night</b> <sup>[1]</sup> 89:8  <b>Ninth</b> <sup>[4]</sup> 14:1 38:24 44:13  <b>50:24</b>  <b>Nken</b> <sup>[3]</sup> 136:16 144:23  <b>145:7</b>  <b>nobody</b> <sup>[4]</sup> 43:2 46:21 47:8  <b>148:19</b>  <b>nobody's</b> <sup>[1]</sup> 49:3  <b>non</b> <sup>[1]</sup> 158:19  <b>non-members</b> <sup>[1]</sup> 40:20  <b>non-named</b> <sup>[1]</sup> 20:25  <b>non-party</b> <sup>[2]</sup> 21:7 131:4  <b>non-plaintiffs</b> <sup>[1]</sup> 40:20  <b>nonbene</b> <sup>[1]</sup> 157:1  <b>noncitizens</b> <sup>[2]</sup> 104:1 160:  <b>19</b>  <b>none</b> <sup>[3]</sup> 5:16 134:8 144:1  <b>nonideological</b> <sup>[1]</sup> 97:16  <b>nonparties</b> <sup>[13]</sup> 69:8,22 71:  <b>21 80:15,16 116:15 126:11</b>  <b>128:15,24 154:19 157:1,20</b>  <b>158:3</b>  <b>nonpartisan</b> <sup>[1]</sup> 97:17  <b>nonparty</b> <sup>[4]</sup> 82:15 126:5  <b>128:17 135:25</b>  <b>nonplaintiff</b> <sup>[1]</sup> 158:25  <b>nor</b> <sup>[2]</sup> 52:22 90:2  <b>norm</b> <sup>[1]</sup> 80:22  <b>normal</b> <sup>[2]</sup> 34:9 112:18  <b>North</b> <sup>[1]</sup> 111:13  <b>note</b> <sup>[3]</sup> 83:19 142:4 146:4  <b>noted</b> <sup>[1]</sup> 144:1  <b>nothing</b> <sup>[5]</sup> 7:10 27:13 85:  <b>12 129:3 149:7</b>  <b>notice</b> <sup>[2]</sup> 8:21 46:14  <b>notion</b> <sup>[2]</sup> 23:25 26:17  <b>novel</b> <sup>[5]</sup> 5:11 43:7,11 65:  <b>20 77:5</b>  <b>NRA</b> <sup>[1]</sup> 137:17  <b>nuclear</b> <sup>[2]</sup> 27:19,23  <b>nuisance</b> <sup>[4]</sup> 15:3 18:15  <b>19:19,24</b>  <b>nuisance-maker</b> <sup>[1]</sup> 19:22  <b>Number</b> <sup>[9]</sup> 14:2 30:2 36:6  <b>50:18 56:25 149:14 151:2,</b>  <b>22 152:17</b>  <b>numbers</b> <sup>[4]</sup> 104:2,8,12,17  <b>numerous</b> <sup>[1]</sup> 135:18</p>	<p style="text-align: center;"><b>O</b></p> <p><b>Obama</b> <sup>[1]</sup> 98:20  <b>obey</b> <sup>[1]</sup> 60:21  <b>object</b> <sup>[1]</sup> 106:10  <b>objected</b> <sup>[2]</sup> 97:20 101:11  <b>objection</b> <sup>[2]</sup> 79:8 83:12  <b>objections</b> <sup>[2]</sup> 82:6 83:11  <b>objects</b> <sup>[1]</sup> 48:8  <b>obligated</b> <sup>[1]</sup> 113:17  <b>obligation</b> <sup>[1]</sup> 155:20  <b>obtain</b> <sup>[1]</sup> 29:22  <b>obvious</b> <sup>[1]</sup> 112:4  <b>obviously</b> <sup>[10]</sup> 15:19 23:15  <b>32:20 49:19 51:2 53:17 86:</b>  <b>2 123:8,14 125:6</b>  <b>occupational</b> <sup>[1]</sup> 98:9  <b>offend</b> <sup>[1]</sup> 78:11  <b>offer</b> <sup>[6]</sup> 16:9 18:1 25:16 30:  <b>12 81:7 92:10</b>  <b>offered</b> <sup>[5]</sup> 23:6,23 24:20  <b>65:25 142:24</b>  <b>offering</b> <sup>[3]</sup> 5:15 141:13  <b>161:17</b>  <b>officials</b> <sup>[5]</sup> 15:23 23:9 56:  <b>14,21,25</b>  <b>offspring</b> <sup>[1]</sup> 160:20  <b>often</b> <sup>[3]</sup> 59:13,14 123:10  <b>oftentimes</b> <sup>[1]</sup> 59:9  <b>Ohio</b> <sup>[1]</sup> 93:10  <b>Oil</b> <sup>[2]</sup> 37:22 38:6  <b>Okay</b> <sup>[27]</sup> 22:9,10,16 37:13  <b>51:15 55:15 62:3,24 63:21,</b>  <b>24 64:2 66:6 68:6 69:2 71:</b>  <b>6 72:11 84:21 86:15 87:3</b>  <b>92:23 94:7 101:20 103:17</b>  <b>107:1 134:16 137:6 147:</b>  <b>14</b>  <b>Oklahoma</b> <sup>[1]</sup> 110:7  <b>on-or-off</b> <sup>[1]</sup> 113:21  <b>on/off</b> <sup>[1]</sup> 109:9  <b>once</b> <sup>[2]</sup> 17:14 35:23  <b>one</b> <sup>[92]</sup> 7:17 8:19 11:10 14:  <b>15 19:13 20:5 22:25 23:18,</b>  <b>23,24 29:6 30:25 31:3,5</b>  <b>33:3,4 34:15,20 35:19 36:</b>  <b>16,24,24,25 40:25 43:5 45:</b>  <b>18 46:7,7 48:6,6,8,8,8</b>  <b>50:20 51:3 52:7 55:5 58:</b>  <b>24 59:23 61:17 64:9,11 65:</b>  <b>19,21,23 67:20 69:16,17</b>  <b>70:7,21 72:19 73:22 74:14</b>  <b>75:16 76:6,10 78:18 79:12</b>  <b>82:17 84:14 85:4 90:15,21</b>  <b>91:3 92:12 94:10 95:24</b>  <b>107:3 108:14,23 112:6</b>  <b>113:6 117:18 121:22 127:</b>  <b>6,22 128:7 130:12 133:8</b>  <b>135:23 142:4 147:9 148:3</b>  <b>152:23,24 153:6,7,20 154:</b>  <b>12 161:9,15</b>  <b>one's</b> <sup>[1]</sup> 98:13  <b>onerous</b> <sup>[1]</sup> 157:5  <b>ones</b> <sup>[4]</sup> 49:9,10 139:5,24</p>	<p><b>ongoing</b> <sup>[2]</sup> 5:21 25:12  <b>only</b> <sup>[32]</sup> 5:6 12:15,16 14:  <b>25 15:23 17:5 18:6 19:16</b>  <b>34:14 35:18 40:19 41:3 43:</b>  <b>13 45:10,12 46:15 49:18</b>  <b>57:16 64:13 67:20 69:24</b>  <b>71:6,13 72:1,3 81:4 101:</b>  <b>25 109:21 114:8 125:20</b>  <b>139:11 145:17</b>  <b>opening</b> <sup>[1]</sup> 58:18  <b>operate</b> <sup>[1]</sup> 5:17  <b>operated</b> <sup>[1]</sup> 126:19  <b>operates</b> <sup>[1]</sup> 75:20  <b>opinion</b> <sup>[7]</sup> 6:17 24:4 27:  <b>10 37:24 61:4 63:7,11</b>  <b>opinions</b> <sup>[3]</sup> 7:3 60:23 63:  <b>5</b>  <b>opportunity</b> <sup>[2]</sup> 57:14 67:6  <b>oppose</b> <sup>[11]</sup> 32:7 34:23 35:  <b>1 51:22 52:6,10,13,14 66:</b>  <b>25 67:3 147:8</b>  <b>opposing</b> <sup>[1]</sup> 67:12  <b>opposite</b> <sup>[1]</sup> 75:20  <b>opt-out</b> <sup>[1]</sup> 8:21  <b>option</b> <sup>[1]</sup> 136:23  <b>opts</b> <sup>[1]</sup> 8:15  <b>oral</b> <sup>[7]</sup> 2:2 3:2,5,9 4:8 77:  <b>13 125:14</b>  <b>Order</b> <sup>[43]</sup> 4:13,15,21 12:2  <b>23:9,11 36:15 52:19 55:16,</b>  <b>24 56:13,17 57:20 62:10</b>  <b>64:5 66:16 67:17,20 70:18</b>  <b>71:1,13 72:4 73:9,12 74:</b>  <b>19 75:23 77:23 80:19 93:</b>  <b>25 95:1 98:21 109:18 117:</b>  <b>21 124:6,20 125:25 135:2</b>  <b>142:12 146:1,3 154:21</b>  <b>155:23 158:24</b>  <b>order's</b> <sup>[4]</sup> 70:18 125:18  <b>126:6,7</b>  <b>ordering</b> <sup>[2]</sup> 72:6 154:16  <b>orders</b> <sup>[5]</sup> 13:11 110:13  <b>128:16 158:3,7</b>  <b>ordinary</b> <sup>[1]</sup> 5:20  <b>organization</b> <sup>[1]</sup> 146:17  <b>organizations</b> <sup>[1]</sup> 146:25  <b>origin</b> <sup>[1]</sup> 79:19  <b>original</b> <sup>[3]</sup> 4:15 55:16 160:  <b>10</b>  <b>originalism</b> <sup>[1]</sup> 135:13  <b>originated</b> <sup>[1]</sup> 157:24  <b>origins</b> <sup>[1]</sup> 6:9  <b>Ortiz</b> <sup>[1]</sup> 7:3  <b>OSHA</b> <sup>[1]</sup> 54:3  <b>other</b> <sup>[51]</sup> 7:1 10:10 14:4  <b>15:13,21 20:20 23:17,25</b>  <b>24:18 25:7 26:6 34:5,6 36:</b>  <b>25 39:10 54:12 65:15 68:</b>  <b>21 72:5 74:3,14 76:7 79:</b>  <b>10,11 81:13 82:4 83:23 88:</b>  <b>1 89:4,6 90:7 91:4,12 94:</b>  <b>10 99:22 102:9 106:8 107:</b>  <b>2 108:24 112:6 116:9,18</b>  <b>120:16 125:1 137:17 139:</b></p>	<p><b>21 140:8 145:17 151:24</b>  <b>157:24 161:17</b>  <b>others</b> <sup>[11]</sup> 15:7 26:19 42:7  <b>45:19 64:4 68:7 74:1 111:</b>  <b>21 150:16 154:16 161:10</b>  <b>otherwise</b> <sup>[2]</sup> 23:10 112:  <b>16</b>  <b>ought</b> <sup>[2]</sup> 36:7 46:1  <b>ourselves</b> <sup>[2]</sup> 92:23 121:4  <b>out</b> <sup>[35]</sup> 6:16 8:15 13:15 22:  <b>19 25:7 38:24 49:16 50:20</b>  <b>56:22 58:18 67:17 71:5 75:</b>  <b>3 76:24 77:25 87:3,18 96:</b>  <b>1,20 97:23,24 102:20 106:</b>  <b>12 107:3 112:19 117:9</b>  <b>121:8 124:17,19 135:24</b>  <b>137:12 145:15 159:10 160:</b>  <b>18 161:7</b>  <b>outlining</b> <sup>[2]</sup> 39:3 97:14  <b>outside</b> <sup>[4]</sup> 73:14 131:5  <b>136:1 153:15</b>  <b>over</b> <sup>[25]</sup> 6:8 17:12,13 46:  <b>19,19 51:18 53:22 70:1,9</b>  <b>79:6 86:17 87:17 106:3</b>  <b>113:20,20 114:19 123:18</b>  <b>125:22 126:19 134:16 150:</b>  <b>1 151:6 152:18 156:19</b>  <b>162:10</b>  <b>overarching</b> <sup>[1]</sup> 54:20  <b>overcorrection</b> <sup>[1]</sup> 136:11  <b>overlooks</b> <sup>[1]</sup> 79:4  <b>override</b> <sup>[1]</sup> 127:24  <b>overruled</b> <sup>[2]</sup> 62:2 106:14  <b>oversight</b> <sup>[1]</sup> 162:9  <b>overstates</b> <sup>[1]</sup> 151:20  <b>overwhelmingly</b> <sup>[1]</sup> 30:19  <b>own</b> <sup>[22]</sup> 20:20 28:25 46:6  <b>77:20 78:23 80:7 81:12 84:</b>  <b>8 93:7 96:11,21,22,24 100:</b>  <b>8 105:10 106:18 113:19,21,</b>  <b>22 116:7 120:1 132:5</b></p> <p style="text-align: center;"><b>P</b></p> <p><b>p.m</b> <sup>[1]</sup> 162:17  <b>PAGE</b> <sup>[1]</sup> 3:2  <b>papers</b> <sup>[2]</sup> 41:14 71:18  <b>parents</b> <sup>[10]</sup> 7:21 11:19,21,  <b>25 42:25 77:24 89:25 102:</b>  <b>9 107:9,13</b>  <b>parents'</b> <sup>[2]</sup> 11:15 41:16  <b>parse</b> <sup>[1]</sup> 71:5  <b>part</b> <sup>[11]</sup> 10:6 19:18 36:22  <b>71:15 73:22 93:17 111:6</b>  <b>119:4 122:16 130:13 151:</b>  <b>13</b>  <b>Parte</b> <sup>[1]</sup> 108:10  <b>partially</b> <sup>[2]</sup> 70:11 93:10  <b>participation</b> <sup>[2]</sup> 92:7 104:  <b>25</b>  <b>particular</b> <sup>[17]</sup> 6:10 14:10,  <b>12 17:22 23:23 24:12 29:9</b>  <b>32:8 37:8 46:25 71:10 81:</b>  <b>17 82:25 83:1 123:6 137:3</b>  <b>162:3</b></p>	<p><b>particularly</b> <sup>[5]</sup> 6:12 58:6  <b>79:21 123:22 127:16</b>  <b>parties</b> <sup>[32]</sup> 18:7 20:2,3,3  <b>41:6 45:11,12 58:13 59:11</b>  <b>70:20 79:11 81:25 84:11</b>  <b>91:12,14 97:20 102:6 110:</b>  <b>5,12 111:17 119:2,23 120:</b>  <b>2,10 130:18 133:12,15 135:</b>  <b>3 139:15 144:2 155:12</b>  <b>157:14</b>  <b>party</b> <sup>[7]</sup> 5:7 38:3 43:4 55:  <b>12 73:2 124:13 148:2</b>  <b>party's</b> <sup>[1]</sup> 93:7  <b>party-centric</b> <sup>[1]</sup> 117:15  <b>passing</b> <sup>[1]</sup> 44:5  <b>passionate</b> <sup>[1]</sup> 59:19  <b>passionately</b> <sup>[1]</sup> 45:21  <b>past</b> <sup>[3]</sup> 53:19,23 130:24  <b>patchwork</b> <sup>[2]</sup> 24:2,12  <b>patent</b> <sup>[1]</sup> 156:5  <b>patently</b> <sup>[1]</sup> 106:18  <b>path</b> <sup>[1]</sup> 29:7  <b>pathological</b> <sup>[1]</sup> 151:2  <b>pathologies</b> <sup>[1]</sup> 40:5  <b>pathology</b> <sup>[1]</sup> 53:18  <b>pause</b> <sup>[2]</sup> 55:18 59:4  <b>peace</b> <sup>[27]</sup> 6:13,18,19 7:3,7,  <b>9,23,23 8:10,11,16 10:20</b>  <b>11:4 41:5 79:21 80:11 106:</b>  <b>22 108:8 115:18 116:2,19</b>  <b>117:11 134:2,6,18 135:8</b>  <b>136:5</b>  <b>pedigree</b> <sup>[2]</sup> 6:12 79:20  <b>peek</b> <sup>[7]</sup> 93:9,17 95:20 96:8,  <b>16 124:9,12</b>  <b>peel</b> <sup>[1]</sup> 19:18  <b>penalties</b> <sup>[1]</sup> 107:13  <b>penalty</b> <sup>[1]</sup> 107:15  <b>people</b> <sup>[33]</sup> 8:24 10:6 13:  <b>14 15:13 23:10,19 26:16</b>  <b>29:13 30:2 36:6,23 44:3,5</b>  <b>50:5 56:16 67:18 72:5 92:</b>  <b>24 98:3 109:20,21 113:24</b>  <b>130:20 131:18 155:14,15,</b>  <b>21 156:16,22 157:8,13 158:</b>  <b>20 160:12</b>  <b>people's</b> <sup>[2]</sup> 74:20 110:21  <b>peoples</b> <sup>[1]</sup> 140:8  <b>percent</b> <sup>[7]</sup> 96:10,10 102:  <b>23 112:20 114:9,13,14</b>  <b>percolated</b> <sup>[1]</sup> 43:12  <b>percolation</b> <sup>[12]</sup> 5:11 31:  <b>12 43:7 44:1 50:20 64:8,</b>  <b>11 65:3 77:5 79:3 81:16</b>  <b>83:7</b>  <b>perfectly</b> <sup>[1]</sup> 100:10  <b>perhap</b> <sup>[1]</sup> 133:18  <b>perhaps</b> <sup>[2]</sup> 133:19 138:18  <b>period</b> <sup>[7]</sup> 55:17,20,23 56:2  <b>108:10 115:22 116:9</b>  <b>Perkins</b> <sup>[3]</sup> 16:25 37:22 38:  <b>5</b>  <b>permanent</b> <sup>[3]</sup> 52:23 129:  <b>9 131:23</b></p>
---	---	---	---	--

## Official

<p><b>permeates</b> <sup>[1]</sup> 113:15</p> <p><b>permit</b> <sup>[3]</sup> 42:7,22,22</p> <p><b>person</b> <sup>[5]</sup> 28:23 33:10 35:13 70:1 72:3</p> <p><b>personal</b> <sup>[4]</sup> 17:13 70:1,10 156:20</p> <p><b>persons</b> <sup>[1]</sup> 89:20</p> <p><b>perspective</b> <sup>[2]</sup> 66:4 124:6</p> <p><b>petition</b> <sup>[1]</sup> 38:22</p> <p><b>Pfander's</b> <sup>[1]</sup> 156:4</p> <p><b>phenomenon</b> <sup>[1]</sup> 152:6</p> <p><b>Philly</b> <sup>[3]</sup> 110:24 111:4,5</p> <p><b>phrased</b> <sup>[1]</sup> 61:23</p> <p><b>PI</b> <sup>[3]</sup> 82:9 122:16 130:1</p> <p><b>piece</b> <sup>[1]</sup> 154:13</p> <p><b>Pierce</b> <sup>[4]</sup> 107:3,7 156:9 159:13</p> <p><b>pin</b> <sup>[1]</sup> 146:21</p> <p><b>Pls</b> <sup>[4]</sup> 79:9 82:21 131:18 151:21</p> <p><b>pivot</b> <sup>[2]</sup> 141:18 142:13</p> <p><b>place</b> <sup>[5]</sup> 21:2 51:18 148:3 157:13 158:1</p> <p><b>places</b> <sup>[1]</sup> 41:15</p> <p><b>plain</b> <sup>[2]</sup> 43:14 125:20</p> <p><b>plaintiff</b> <sup>[37]</sup> 13:17,18 14:16 15:5,12 16:4,19 17:5,22 18:14,18,20 19:7,16 20:14,25 21:2,6 27:18 39:8 54:15 70:13 71:7,15,25 72:1,3 73:8 74:10 79:14 84:1 107:14 118:8 146:8 153:12 154:3 155:15</p> <p><b>plaintiffs</b> <sup>[2]</sup> 73:25 146:8</p> <p><b>plaintiff-specific</b> <sup>[1]</sup> 142:1</p> <p><b>plaintiffs</b> <sup>[36]</sup> 5:19 9:24 13:3 15:18,22 19:7 22:3,4 23:5 24:14 32:4 36:10 38:14 41:21,22 60:1 66:15 67:4 118:23 119:23 126:12,21 127:10 138:2 142:11,21,21,24 147:3,12 153:8,13,17,24 158:19 159:4</p> <p><b>plaintiffs'</b> <sup>[1]</sup> 84:17</p> <p><b>plan</b> <sup>[4]</sup> 94:17 105:14 109:11 110:2</p> <p><b>planning</b> <sup>[1]</sup> 106:17</p> <p><b>plans</b> <sup>[1]</sup> 105:11</p> <p><b>plant</b> <sup>[5]</sup> 15:10 18:12,14 109:12 110:3</p> <p><b>plausibly</b> <sup>[1]</sup> 52:13</p> <p><b>playing</b> <sup>[2]</sup> 150:22 153:4</p> <p><b>please</b> <sup>[5]</sup> 4:11 33:2 65:11 77:16 125:17</p> <p><b>plenty</b> <sup>[1]</sup> 64:19</p> <p><b>pocketbook</b> <sup>[4]</sup> 23:12 77:21 83:2 97:2</p> <p><b>podium</b> <sup>[2]</sup> 109:6 119:5</p> <p><b>Poe</b> <sup>[3]</sup> 30:13 64:15 149:20</p> <p><b>point</b> <sup>[56]</sup> 12:20 15:16 19:13,25 22:17 25:7 27:14 32:25 33:9 37:23 39:24 40:15:16 54:20 59:5,18 66:9</p>	<p>69:1,19 84:18,23 88:14,17,24 105:21 107:24 108:15,17,24 109:3,4,17 111:1 112:12,17 116:5 119:24 123:13 125:5 128:20 130:6 131:3 132:13 133:7 134:23 135:12 136:22 143:4 149:19 151:1 153:7 154:4 156:11 157:12 159:17 160:18</p> <p><b>pointed</b> <sup>[4]</sup> 6:16 22:19 38:24 161:6</p> <p><b>pointing</b> <sup>[2]</sup> 67:17 129:2</p> <p><b>points</b> <sup>[4]</sup> 76:24 107:3 108:2 136:20</p> <p><b>policies</b> <sup>[5]</sup> 59:21 81:11,12 89:15 99:14</p> <p><b>policy</b> <sup>[19]</sup> 55:10 56:5 59:24,25 61:9,21 62:19,20 75:24 76:2,5 93:13,15,17 99:18,19 127:24 132:5 141:11</p> <p><b>pollution</b> <sup>[1]</sup> 15:11</p> <p><b>porous</b> <sup>[1]</sup> 111:6</p> <p><b>portion</b> <sup>[2]</sup> 39:17 67:20</p> <p><b>position</b> <sup>[7]</sup> 52:11 53:5,6,7 54:19 99:16 160:25</p> <p><b>positive</b> <sup>[1]</sup> 124:3</p> <p><b>possibility</b> <sup>[2]</sup> 31:7 54:4</p> <p><b>possible</b> <sup>[8]</sup> 18:19 39:7 53:11,13 76:13 89:3 100:13 161:9</p> <p><b>possibly</b> <sup>[3]</sup> 84:20 94:4 106:7</p> <p><b>post-Civil</b> <sup>[1]</sup> 78:16</p> <p><b>posture</b> <sup>[5]</sup> 121:3,16 122:7 129:20 130:2</p> <p><b>potential</b> <sup>[2]</sup> 60:16,17</p> <p><b>potentially</b> <sup>[4]</sup> 34:19 75:2 111:1 112:13</p> <p><b>pouring</b> <sup>[1]</sup> 15:10</p> <p><b>Powell</b> <sup>[1]</sup> 5:24</p> <p><b>power</b> <sup>[10]</sup> 5:5 9:15 17:6,9 18:6 58:25 59:1 75:15 109:12 110:2</p> <p><b>powers</b> <sup>[1]</sup> 6:4</p> <p><b>practical</b> <sup>[17]</sup> 5:9 39:4,12,22 56:9 66:19 67:25 68:2 97:23 98:3,4 99:8,11 136:19,24 137:13 139:14</p> <p><b>practically</b> <sup>[11]</sup> 80:4 81:25 82:16 91:19 100:9 109:16 110:4 118:12 119:22 120:17,20</p> <p><b>practice</b> <sup>[18]</sup> 33:18,22,25 40:6 61:5,8,11,12,17 63:11,14 79:7 106:4 114:20 123:19 125:23 145:3 156:1</p> <p><b>practices</b> <sup>[3]</sup> 27:21 34:17 129:7</p> <p><b>pragmatic</b> <sup>[1]</sup> 127:23</p> <p><b>precedent</b> <sup>[29]</sup> 9:18,23 31:14 32:18 33:19 35:12,21 36:2 43:13,13 47:22 48:1,25 55:8 60:22 61:3,24 62:</p>	<p>2 63:17 94:22,24 95:7 106:19 114:19,24 123:7 125:22 145:1 156:1</p> <p><b>precedents</b> <sup>[8]</sup> 11:12 12:3 25:15 35:16 61:6 63:14 89:24 104:14</p> <p><b>precludes</b> <sup>[1]</sup> 40:13</p> <p><b>predecessors</b> <sup>[1]</sup> 134:22</p> <p><b>predicting</b> <sup>[1]</sup> 52:10</p> <p><b>preeminent</b> <sup>[1]</sup> 159:18</p> <p><b>preferred</b> <sup>[1]</sup> 108:20</p> <p><b>prefers</b> <sup>[1]</sup> 78:1</p> <p><b>preliminary</b> <sup>[15]</sup> 27:16 36:11 126:10,16 127:3 128:21 129:8,12,19 131:20,24 133:12 134:24 136:23 145:12</p> <p><b>premise</b> <sup>[1]</sup> 134:19</p> <p><b>prepared</b> <sup>[1]</sup> 51:21</p> <p><b>presence</b> <sup>[1]</sup> 57:5</p> <p><b>present</b> <sup>[8]</sup> 8:7 41:9 50:8 52:20,21 143:7 148:23 160:13</p> <p><b>presented</b> <sup>[8]</sup> 9:2 47:1 100:25 101:4 106:1 119:7 161:3,13</p> <p><b>presenting</b> <sup>[1]</sup> 160:15</p> <p><b>presents</b> <sup>[1]</sup> 31:3</p> <p><b>preserve</b> <sup>[1]</sup> 135:2</p> <p><b>preserves</b> <sup>[1]</sup> 133:14</p> <p><b>PRESIDENT</b> <sup>[14]</sup> 1:3,10,17 4:12 11:9 13:7,11 44:23 98:17,18,19,19 150:10 151:25</p> <p><b>presidential</b> <sup>[2]</sup> 5:3 60:8</p> <p><b>Presidents</b> <sup>[6]</sup> 58:7,9,13 59:10 97:19 152:10</p> <p><b>press</b> <sup>[2]</sup> 101:22 120:7</p> <p><b>pressed</b> <sup>[1]</sup> 101:17</p> <p><b>pressures</b> <sup>[1]</sup> 5:23</p> <p><b>presumably</b> <sup>[1]</sup> 54:2</p> <p><b>Presuming</b> <sup>[1]</sup> 36:22</p> <p><b>presumption</b> <sup>[1]</sup> 135:7</p> <p><b>pretty</b> <sup>[3]</sup> 46:11 97:1 151:19</p> <p><b>prevail</b> <sup>[3]</sup> 27:2 55:16,18</p> <p><b>prevent</b> <sup>[3]</sup> 5:10 47:16 126:20</p> <p><b>preventing</b> <sup>[3]</sup> 18:19,19 112:9</p> <p><b>primarily</b> <sup>[1]</sup> 58:3</p> <p><b>primary</b> <sup>[2]</sup> 8:4 141:19</p> <p><b>principal</b> <sup>[1]</sup> 116:17</p> <p><b>Principi</b> <sup>[1]</sup> 129:4</p> <p><b>principle</b> <sup>[8]</sup> 16:12 19:4,6 43:19 45:23 46:1 71:20 72:19</p> <p><b>principles</b> <sup>[8]</sup> 9:5 40:3 45:25 136:15 139:3 140:2 149:9 161:16</p> <p><b>prior</b> <sup>[1]</sup> 133:5</p> <p><b>Private</b> <sup>[5]</sup> 2:14 3:11 107:14 125:15 142:21</p> <p><b>probably</b> <sup>[3]</sup> 87:25 89:13 143:3</p>	<p><b>problem</b> <sup>[33]</sup> 5:2 21:11 24:5,18,25 25:3 39:13,22 51:10 56:6 65:6 66:1 75:20 90:22 97:23 98:3,4 99:9 112:2,23 117:14 122:22 130:13,22 132:15 136:19,24 138:9 148:9,15,24,25 161:4</p> <p><b>problematic</b> <sup>[1]</sup> 148:17</p> <p><b>problems</b> <sup>[18]</sup> 5:9 20:5 24:13,23 26:23 39:4 52:15 82:11 97:14 99:11 103:22 111:20,25 130:16 137:3,13 138:10 141:11</p> <p><b>procedural</b> <sup>[1]</sup> 51:16</p> <p><b>procedures</b> <sup>[3]</sup> 8:21 53:20 55:3</p> <p><b>proceed</b> <sup>[1]</sup> 139:6</p> <p><b>proceeding</b> <sup>[7]</sup> 21:3,20 48:8 68:11 110:24 121:14 133:10</p> <p><b>process</b> <sup>[5]</sup> 57:24 66:21,24 89:23 148:2</p> <p><b>produce</b> <sup>[1]</sup> 92:9</p> <p><b>Professor</b> <sup>[4]</sup> 59:17 128:22 146:5 156:3</p> <p><b>proffered</b> <sup>[1]</sup> 6:13</p> <p><b>profoundly</b> <sup>[6]</sup> 13:24 14:4 30:11 38:1 40:17 160:25</p> <p><b>program</b> <sup>[2]</sup> 104:4,16</p> <p><b>programs</b> <sup>[8]</sup> 92:6,8 103:24 105:4,16 112:16,23 113:19</p> <p><b>prohibit</b> <sup>[3]</sup> 9:6 126:5 128:23</p> <p><b>prohibits</b> <sup>[1]</sup> 40:19</p> <p><b>projecting</b> <sup>[1]</sup> 132:5</p> <p><b>proliferated</b> <sup>[1]</sup> 6:8</p> <p><b>proliferation</b> <sup>[1]</sup> 151:16</p> <p><b>promise</b> <sup>[1]</sup> 87:1</p> <p><b>promising</b> <sup>[1]</sup> 52:4</p> <p><b>promptly</b> <sup>[3]</sup> 4:19 92:16 94:18</p> <p><b>prong</b> <sup>[1]</sup> 140:6</p> <p><b>prongs</b> <sup>[1]</sup> 127:17</p> <p><b>properly</b> <sup>[2]</sup> 77:18 140:24</p> <p><b>property</b> <sup>[2]</sup> 156:3 159:22</p> <p><b>proposal</b> <sup>[6]</sup> 128:5,22,25 141:13 143:8 149:6</p> <p><b>proposed</b> <sup>[2]</sup> 35:3 94:2</p> <p><b>proposing</b> <sup>[1]</sup> 149:10</p> <p><b>protect</b> <sup>[1]</sup> 15:20</p> <p><b>Protecting</b> <sup>[3]</sup> 4:13 48:23 60:1</p> <p><b>protection</b> <sup>[1]</sup> 20:14</p> <p><b>prototypical</b> <sup>[1]</sup> 134:3</p> <p><b>prove</b> <sup>[1]</sup> 145:24</p> <p><b>proven</b> <sup>[1]</sup> 161:18</p> <p><b>provide</b> <sup>[11]</sup> 23:5 34:17 41:24 66:12 71:24 101:16 126:11 127:9 131:24 140:3 158:9</p> <p><b>provided</b> <sup>[5]</sup> 24:1 49:13 73:20 136:1 158:3</p>	<p><b>provides</b> <sup>[7]</sup> 29:20 31:25 41:1 50:8 131:16,16,22</p> <p><b>providing</b> <sup>[3]</sup> 112:10 126:5 136:15</p> <p><b>provision</b> <sup>[1]</sup> 38:11</p> <p><b>provisional</b> <sup>[1]</sup> 104:21</p> <p><b>prudential</b> <sup>[1]</sup> 17:19</p> <p><b>pseudo</b> <sup>[1]</sup> 153:24</p> <p><b>public</b> <sup>[5]</sup> 15:3 111:19 127:16 140:5,9</p> <p><b>pure</b> <sup>[1]</sup> 42:16</p> <p><b>purport</b> <sup>[2]</sup> 8:24 132:2</p> <p><b>purportedly</b> <sup>[1]</sup> 77:2</p> <p><b>purpose</b> <sup>[2]</sup> 10:20 74:23</p> <p><b>purposes</b> <sup>[4]</sup> 86:7 103:19,19 159:7</p> <p><b>pursuant</b> <sup>[1]</sup> 69:25</p> <p><b>pursue</b> <sup>[2]</sup> 132:20 146:14</p> <p><b>push</b> <sup>[1]</sup> 58:9</p> <p><b>pushing</b> <sup>[4]</sup> 58:11,14 140:15,22</p> <p><b>put</b> <sup>[21]</sup> 28:6 30:4 35:3,3,3 44:22 54:6 94:7 97:23,24 106:12 120:9,10,16 123:11 128:2,3 136:19 153:19 157:16,25</p> <p><b>putative</b> <sup>[7]</sup> 129:13,19,24 131:19 133:11 134:25 136:22</p> <p><b>puts</b> <sup>[4]</sup> 110:20 122:5 142:7 157:12</p> <p><b>Putting</b> <sup>[4]</sup> 79:18 105:10,13 134:14</p>
---	--	--	--	--

## Q

**quarrel** <sup>[1]</sup> 106:11

**question** <sup>[76]</sup> 8:1 9:4 10:21 16:1 22:11,17 26:24,25 27:3 28:21 29:12 31:3 32:14,18 42:17 43:9 44:20 46:5,13,15,16,18 47:2,6,19 48:10,19 49:22,25 56:9 58:1 64:3,14,16,19 65:2,20 66:5,7 67:24 72:19 73:3 79:3,5 83:19 84:13 85:11 86:8 91:21,22 94:9,10 95:18 96:14 97:25 100:16 101:24 106:21 115:8 117:19,25 121:10 122:7 128:4,15 143:22 144:8,12 145:17 147:5 150:12 151:15 152:23 161:12,14,16

**questioned** <sup>[1]</sup> 25:14

**questioning** <sup>[1]</sup> 142:18

**questions** <sup>[25]</sup> 5:12 6:5 30:3 50:14 59:1 64:4 78:8 79:17 82:7 85:17 91:17 100:18 105:25 111:10 123:9,12 126:25 137:19 141:4 142:14 143:11 147:24,24 148:10 149:18

**quick** <sup>[3]</sup> 33:3,4 108:14

**quickly** <sup>[8]</sup> 32:15,18 37:1 41:11 76:13,20 116:6 141:

## Official

<p>18  <b>quintessentially</b> <sup>[1]</sup> 148:14  <b>quite</b> <sup>[9]</sup> 31:4 109:14 123:4, 14,24 124:25 134:12 139:22 158:2  <b>quo</b> <sup>[1]</sup> 126:17  <b>quotation</b> <sup>[1]</sup> 63:22  <b>quote</b> <sup>[1]</sup> 146:5</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>racial</b> <sup>[1]</sup> 14:13  <b>racing</b> <sup>[2]</sup> 75:21 161:4  <b>Rahimi</b> <sup>[1]</sup> 116:9  <b>railroad</b> <sup>[2]</sup> 136:6 156:9  <b>raise</b> <sup>[3]</sup> 82:6 95:13 119:16  <b>raised</b> <sup>[5]</sup> 78:3 101:25 119:18,19 120:21  <b>raises</b> <sup>[2]</sup> 81:9 157:15  <b>raising</b> <sup>[2]</sup> 78:7 108:25  <b>ramp-up</b> <sup>[2]</sup> 55:23 56:2  <b>rampant</b> <sup>[1]</sup> 5:12  <b>ran</b> <sup>[1]</sup> 128:25  <b>range</b> <sup>[1]</sup> 34:18  <b>rare</b> <sup>[1]</sup> 38:21  <b>rate</b> <sup>[1]</sup> 107:2  <b>rates</b> <sup>[1]</sup> 156:9  <b>rather</b> <sup>[3]</sup> 27:3 29:4 70:6  <b>ratified</b> <sup>[1]</sup> 126:18  <b>re-begin</b> <sup>[1]</sup> 19:23  <b>reach</b> <sup>[4]</sup> 26:25 50:17 76:13 77:4  <b>reaction</b> <sup>[1]</sup> 133:9  <b>read</b> <sup>[3]</sup> 71:18 108:12 134:1  <b>readiness</b> <sup>[1]</sup> 76:2  <b>reading</b> <sup>[5]</sup> 37:19 85:24 108:6 116:25 125:7  <b>reads</b> <sup>[1]</sup> 86:2  <b>reaffirmed</b> <sup>[2]</sup> 72:21 123:18  <b>real</b> <sup>[4]</sup> 49:24 74:14 95:14 139:13  <b>realize</b> <sup>[2]</sup> 105:7 123:9  <b>really</b> <sup>[35]</sup> 16:7 17:8 23:14 31:21 35:15 37:21 38:22 43:22 45:15,15,24 50:2 61:20 64:8,11 71:5 84:4 85:2 89:25 90:16 92:1 93:13 95:18 113:14 114:4 140:9 145:6 146:9,15 147:12 148:19 150:9,18 155:5 156:4  <b>realm</b> <sup>[1]</sup> 98:16  <b>Realtors</b> <sup>[1]</sup> 54:16  <b>reason</b> <sup>[12]</sup> 37:2,8 43:5 56:3 64:12,25 110:10 116:18 131:2 138:3 148:23 155:16  <b>reasonable</b> <sup>[2]</sup> 83:8,11  <b>reasoning</b> <sup>[4]</sup> 116:8 117:2,7,16  <b>reasons</b> <sup>[12]</sup> 9:9 23:3 30:21 45:3 59:1 120:21 127:6,</p>	<p>20 142:1 161:15,23 162:12  <b>REBUTTAL</b> <sup>[4]</sup> 3:12 122:21 160:5,6  <b>receives</b> <sup>[1]</sup> 128:18  <b>receiving</b> <sup>[1]</sup> 41:19  <b>recent</b> <sup>[4]</sup> 13:23 24:8 25:21 139:24  <b>recently</b> <sup>[5]</sup> 64:23 80:18 89:1 130:5 139:18  <b>recognize</b> <sup>[3]</sup> 41:16 45:18 91:6  <b>recognized</b> <sup>[1]</sup> 127:13  <b>reconcile</b> <sup>[1]</sup> 93:15  <b>rectified</b> <sup>[1]</sup> 39:13  <b>redistricting</b> <sup>[3]</sup> 14:16 109:11 110:2  <b>redone</b> <sup>[1]</sup> 109:11  <b>redrawing</b> <sup>[1]</sup> 14:23  <b>redress</b> <sup>[2]</sup> 18:7 96:6  <b>redressed</b> <sup>[1]</sup> 96:11  <b>refer</b> <sup>[1]</sup> 31:24  <b>referred</b> <sup>[3]</sup> 12:22 25:20 72:20  <b>referring</b> <sup>[1]</sup> 108:11  <b>reflect</b> <sup>[1]</sup> 149:11  <b>reflected</b> <sup>[3]</sup> 30:18 59:2 162:5  <b>reflects</b> <sup>[1]</sup> 4:15  <b>reflexive</b> <sup>[1]</sup> 80:22  <b>regardless</b> <sup>[1]</sup> 126:6  <b>regime</b> <sup>[2]</sup> 74:17 136:25  <b>regularly</b> <sup>[2]</sup> 79:13 120:13  <b>regulation</b> <sup>[1]</sup> 73:23  <b>reject</b> <sup>[1]</sup> 126:15  <b>rejected</b> <sup>[5]</sup> 44:15,18 128:24 138:25 162:11  <b>rejecting</b> <sup>[1]</sup> 135:18  <b>relate</b> <sup>[1]</sup> 86:21  <b>related</b> <sup>[1]</sup> 8:5  <b>relates</b> <sup>[1]</sup> 76:10  <b>relative</b> <sup>[1]</sup> 70:1  <b>release</b> <sup>[1]</sup> 18:16  <b>releases</b> <sup>[1]</sup> 18:12  <b>relevant</b> <sup>[4]</sup> 8:19 44:8 70:17 115:22  <b>relied</b> <sup>[2]</sup> 106:22,23  <b>relief</b> <sup>[122]</sup> 15:22 17:17,22 22:21 23:5,21 24:1,14 25:20,22 26:16,18 29:23 30:15 35:7 36:12 38:11 39:20 51:10 55:4 64:14,16 66:13 69:7,22 70:3 71:21,24 77:20 78:2 79:15 80:10,15,22 81:14 82:15 83:5 87:23 88:9 89:15 90:21 91:2,9,12 93:2,14,16,21 94:3,5 95:2,25 96:20,24,25 100:14 102:4,5,7,8,12,13 112:10 115:1,24 116:15 117:19,21 118:7,21,22 119:1,10,11 121:19 123:25 124:1,14,15 126:5,12 127:8,9,14 128:2,18,23 129:8,9,13,13,19,23 130:8 131:18,20,23,24 132:18</p>	<p>133:13,15 135:3,25 136:23 138:24 139:15 140:18 141:17,22 142:10 146:7,16 147:13 154:15,20 155:6,9 157:20 158:4,9 159:8 162:2  <b>relying</b> <sup>[1]</sup> 130:7  <b>rem</b> <sup>[1]</sup> 156:2  <b>remedial</b> <sup>[7]</sup> 30:15 65:24 66:3,5 94:8,10 161:12  <b>remediate</b> <sup>[5]</sup> 13:2 14:25 23:16 73:1 74:7  <b>remediates</b> <sup>[1]</sup> 73:24  <b>remediating</b> <sup>[2]</sup> 15:4 73:6  <b>remedied</b> <sup>[4]</sup> 83:3 97:5 99:25 100:25  <b>remedies</b> <sup>[8]</sup> 16:17 17:2,3 47:2 82:7,8 97:4 159:19  <b>remedy</b> <sup>[24]</sup> 14:22 15:16 16:3,16 22:20 38:14,16 40:21 73:17,20,23 74:1 83:21 84:17 93:8 95:3 100:7 102:1 108:20 114:9 115:1 119:17 121:8 161:12  <b>remedying</b> <sup>[5]</sup> 19:6 81:24 83:1 91:18 93:6  <b>remotely</b> <sup>[1]</sup> 75:6  <b>removal</b> <sup>[3]</sup> 110:23,25 111:7  <b>remove</b> <sup>[1]</sup> 16:18  <b>removing</b> <sup>[1]</sup> 154:7  <b>render</b> <sup>[1]</sup> 41:14  <b>repeated</b> <sup>[1]</sup> 5:25  <b>repeatedly</b> <sup>[2]</sup> 27:24 44:19  <b>represent</b> <sup>[2]</sup> 90:1,3  <b>representation</b> <sup>[1]</sup> 52:24  <b>representational</b> <sup>[1]</sup> 115:19  <b>representative</b> <sup>[3]</sup> 6:1 134:13 158:2  <b>represented</b> <sup>[4]</sup> 6:23 40:23 41:10 68:8  <b>require</b> <sup>[11]</sup> 5:13 16:2 23:16 57:4 71:12 78:4 85:24 96:25 106:15 142:5,10  <b>required</b> <sup>[2]</sup> 17:21 84:16  <b>requirement</b> <sup>[2]</sup> 17:7,24  <b>requirements</b> <sup>[3]</sup> 29:17 132:25 133:5  <b>requires</b> <sup>[7]</sup> 16:6 87:9 102:14,17 104:7 106:16 109:15  <b>requiring</b> <sup>[1]</sup> 154:22  <b>reserve</b> <sup>[2]</sup> 27:3 61:2  <b>reserved</b> <sup>[1]</sup> 79:15  <b>resident</b> <sup>[1]</sup> 52:23  <b>residents</b> <sup>[2]</sup> 91:15 99:24  <b>resides</b> <sup>[1]</sup> 78:15  <b>resisted</b> <sup>[2]</sup> 32:2 60:20  <b>resolution</b> <sup>[1]</sup> 6:20  <b>resolve</b> <sup>[2]</sup> 32:14,18  <b>respect</b> <sup>[24]</sup> 17:9 25:6 33:19 35:22,25 36:2 42:18 45:8,9 61:6,14,23 63:4,6,11,14,17 68:18 70:11,12 71:14 133:15 142:20 157:17</p>	<p><b>Respectfully</b> <sup>[3]</sup> 10:17 43:16 47:17  <b>respecting</b> <sup>[2]</sup> 47:21 48:24  <b>respects</b> <sup>[1]</sup> 83:22  <b>respond</b> <sup>[1]</sup> 134:22  <b>responded</b> <sup>[1]</sup> 24:3  <b>Respondents</b> <sup>[11]</sup> 1:8,15,22 2:12,14 3:8,11 6:14 21:22 77:14 125:15  <b>responding</b> <sup>[1]</sup> 150:25  <b>response</b> <sup>[11]</sup> 8:3 18:1,23 23:14,24,25 25:17 47:19 49:22 98:2 133:8  <b>responses</b> <sup>[3]</sup> 16:9 72:14,18  <b>responsibilities</b> <sup>[1]</sup> 102:18  <b>responsibility</b> <sup>[2]</sup> 104:25 105:10  <b>responsible</b> <sup>[1]</sup> 105:13  <b>responsive</b> <sup>[1]</sup> 128:14  <b>rest</b> <sup>[2]</sup> 12:18 27:8  <b>restrained</b> <sup>[3]</sup> 98:13 99:14 107:16  <b>result</b> <sup>[8]</sup> 23:12 28:14,23 29:2 30:8,11 31:5 126:21  <b>resulted</b> <sup>[1]</sup> 14:13  <b>results</b> <sup>[1]</sup> 26:23  <b>return</b> <sup>[1]</sup> 82:1  <b>reversed</b> <sup>[1]</sup> 37:24  <b>revert</b> <sup>[1]</sup> 88:20  <b>review</b> <sup>[2]</sup> 5:21 95:7  <b>rights</b> <sup>[2]</sup> 74:21 139:12  <b>rigorous</b> <sup>[7]</sup> 11:3 29:21,22 35:5 53:1 89:14 136:5  <b>rigors</b> <sup>[4]</sup> 66:21,23 89:5,11  <b>rise</b> <sup>[1]</sup> 85:8  <b>rises</b> <sup>[1]</sup> 85:12  <b>risk</b> <sup>[3]</sup> 5:21 68:11 142:8  <b>road</b> <sup>[1]</sup> 143:3  <b>ROBERTS</b> <sup>[36]</sup> 4:3 7:13,15 11:7 12:17 13:8 14:8 36:17 37:13 39:2 40:9 46:3 50:11 51:7 60:13 69:3 77:10 81:3 83:6 97:9 100:19 111:22 115:4 120:25 125:11 129:17 142:16 143:13,16 145:8 147:15 150:4 152:20 154:9 160:3 162:14  <b>role</b> <sup>[2]</sup> 150:22 153:5  <b>room</b> <sup>[1]</sup> 123:10  <b>Roosevelt</b> <sup>[1]</sup> 59:21  <b>roughly</b> <sup>[1]</sup> 139:9  <b>roving</b> <sup>[1]</sup> 162:7  <b>Rule</b> <sup>[85]</sup> 5:15 6:25 8:18 11:3,3 12:13,19 16:5 22:3,6 29:2,4,5,6,16,17,20 30:1,4 31:25 33:16 40:23 41:1 42:23 50:7 52:4 53:3,8,21 58:6 69:9 75:6 78:21 80:12 81:19 82:20 84:25 86:1 87:19 108:8,10 112:8 116:14,21 125:3 128:6,10,10,10,</p>	<p>11,13,16,20,21,23 129:2,7 130:8,19 131:6,6,15 132:1,6 133:1,24 134:4,7,22 136:9,21 138:16 139:7 141:10 149:7 150:11,15 156:12,25 157:4,24,25 158:6 159:3 160:1  <b>ruled</b> <sup>[1]</sup> 49:17  <b>rules</b> <sup>[12]</sup> 28:15 31:6 112:5 117:9 128:8,9,21 129:6 130:14 131:12 132:3 155:16  <b>Rules-Enabling</b> <sup>[1]</sup> 129:1  <b>ruling</b> <sup>[2]</sup> 33:11 155:10  <b>run</b> <sup>[2]</sup> 20:19 162:2  <b>running</b> <sup>[1]</sup> 81:16  <b>rush</b> <sup>[1]</sup> 89:2  <b>rushed</b> <sup>[3]</sup> 5:13 65:8,11</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>safety</b> <sup>[1]</sup> 37:3  <b>saluting</b> <sup>[1]</sup> 107:21  <b>same</b> <sup>[16]</sup> 4:25 7:6 8:21 24:9 29:15 34:6 66:9 78:18 117:13 129:14 138:3 148:18 151:21 156:6 157:13 158:1  <b>San</b> <sup>[1]</sup> 148:5  <b>satisfies</b> <sup>[1]</sup> 11:3  <b>satisfying</b> <sup>[1]</sup> 88:12  <b>SAUER</b> <sup>[158]</sup> 2:7 3:3,13 4:7,8,10 6:6,15 8:2,17 9:8,12,16,22 10:2,9,13,17,22 11:2 12:4,11,19,25 13:20 14:21 16:8,11 17:25 19:2,5,10,25 20:18 21:4,8,16,21,25 22:5,12 23:2 24:15 25:4,16 26:3,22 27:6 28:3,16,19 29:6,20 30:10 31:8,19,24 32:5,16,19 33:17 34:1,16,25 35:4,20 36:1,9 37:11,18 38:19 39:14 40:1,16,22 41:4,9 42:11 43:4,16,25 44:8,16 45:2,14 46:24 47:17 48:9,20 49:12,18 50:7,18 51:5,14,24 52:8,15 53:13 54:7,11 55:14,22 56:12,20,24 57:3,12,19 58:22 59:15 60:15 61:5,18,21 62:13,17,22 63:3,9,19,22,25 64:10,22 65:4,16,23 66:23 67:5,11 68:5,7,19,24 69:13,16 70:17 72:14,16,18 73:15 74:6,9 75:19 77:5 97:13 122:20 127:7 132:15,22 137:1 144:1 151:15 157:6 160:5,6,8  <b>Sauer's</b> <sup>[2]</sup> 128:5 151:1  <b>saying</b> <sup>[33]</sup> 30:1 31:22 34:13,14 43:2 62:16 63:6 65:11 66:17 69:12,21 76:25 84:18 86:3,15 88:16 90:17 91:11 95:21 99:24 108:19 113:1 118:17 122:2 123:</p>
--	--	---	--	--

## Official

15,16,23 124:4 125:2 133: 17 137:9 139:10 153:15 <b>says</b> <sup>[29]</sup> 11:21,24 13:13 18: 15 23:18 24:5,24 27:10 48: 4,5 56:14 70:21 71:3,13,25 72:8 74:22 75:1 81:19 98: 20 102:4 106:13 109:19 117:3 121:6 125:4 128:17 129:3 158:21 <b>Scarborough</b> <sup>[1]</sup> 129:5 <b>scenario</b> <sup>[2]</sup> 57:22 153:25 <b>scheme</b> <sup>[1]</sup> 126:23 <b>scholar</b> <sup>[1]</sup> 159:18 <b>scholarly</b> <sup>[1]</sup> 98:6 <b>scholars</b> <sup>[1]</sup> 136:4 <b>school</b> <sup>[2]</sup> 15:3 107:14 <b>schools</b> <sup>[1]</sup> 107:14 <b>scope</b> <sup>[13]</sup> 18:2 22:25 24: 20 30:15,18 45:17 47:2 64: 14,16 72:25 73:14 96:20 161:12 <b>Scott</b> <sup>[1]</sup> 38:8 <b>Second</b> <sup>[22]</sup> 24:4 33:12,14, 16 35:11 36:3 47:23,23 60: 22 61:2,14,15 62:5,10 63:2 82:2,3 84:20 132:13 142:3, 4 153:22 <b>Seconds</b> <sup>[1]</sup> 23:7 <b>Section</b> <sup>[1]</sup> 56:14 <b>secured</b> <sup>[1]</sup> 11:25 <b>Security</b> <sup>[4]</sup> 104:2,8,12,16 <b>see</b> <sup>[30]</sup> 12:2 17:2 21:13,16 38:3 39:4 45:18 48:15 54: 3,13 57:6 60:18 66:20 70: 8 74:3 88:15 90:8,11,20 91:5 96:7 101:1 113:20 114:17 116:3,11 136:24 137:13 156:6 161:20 <b>seek</b> <sup>[9]</sup> 22:10 51:4 55:3 95: 4 104:5 137:24 146:25 147:13 155:10 <b>seekers</b> <sup>[1]</sup> 154:8 <b>seeking</b> <sup>[6]</sup> 51:18 91:2,3,9, 11 138:4 <b>seeks</b> <sup>[1]</sup> 146:8 <b>seem</b> <sup>[3]</sup> 16:4 17:6 85:1 <b>seems</b> <sup>[15]</sup> 17:20 18:20 51: 10,16 58:4 69:6 71:23 74: 15,25 76:18 84:15 89:12 131:14,19 139:22 <b>seen</b> <sup>[3]</sup> 151:16 152:18 154: 7 <b>sees</b> <sup>[1]</sup> 97:14 <b>seize</b> <sup>[1]</sup> 13:15 <b>Seldin</b> <sup>[5]</sup> 16:13 18:5 72:21 73:14 74:11 <b>selection</b> <sup>[2]</sup> 131:7 148:2 <b>Senator</b> <sup>[1]</sup> 44:10 <b>sends</b> <sup>[1]</sup> 13:15 <b>sense</b> <sup>[6]</sup> 10:16 81:8,22 133:4 141:5 157:21 <b>sensitive</b> <sup>[2]</sup> 43:8 77:6 <b>sent</b> <sup>[1]</sup> 107:13 <b>sentence</b> <sup>[1]</sup> 103:20	<b>sentences</b> <sup>[4]</sup> 101:18 106: 2 119:15 120:20 <b>separate</b> <sup>[10]</sup> 6:17 9:25 27: 10 30:22 64:16,19 80:6 138:13 145:6,15 <b>separation</b> <sup>[1]</sup> 6:4 <b>series</b> <sup>[1]</sup> 158:18 <b>serious</b> <sup>[5]</sup> 78:7 82:6 92:2 102:11 111:11 <b>seriously</b> <sup>[2]</sup> 25:13 120:7 <b>service</b> <sup>[1]</sup> 104:19 <b>services</b> <sup>[2]</sup> 23:11 41:24 <b>set</b> <sup>[12]</sup> 6:21 11:2 19:7 31:6 54:7 71:4 73:18 82:5,9 93: 24 134:3 148:16 <b>sets</b> <sup>[1]</sup> 52:17 <b>setting</b> <sup>[1]</sup> 83:13 <b>settle</b> <sup>[1]</sup> 10:21 <b>settled</b> <sup>[7]</sup> 79:5 106:18 114: 24 123:7,17 126:10 127:6 <b>several</b> <sup>[1]</sup> 121:25 <b>share</b> <sup>[3]</sup> 85:7 94:12,16 <b>Shilling</b> <sup>[1]</sup> 76:1 <b>shoes</b> <sup>[1]</sup> 47:11 <b>shopping</b> <sup>[1]</sup> 5:13 <b>shouldn't</b> <sup>[6]</sup> 21:6 27:1 41: 8,25 92:25 113:1 <b>shoving</b> <sup>[1]</sup> 131:6 <b>show</b> <sup>[1]</sup> 123:5 <b>showing</b> <sup>[9]</sup> 57:4,5 114:16, 18 119:12 120:22 122:17 124:20,22 <b>shown</b> <sup>[1]</sup> 122:9 <b>shows</b> <sup>[3]</sup> 109:14 110:10 136:7 <b>shut</b> <sup>[1]</sup> 19:19 <b>side</b> <sup>[16]</sup> 25:7 76:7 81:13 82:5 83:23 88:1 89:4,6 99: 22 106:9 116:18 123:11 124:3 125:1 139:21 161: 17 <b>signed</b> <sup>[1]</sup> 159:15 <b>significant</b> <sup>[4]</sup> 77:21 83:1 97:2 151:6 <b>similar</b> <sup>[7]</sup> 15:2,9 30:12 31: 9 41:5 72:23 76:23 <b>similarly</b> <sup>[2]</sup> 107:20 139:15 <b>simply</b> <sup>[5]</sup> 79:9 102:16 126: 24 133:17 156:18 <b>Since</b> <sup>[5]</sup> 4:22 78:12 105: 22 107:25 123:18 <b>single</b> <sup>[7]</sup> 24:7 28:23 29:2 35:13 40:25 79:1 86:1 <b>singular</b> <sup>[1]</sup> 8:1 <b>Sisters</b> <sup>[3]</sup> 107:4,7 156:10 <b>sit</b> <sup>[1]</sup> 13:16 <b>sitting</b> <sup>[1]</sup> 98:14 <b>situated</b> <sup>[1]</sup> 139:15 <b>situation</b> <sup>[6]</sup> 14:20 62:1,4, 9 63:1 154:20 <b>situations</b> <sup>[5]</sup> 26:13 98:16 99:6 100:13 102:4 <b>six</b> <sup>[1]</sup> 151:23 <b>Sixth</b> <sup>[1]</sup> 7:9	<b>skew</b> <sup>[1]</sup> 110:3 <b>skis</b> <sup>[1]</sup> 150:1 <b>slapping</b> <sup>[1]</sup> 132:10 <b>slaughter</b> <sup>[1]</sup> 161:19 <b>slaughterhouse</b> <sup>[1]</sup> 160: 23 <b>slaves</b> <sup>[4]</sup> 4:17 8:6 43:21 160:12 <b>slowing</b> <sup>[1]</sup> 161:19 <b>small</b> <sup>[2]</sup> 6:20,21 <b>snap</b> <sup>[4]</sup> 43:17 49:18 104: 10 161:2 <b>Social</b> <sup>[5]</sup> 104:2,8,12,16,19 <b>Society</b> <sup>[3]</sup> 107:4,7 156:9 <b>Solicitor</b> <sup>[2]</sup> 2:7,10 <b>solve</b> <sup>[8]</sup> 130:13,22 131:19, 20 138:19 141:11 148:15 149:7 <b>solved</b> <sup>[2]</sup> 39:23 138:12 <b>solves</b> <sup>[1]</sup> 90:21 <b>solving</b> <sup>[1]</sup> 138:8 <b>somebody</b> <sup>[3]</sup> 48:4,7 49:3 <b>somehow</b> <sup>[2]</sup> 71:21 157:1 <b>someone</b> <sup>[9]</sup> 7:20,21 21: 18 47:23 78:6,15 86:2 143: 14 158:24 <b>Sometimes</b> <sup>[6]</sup> 16:20 81: 12 98:7 99:17 100:6 135:9 <b>somewhat</b> <sup>[1]</sup> 112:12 <b>somewhere</b> <sup>[1]</sup> 103:11 <b>sorry</b> <sup>[11]</sup> 7:12 23:21 33:1,1, 2 88:14 90:24 92:12 129: 21 142:15 158:21 <b>sort</b> <sup>[30]</sup> 6:11 8:22,25 20:16 22:20 25:19 38:10 39:18 40:5 43:25 46:5 59:20 69: 11 75:22 92:22 111:9 113: 23 116:7 118:5 121:16 122:6,10 130:8 133:24 136:13 143:7 146:20 147: 11 149:3 156:16 <b>sorts</b> <sup>[4]</sup> 53:8 119:17 149: 22,23 <b>SOTOMAYOR</b> <sup>[64]</sup> 7:12,14, 16 8:14 9:3,10,13,19 10:1, 4,11,15,19,23 11:6,8 12:5, 15,23 13:6,10 14:6 25:13 35:17 40:10,11,18 41:2,7, 11 42:14 43:10,24 44:2,14, 18 45:5 100:20,21 101:8, 12,19,23 102:3 103:2,6,9, 16 106:20 107:11,20 108:2, 3,16 115:14 135:23 145:9, 10 146:13,20,24 147:4,14 156:8 <b>sought</b> <sup>[5]</sup> 36:11 79:11 88: 2 107:9,15 <b>sounds</b> <sup>[1]</sup> 62:25 <b>sovereign</b> <sup>[3]</sup> 11:14,16 77: 21 <b>space</b> <sup>[1]</sup> 80:10 <b>spanned</b> <sup>[1]</sup> 5:2 <b>specific</b> <sup>[1]</sup> 88:4 <b>specifically</b> <sup>[5]</sup> 80:12 83: 24 94:1 116:14 118:17 <b>speculating</b> <sup>[1]</sup> 58:22 <b>speculative</b> <sup>[1]</sup> 57:22 <b>spent</b> <sup>[1]</sup> 138:22 <b>spotting</b> <sup>[2]</sup> 86:4,14 <b>squiggle</b> <sup>[1]</sup> 87:3 <b>SSNs</b> <sup>[1]</sup> 104:20 <b>stage</b> <sup>[2]</sup> 142:17 154:19 <b>stand</b> <sup>[3]</sup> 20:24 21:18 63: 25 <b>stand-in</b> <sup>[1]</sup> 118:18 <b>standing</b> <sup>[9]</sup> 21:9 22:22,24 29:25 39:7 40:24 96:17 137:15 161:25 <b>standpoint</b> <sup>[1]</sup> 74:18 <b>stands</b> <sup>[2]</sup> 20:24 133:19 <b>stare</b> <sup>[2]</sup> 55:12 149:21 <b>start</b> <sup>[3]</sup> 100:21 106:17 128: 13 <b>started</b> <sup>[6]</sup> 19:23 35:17 38: 24 55:24 106:21 108:18 <b>starting</b> <sup>[3]</sup> 57:23 117:1 135:6 <b>State</b> <sup>[43]</sup> 2:11 3:7 14:18 23:18,19,24 41:22 54:14 77:14,25 78:5,7,15,19 87: 24 89:20 90:6 94:21 99:25 102:20,21,24 103:13 105: 10,20,24 107:5,17 109:22 110:17,22 111:8 112:7,19, 21 113:10 114:7 121:19 129:22 138:5 142:25 146: 13 161:24 <b>state's</b> <sup>[2]</sup> 100:8 114:3 <b>state-only</b> <sup>[1]</sup> 100:1 <b>stated</b> <sup>[1]</sup> 30:21 <b>stateless</b> <sup>[1]</sup> 41:15 <b>statements</b> <sup>[1]</sup> 44:10 <b>STATES</b> <sup>[73]</sup> 1:1,4,11,18 2: 3 7:19,24 22:17 23:13,18, 20 24:1 39:6,16 56:11,20 66:13 77:19 78:10,17,18, 23 79:13 81:9,10,11,15 84: 2,10 89:24 90:1,4,10,18 91: 2,3,16 92:2,22 93:2,13,14 94:2,4,17,20 95:24 99:11 100:13 102:15 103:3,10 104:4 105:6 106:10,11 107:12 109:6 110:9,15 112:4 113:17,25 114:6 117:20 118:21 119:20 120: 7 124:15 125:8 160:14 161:22 162:2 <b>States'</b> <sup>[2]</sup> 96:22 103:16 <b>statewide</b> <sup>[4]</sup> 38:10 51:19, 23 52:6 <b>status</b> <sup>[3]</sup> 111:2 126:17 150:15 <b>statute</b> <sup>[5]</sup> 55:10 71:3 102: 14 125:22 145:2 <b>statutes</b> <sup>[2]</sup> 81:12 114:21 <b>stay</b> <sup>[7]</sup> 64:13 65:10 98:23, 25 122:16 126:1,16 <b>stayed</b> <sup>[2]</sup> 76:4 139:25	<b>step</b> <sup>[2]</sup> 82:23 89:9 <b>steps</b> <sup>[4]</sup> 51:12 69:9 106: 12,16 <b>still</b> <sup>[11]</sup> 7:25 11:23 12:1 14: 6 44:20 50:4 62:15,18 92: 2 95:5 139:6 <b>stop</b> <sup>[19]</sup> 12:8 15:9 44:22, 23 45:1 70:4,12 71:1,14,25 73:5,7,11 74:20 75:18 122: 3,10,24 156:21 <b>stopped</b> <sup>[1]</sup> 11:22 <b>story</b> <sup>[2]</sup> 146:9 151:13 <b>Story's</b> <sup>[1]</sup> 159:15 <b>Strauss</b> <sup>[1]</sup> 19:17 <b>strength</b> <sup>[5]</sup> 93:7 114:16, 23 119:12 124:21 <b>stretch</b> <sup>[1]</sup> 58:10 <b>strictures</b> <sup>[1]</sup> 45:16 <b>strikes</b> <sup>[1]</sup> 112:3 <b>striking</b> <sup>[1]</sup> 123:14 <b>stripping</b> <sup>[1]</sup> 125:18 <b>strong</b> <sup>[1]</sup> 59:1 <b>stronger</b> <sup>[2]</sup> 114:18 146:8 <b>struggling</b> <sup>[1]</sup> 84:25 <b>student</b> <sup>[1]</sup> 54:3 <b>studied</b> <sup>[1]</sup> 136:4 <b>subject</b> <sup>[5]</sup> 17:11 29:21 42: 7 56:17 70:2 <b>submission</b> <sup>[2]</sup> 80:8 110: 14 <b>submitted</b> <sup>[3]</sup> 64:13 162: 16,18 <b>substantial</b> <sup>[2]</sup> 39:13,17 <b>substantially</b> <sup>[1]</sup> 105:15 <b>substantive</b> <sup>[3]</sup> 46:15,17 48:19 <b>succeed</b> <sup>[2]</sup> 30:20 135:1 <b>success</b> <sup>[1]</sup> 145:13 <b>successfully</b> <sup>[4]</sup> 55:11 66: 25 67:3 132:20 <b>sue</b> <sup>[3]</sup> 19:21 26:16,20 <b>sued</b> <sup>[2]</sup> 70:21 107:15 <b>suffer</b> <sup>[7]</sup> 77:21 93:3 94:25 110:12 122:9,14 133:20 <b>suffering</b> <sup>[2]</sup> 91:15 95:6 <b>sufficient</b> <sup>[1]</sup> 124:19 <b>sufficiently</b> <sup>[1]</sup> 149:13 <b>suggest</b> <sup>[7]</sup> 18:22 50:16 85:1 92:21 135:25 136:14 138:21 <b>suggested</b> <sup>[5]</sup> 25:13 100: 23 108:21 141:2 156:25 <b>suggesting</b> <sup>[9]</sup> 16:5 17:4 34:4 47:7 49:23 128:12 136:10 137:10 139:8 <b>suggestion</b> <sup>[4]</sup> 24:11 139: 1 147:7 160:24 <b>suggestions</b> <sup>[1]</sup> 101:25 <b>suggests</b> <sup>[3]</sup> 18:17 29:24 102:22 <b>suing</b> <sup>[1]</sup> 91:13 <b>suit</b> <sup>[8]</sup> 20:16 21:19 28:25 34:15 35:13,19 115:19 119:20
--	--	--	--



## Official

<b>suitable</b> <sup>[1]</sup> 137:18 <b>suits</b> <sup>[6]</sup> 27:11 51:18 133:3 134:13 137:5 158:2 <b>Summers</b> <sup>[1]</sup> 38:23 <b>super-important</b> <sup>[1]</sup> 148:13 <b>supplemental</b> <sup>[3]</sup> 83:13 93:25 143:25 <b>support</b> <sup>[3]</sup> 78:24 115:23 127:23 <b>supports</b> <sup>[1]</sup> 81:18 <b>suppose</b> <sup>[6]</sup> 18:11 35:10, 12 39:9 95:3 110:25 <b>supposed</b> <sup>[3]</sup> 47:15 75:14 110:25 <b>SUPREME</b> <sup>[21]</sup> 1:1 2:3 9: 14,16 10:24 11:11 12:3,6,7, 21 34:11 42:25 45:10 47: 12 50:2 63:1,5,15 76:21 94:21 114:19 <b>survived</b> <sup>[1]</sup> 38:17 <b>Sutton</b> <sup>[3]</sup> 7:9 24:16,23 <b>Sutton's</b> <sup>[1]</sup> 24:4 <b>switch</b> <sup>[2]</sup> 109:9 113:21 <b>symmetry</b> <sup>[1]</sup> 68:13 <b>sympathetic</b> <sup>[1]</sup> 81:14 <b>system</b> <sup>[9]</sup> 47:20 74:16 75: 7,9,13 76:12 77:7,8 122:25 <b>systematic</b> <sup>[1]</sup> 60:10 <hr/> <b>T</b> <hr/> <b>table</b> <sup>[3]</sup> 75:23 81:16 99:16 <b>tailored</b> <sup>[2]</sup> 16:17,17 <b>talked</b> <sup>[3]</sup> 53:23 116:8 117: 10 <b>talks</b> <sup>[4]</sup> 89:20,21,22 156:5 <b>TANF</b> <sup>[1]</sup> 104:11 <b>target</b> <sup>[1]</sup> 67:20 <b>targets</b> <sup>[1]</sup> 67:18 <b>tax</b> <sup>[4]</sup> 80:17 106:23 108:9 116:22 <b>technical</b> <sup>[1]</sup> 51:9 <b>technicalities</b> <sup>[1]</sup> 131:13 <b>technicality</b> <sup>[2]</sup> 131:14,15 <b>tee</b> <sup>[1]</sup> 95:12 <b>teeth</b> <sup>[1]</sup> 85:9 <b>tells</b> <sup>[3]</sup> 15:23 115:10,22 <b>temporarily</b> <sup>[4]</sup> 12:24,25 52:20 160:13 <b>temporary</b> <sup>[2]</sup> 4:18 57:6 <b>tens</b> <sup>[1]</sup> 157:8 <b>tension</b> <sup>[4]</sup> 60:16,17,18 157:23 <b>term</b> <sup>[2]</sup> 80:1,6 <b>terminated</b> <sup>[1]</sup> 88:4 <b>termination</b> <sup>[1]</sup> 88:3 <b>terms</b> <sup>[1]</sup> 131:17 <b>terrific</b> <sup>[1]</sup> 159:16 <b>territory</b> <sup>[2]</sup> 7:18 11:23 <b>test</b> <sup>[3]</sup> 127:18 135:14 140: 6 <b>tethered</b> <sup>[1]</sup> 142:22 <b>Texas</b> <sup>[9]</sup> 88:2,4,8 99:23 100:2,3,4 146:6 148:6	<b>text</b> <sup>[2]</sup> 78:11 125:21 <b>theme</b> <sup>[1]</sup> 38:3 <b>themselves</b> <sup>[2]</sup> 102:17 154:1 <b>theory</b> <sup>[4]</sup> 9:4 14:19 113:10 157:21 <b>there's</b> <sup>[37]</sup> 7:16 8:23 13: 11 17:11,13 23:14 31:22 35:12 37:21 45:11 47:8 50: 18 52:17 54:20 58:16 66: 16 68:2 69:13 73:18 79:24 80:9 87:21 92:17 94:23 95: 22 101:7 102:11 103:3 108:6 109:8,18 120:13 125:3 146:4,4 147:4 154: 12 <b>therefore</b> <sup>[2]</sup> 23:20 45:24 <b>they'll</b> <sup>[1]</sup> 46:20 <b>they've</b> <sup>[6]</sup> 22:19 58:11 80: 20,21 101:17,25 <b>thinking</b> <sup>[2]</sup> 98:10 141:3 <b>thinks</b> <sup>[6]</sup> 30:25 31:4 85:4 116:18 139:4 148:19 <b>third</b> <sup>[16]</sup> 82:13 84:11 86: 20 87:4,6,20 88:21,25 91: 14 102:5 110:5,12 113:14 119:23 120:2 148:12 <b>third-party</b> <sup>[2]</sup> 111:11 161: 24 <b>Thirteenth</b> <sup>[1]</sup> 44:4 <b>THOMAS</b> <sup>[11]</sup> 6:6,15 37:15, 16 38:17 79:18 97:11 106: 21 127:1,21 143:18 <b>Thomas's</b> <sup>[1]</sup> 27:9 <b>though</b> <sup>[9]</sup> 6:9 20:8 24:11 84:3 102:8 104:13 105:19 116:25 143:17 <b>thoughtful</b> <sup>[1]</sup> 84:14 <b>thoughts</b> <sup>[2]</sup> 25:15 133:21 <b>thousands</b> <sup>[5]</sup> 10:5,25 41: 12 137:4 157:8 <b>three</b> <sup>[20]</sup> 6:8 8:3 35:14 36: 14,19,19 50:23 81:7,21 84: 13,24 89:7 91:7,10 103:22 108:21,22 113:5 126:17 151:7 <b>throughout</b> <sup>[3]</sup> 14:17,18 55:8 <b>Thursday</b> <sup>[1]</sup> 1:25 <b>TikTok</b> <sup>[1]</sup> 36:21 <b>timing</b> <sup>[1]</sup> 131:21 <b>today</b> <sup>[9]</sup> 83:24 91:25 92: 21 95:14 109:6 118:11 119:6 123:9 127:7 <b>together</b> <sup>[3]</sup> 57:18 113:5 128:10 <b>tomorrow</b> <sup>[1]</sup> 94:1 <b>took</b> <sup>[4]</sup> 46:15 55:17 82:4 125:1 <b>tool</b> <sup>[3]</sup> 26:7 42:12 161:9 <b>tools</b> <sup>[13]</sup> 25:18,19 26:13 29:21 32:1 34:18,21 36:13, 16 45:4 49:12 50:19 161:8 <b>totally</b> <sup>[3]</sup> 74:3 88:23 110:4	<b>touchstone</b> <sup>[1]</sup> 160:18 <b>toxins</b> <sup>[2]</sup> 18:13,25 <b>trace</b> <sup>[1]</sup> 80:10 <b>trade</b> <sup>[1]</sup> 137:15 <b>tradition</b> <sup>[7]</sup> 54:21 80:14 116:7,10,12,13 126:4 <b>traditional</b> <sup>[7]</sup> 5:8 30:18 34:17 40:2,4 72:25 84:15 <b>training</b> <sup>[1]</sup> 104:18 <b>transcript</b> <sup>[1]</sup> 101:15 <b>transgress</b> <sup>[1]</sup> 5:7 <b>transpire</b> <sup>[1]</sup> 138:16 <b>TransUnion</b> <sup>[1]</sup> 162:11 <b>travel</b> <sup>[1]</sup> 24:2 <b>traveling</b> <sup>[1]</sup> 112:20 <b>Treasuries</b> <sup>[3]</sup> 16:24 38:5, 5 <b>treat</b> <sup>[5]</sup> 15:24 23:9 84:2 129:6 132:6 <b>treated</b> <sup>[6]</sup> 36:8 46:20 48: 16 104:1 160:19,20 <b>treatment</b> <sup>[1]</sup> 51:19 <b>Trenton</b> <sup>[1]</sup> 2:10 <b>trial</b> <sup>[5]</sup> 98:14,14,15,17,20 <b>tries</b> <sup>[1]</sup> 109:6 <b>TRO</b> <sup>[2]</sup> 129:20 130:1 <b>TROs</b> <sup>[3]</sup> 55:25 82:21 151: 20 <b>trouble</b> <sup>[1]</sup> 117:17 <b>true</b> <sup>[9]</sup> 9:13 53:4 90:20 92: 25 102:16 121:20 126:14 157:23 159:12 <b>Trumbull</b> <sup>[1]</sup> 44:10 <b>TRUMP</b> <sup>[10]</sup> 1:3,10,17 4:4, 12 6:17 27:10 37:19 98:18 148:3 <b>try</b> <sup>[7]</sup> 62:1 68:20,21 82:5 89:25 90:2 138:18 <b>trying</b> <sup>[8]</sup> 58:17 100:22 117: 1 124:18 138:22 149:10 156:15 159:9 <b>tunes</b> <sup>[2]</sup> 83:2 97:3 <b>turn</b> <sup>[9]</sup> 74:13,15 78:6 93:8, 17 97:5,6 105:23 111:1 <b>turned</b> <sup>[1]</sup> 105:19 <b>turns</b> <sup>[6]</sup> 96:24 103:18 110: 16,21 111:7 121:8 <b>Twenty-three</b> <sup>[1]</sup> 103:9 <b>two</b> <sup>[30]</sup> 16:9 23:2 39:11 52: 17 67:18 72:14,18 79:24 85:23 91:4 92:17 93:15 95: 22 100:24 101:17,24 106:2 107:14 108:2,24 112:4 113:7 119:15 120:19 127: 5,19 140:20 141:25 150:13, 19 <b>type</b> <sup>[1]</sup> 14:9 <b>typical</b> <sup>[1]</sup> 147:23 <b>typicality</b> <sup>[3]</sup> 52:16,24 133: 1 <hr/> <b>U</b> <hr/> <b>U.S</b> <sup>[2]</sup> 78:1,20 <b>U.S.'s</b> <sup>[1]</sup> 79:8	<b>U.S.-born</b> <sup>[1]</sup> 125:19 <b>U.S.C</b> <sup>[4]</sup> 102:13 104:10,10 105:12 <b>ultimate</b> <sup>[1]</sup> 135:3 <b>ultimately</b> <sup>[10]</sup> 31:13 82:11 88:3 95:4,15 97:7 112:14 116:20 150:12,13 <b>unable</b> <sup>[1]</sup> 37:9 <b>unanswered</b> <sup>[1]</sup> 78:8 <b>unconstitutional</b> <sup>[8]</sup> 44: 23,24 45:15,24 55:10 62: 11 126:23 146:3 <b>unconstitutionally</b> <sup>[1]</sup> 15: 1 <b>under</b> <sup>[20]</sup> 6:25 20:23,23, 24 29:16 57:19 72:24,25 73:17 74:25 76:16 82:11 87:18 104:14 109:20 121: 11 126:19 145:12 158:6 161:25 <b>underlying</b> <sup>[4]</sup> 30:16 59:5 77:4 143:22 <b>undermine</b> <sup>[2]</sup> 79:12 103: 23 <b>undermines</b> <sup>[1]</sup> 157:11 <b>understand</b> <sup>[29]</sup> 16:7 48: 10 60:25 61:18 64:7,18 67: 8 69:20 70:15 71:16 72:11 73:13 74:5,12 75:5 84:25 109:5 116:3 122:13,17 128:5 131:1 134:2 145:11 150:9 153:5 154:12 157:3 159:6 <b>understandably</b> <sup>[1]</sup> 58:12 <b>understanding</b> <sup>[4]</sup> 58:15 62:23 63:13 128:9 <b>understood</b> <sup>[6]</sup> 48:10 90:6 96:13,14 127:7 134:19 <b>undertake</b> <sup>[1]</sup> 102:18 <b>undocumented</b> <sup>[2]</sup> 105:3, 17 <b>undone</b> <sup>[1]</sup> 139:25 <b>unfair</b> <sup>[1]</sup> 110:4 <b>uniform</b> <sup>[1]</sup> 89:16 <b>uniformly</b> <sup>[2]</sup> 46:11 106:4 <b>unilateral</b> <sup>[1]</sup> 152:17 <b>Union</b> <sup>[3]</sup> 16:24,24 38:5 <b>unique</b> <sup>[4]</sup> 60:7 113:23 123: 4 161:22 <b>unitary</b> <sup>[1]</sup> 109:9 <b>UNITED</b> <sup>[18]</sup> 1:1,4,11,18 2: 3 7:19,24 78:17 81:9,15 96:22 103:16 109:6 110: 15 114:6 120:7 124:15 160:14 <b>universal</b> <sup>[8]</sup> 4:20,22,24 5: 4 6:7,10,19 7:11 9:6 15:15, 20 20:6,12,15 21:1,14 24:6 25:20 34:20 36:14 37:17, 21,25 38:10,18 39:5,10,25 40:2,13 42:20,23 43:2 53: 24 54:24 55:25 59:6,22 68: 3 69:7 70:7,15 76:16 79: 20 80:5,10,15 81:14 87:23	97:15 98:1 107:8,22,24 108:19 115:24 116:20 117: 22 118:3,22 119:10,11 127: 8,13 130:17 135:5 138:24 139:10 145:16 149:15 151: 2,17 153:10 155:21 157:2, 17,19 158:22,23 159:5 161: 20 <b>universally</b> <sup>[5]</sup> 9:20 12:9 76:3,8 133:18 <b>unlawful</b> <sup>[25]</sup> 18:16,25 28: 12 42:3,8,9 59:11 70:5,20, 23 71:5,6,10 72:13 73:9,23 75:17 77:3 98:20 121:13, 24 123:16 126:1 154:19 156:21 <b>unlawfully</b> <sup>[2]</sup> 18:12 160: 13 <b>unlawfulness</b> <sup>[1]</sup> 122:4 <b>unless</b> <sup>[4]</sup> 41:17 99:6,6 142:14 <b>unprecedented</b> <sup>[1]</sup> 92:9 <b>unresolved</b> <sup>[1]</sup> 117:4 <b>until</b> <sup>[7]</sup> 13:17 38:17 45:6 75:2 130:9,10,24 <b>untold</b> <sup>[1]</sup> 36:6 <b>unusual</b> <sup>[1]</sup> 123:23 <b>unworkable</b> <sup>[1]</sup> 143:12 <b>up</b> <sup>[25]</sup> 22:8 29:25 33:11 34: 10 35:14 44:17 47:10,24 58:1 59:13,14 66:19 76:3 89:18 90:7 95:12 110:8,8 121:3 123:8 140:21,24 143:21,21 161:23 <b>upend</b> <sup>[1]</sup> 145:2 <b>urge</b> <sup>[1]</sup> 140:11 <b>urgent</b> <sup>[2]</sup> 161:14,16 <b>useful</b> <sup>[1]</sup> 124:25 <b>using</b> <sup>[1]</sup> 117:3 <hr/> <b>V</b> <hr/> <b>vacate</b> <sup>[1]</sup> 73:19 <b>vacatur</b> <sup>[4]</sup> 73:17 82:5,7 91: 21 <b>vaccine</b> <sup>[2]</sup> 54:3 150:17 <b>Value</b> <sup>[1]</sup> 4:14 <b>variation</b> <sup>[1]</sup> 78:19 <b>vary</b> <sup>[2]</sup> 78:5,14 <b>vast</b> <sup>[3]</sup> 47:4 50:5 63:10 <b>vehicle</b> <sup>[2]</sup> 47:3 66:1 <b>Venn</b> <sup>[1]</sup> 132:16 <b>verification</b> <sup>[2]</sup> 102:15 113: 18 <b>verifications</b> <sup>[1]</sup> 102:25 <b>versus</b> <sup>[9]</sup> 4:5 62:25 73:14 74:11 93:10 107:4,7 111: 13 151:12 <b>vertical</b> <sup>[1]</sup> 149:21 <b>via</b> <sup>[1]</sup> 66:11 <b>view</b> <sup>[7]</sup> 28:14 66:14 74:16 82:11 87:19 152:9 154:15 <b>viewed</b> <sup>[1]</sup> 72:24 <b>vindicate</b> <sup>[1]</sup> 91:14 <b>violate</b> <sup>[1]</sup> 72:4
---	--	---	--	---



## Official

<p><b>violated</b> <sup>[1]</sup> 9:23</p> <p><b>violates</b> <sup>[3]</sup> 12:3 121:15 159:1</p> <p><b>violating</b> <sup>[5]</sup> 11:10 12:9 43:13 47:25 74:20</p> <p><b>violation</b> <sup>[1]</sup> 141:7</p> <p><b>violence</b> <sup>[1]</sup> 13:12</p> <p><b>Virginia</b> <sup>[3]</sup> 107:5,21 151:12</p> <p><b>visa</b> <sup>[2]</sup> 57:7 154:8</p> <p><b>vision</b> <sup>[2]</sup> 162:4,7</p> <p><b>visitor</b> <sup>[1]</sup> 57:6</p> <p><b>visitors</b> <sup>[1]</sup> 4:18</p> <p><b>voting</b> <sup>[2]</sup> 15:1 109:22</p> <p><b>vulnerable</b> <sup>[2]</sup> 98:9 154:4</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> <sup>[2]</sup> 13:17 45:6</p> <p><b>wanted</b> <sup>[3]</sup> 61:1 120:7 146:21</p> <p><b>wants</b> <sup>[3]</sup> 76:20 110:15 119:25</p> <p><b>War</b> <sup>[3]</sup> 78:16 105:22 152:1</p> <p><b>warranted</b> <sup>[1]</sup> 126:12</p> <p><b>Warth</b> <sup>[5]</sup> 16:13 18:5 72:20 73:14 74:11</p> <p><b>WASHINGTON</b> <sup>[6]</sup> 1:14, 24 2:8,13 22:13 53:16</p> <p><b>water</b> <sup>[2]</sup> 15:10,11</p> <p><b>watermark</b> <sup>[1]</sup> 135:13</p> <p><b>way</b> <sup>[36]</sup> 14:25 26:11 31:9, 23 35:14 44:22 47:12 51:1 63:14 85:25 86:19 94:10 95:12 96:1,16 98:7 103:23 110:1,4 113:15 119:5 130:12,14 132:6,14 135:14 138:19 140:25 147:20,23 148:14,18 151:3 157:14 159:14, 20</p> <p><b>ways</b> <sup>[10]</sup> 56:25 81:24 83:1, 15 91:18 92:18 95:22 100:24 108:21 119:16</p> <p><b>weak</b> <sup>[1]</sup> 160:25</p> <p><b>weapon</b> <sup>[2]</sup> 27:20,23</p> <p><b>week</b> <sup>[2]</sup> 62:9,12</p> <p><b>weeks</b> <sup>[2]</sup> 108:12 151:23</p> <p><b>weird</b> <sup>[1]</sup> 94:22</p> <p><b>welcome</b> <sup>[4]</sup> 6:5 79:17 120:15 126:25</p> <p><b>West</b> <sup>[3]</sup> 107:4,21 151:12</p> <p><b>Western</b> <sup>[2]</sup> 22:13 53:16</p> <p><b>whatever</b> <sup>[2]</sup> 98:11 148:14</p> <p><b>whatsoever</b> <sup>[1]</sup> 10:16</p> <p><b>whenever</b> <sup>[1]</sup> 37:4</p> <p><b>whereas</b> <sup>[1]</sup> 155:21</p> <p><b>Whereupon</b> <sup>[1]</sup> 162:17</p> <p><b>whether</b> <sup>[34]</sup> 17:11,12 19:15 33:25 47:10 51:12 57:7 60:21 68:2 72:24 76:15 96:17,19,23 97:3 99:18 101:24 111:4 113:17,18 114:13 121:11,14,23 123:1 124:6, 13 128:15 130:12 139:13 145:16 146:15 150:18 159:</p>	<p>21</p> <p><b>Whitford</b> <sup>[4]</sup> 14:25 16:14 18:8 72:22</p> <p><b>who's</b> <sup>[2]</sup> 14:11 47:9</p> <p><b>whole</b> <sup>[9]</sup> 14:17,18 19:19 26:18 38:25 90:5,10 122:5 136:13</p> <p><b>wholly</b> <sup>[1]</sup> 142:22</p> <p><b>whom</b> <sup>[3]</sup> 50:5 70:9 156:19</p> <p><b>widespread</b> <sup>[1]</sup> 60:9</p> <p><b>Wilkins</b> <sup>[1]</sup> 160:24</p> <p><b>Wilkinson</b> <sup>[1]</sup> 64:23</p> <p><b>will</b> <sup>[32]</sup> 4:3 28:19 36:24,25 37:6 46:21 52:10,10 53:6 56:21 57:21 87:25 90:18 93:17 99:11 102:5 103:23, 25 105:9 110:12 114:15 116:6 120:19 126:20 134:20 140:17 143:14 144:3,13, 20 150:13 159:24</p> <p><b>willing</b> <sup>[1]</sup> 35:10</p> <p><b>win</b> <sup>[7]</sup> 5:18,19 48:12 49:2, 9 51:16 66:16</p> <p><b>winning</b> <sup>[2]</sup> 47:9 144:3</p> <p><b>wins</b> <sup>[1]</sup> 109:23</p> <p><b>Winter</b> <sup>[10]</sup> 111:15,18 124:16,24 125:2 127:18 136:16 140:6 145:12,18</p> <p><b>Winters</b> <sup>[1]</sup> 124:22</p> <p><b>Wirtz</b> <sup>[1]</sup> 37:20</p> <p><b>wise</b> <sup>[1]</sup> 27:1</p> <p><b>wished</b> <sup>[1]</sup> 94:1</p> <p><b>wishes</b> <sup>[1]</sup> 161:7</p> <p><b>withdraw</b> <sup>[1]</sup> 100:17</p> <p><b>within</b> <sup>[6]</sup> 33:19 60:22 61:15 108:23 117:16 136:15</p> <p><b>without</b> <sup>[23]</sup> 22:20 31:6 38:18 41:13 51:11 69:8 78:19 83:4 94:5 95:20 96:8,20 103:11 104:13,20,20 112:21 113:10 114:12 133:20 143:23 144:24 145:20</p> <p><b>Witnesses</b> <sup>[1]</sup> 107:22</p> <p><b>woman</b> <sup>[1]</sup> 46:19</p> <p><b>won</b> <sup>[2]</sup> 95:8 107:15</p> <p><b>wonder</b> <sup>[1]</sup> 71:22</p> <p><b>wondering</b> <sup>[1]</sup> 19:15</p> <p><b>Wong</b> <sup>[6]</sup> 11:13 14:3 106:6, 13 123:16 160:22</p> <p><b>words</b> <sup>[3]</sup> 7:8 24:18 30:24</p> <p><b>work</b> <sup>[8]</sup> 56:9 57:11 58:8 84:5 90:10,14 106:7 120:9</p> <p><b>workability</b> <sup>[7]</sup> 97:7 105:25 111:17,20,25 142:14,20</p> <p><b>workable</b> <sup>[14]</sup> 80:4 81:25 87:11 91:19 96:2 100:9 109:16 111:14 119:22 120:18,21 142:3,5 143:7</p> <p><b>workers</b> <sup>[1]</sup> 104:19</p> <p><b>world</b> <sup>[7]</sup> 26:18 28:4 70:24 72:8 135:22 155:22 156:16</p> <p><b>worried</b> <sup>[4]</sup> 41:12 140:16, 23,24</p>	<p><b>worry</b> <sup>[3]</sup> 55:21 76:23 147:16</p> <p><b>worrying</b> <sup>[1]</sup> 112:21</p> <p><b>wrinkle</b> <sup>[1]</sup> 130:21</p> <p><b>writings</b> <sup>[1]</sup> 80:6</p> <p><b>wrote</b> <sup>[1]</sup> 78:16</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> <sup>[6]</sup> 77:25 102:20 112:20 150:13,19 151:25</p> <p><b>years</b> <sup>[13]</sup> 13:23 35:15,24 36:5,19,19 53:23 79:6 87:18 114:19 123:17 145:3 152:18</p> <p><b>yields</b> <sup>[1]</sup> 40:5</p> <p><b>York</b> <sup>[4]</sup> 61:3 109:22 110:6 139:19</p> <p><b>Young</b> <sup>[1]</sup> 108:10</p> <p><b>yourself</b> <sup>[1]</sup> 28:6</p>
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