

IN THE SUPREME COURT OF THE UNITED STATES

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 MICHAEL J. BOST, ET AL.,)
4 Petitioners,)
5 v.) No. 24-568
6 ILLINOIS STATE BOARD OF ELECTIONS,)
7 ET AL.,)
8 Respondents.)
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Washington, D.C.
Wednesday, October 8, 2025

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:04 a.m.

1 APPEARANCES:

2 PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on
3 behalf of the Petitioners.

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5 Department of Justice, Washington, D.C.; for the
6 United States, as amicus curiae, supporting the
7 Petitioners.

8 JANE E. NOTZ, Solicitor General, Chicago, Illinois; on
9 behalf of the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	MICHAEL TALENT, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	56
9	ORAL ARGUMENT OF:	
10	JANE E. NOTZ, ESQ.	
11	On behalf of the Respondents	75
12	REBUTTAL ARGUMENT OF:	
13	PAUL D. CLEMENT, ESQ.	
14	On behalf of the Petitioners	115
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-568,
5 Bost versus the Illinois State Board of
6 Elections.

7 Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT
9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Mr. Chief Justice, and
11 may it please the Court:

12 Illinois counts mail-in ballots
13 received up to two weeks after Election Day.
14 Petitioners contend that under controlling
15 federal law, that is two weeks too long. As a
16 result, if the Petitioners' merits theory is
17 credited, which it must be for evaluating
18 standing, then Illinois is counting unlawful
19 ballots. Those unlawful ballots could cost
20 Congressman Bost the election or at least
21 reduce his margin of victory, and he has to pay
22 his campaign staff for two extra weeks.

23 All of that means that Congressman
24 Bost has standing three times over. The court
25 below lost sight of that straightforward

1 conclusion only by misreading this Court's
2 precedents and misperceiving candidates, who
3 pour untold time and treasure into the election
4 and are the ones whose names are actually on
5 the ballot as mere bystanders with a
6 generalized grievance.

7 That decision is not only wrong but
8 dangerous. It needlessly injects federal
9 courts into the role of political
10 prognosticators. It risks denying judicial
11 access to minor party candidates, and it
12 shuffles election disputes into the closest
13 races and the worst possible context: Election
14 disputes after the election, where federal
15 courts are in the uncomfortable position of
16 having to pick the political winners.

17 There is a better way, and it simply
18 requires acknowledging that candidates have a
19 unique, concrete, and particularized interest
20 in the rules of the electoral road, especially
21 those that address which ballots are going to
22 be counted and when. At a bare minimum, a
23 longer campaign is a more expensive campaign,
24 and that classic pocketbook injury is
25 sufficient to give Congressman Bost standing.

1 There is no need to make the standing inquiry
2 here any more complicated than that.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Mr. Clement, how do
5 we know that Petitioner has -- will suffer a
6 risk of competitive harm?

7 MR. CLEMENT: So, in -- in some
8 respects, we know that from the very fact that
9 he is a candidate in the election. I mean,
10 obviously, he's put that in a declaration as
11 well, but I think this is something where every
12 candidate cares very deeply and uniquely about
13 the outcome of the -- the -- the election but
14 also their vote tally and the margin of victory
15 or the margin of defeat.

16 And this idea that, like, all a
17 candidate can care about is the ultimate win or
18 loss, I just don't think that maps on to the
19 way elections actually operate or people think
20 about them.

21 JUSTICE THOMAS: Well, I think you
22 could argue that he will actually benefit from
23 the additional time.

24 MR. CLEMENT: So, I mean, I --

25 JUSTICE THOMAS: Well, someone has to

1 benefit or there wouldn't be a risk of -- of
2 competitive harm.

3 MR. CLEMENT: I suppose anytime the
4 government changes the rules for any highly
5 regulated activity, it may be that some of the
6 people that are affected by the new regulations
7 are actually going to be better off. They may
8 be better off -- better able to sort of incur
9 the costs or they may be better able to take
10 advantage of that additional time.

11 Here, Congressman Bost has alleged
12 that, no, this is going to hurt his sort of
13 margin for victory. But I also think, as a
14 general matter, I'm not even sure you need to
15 get to that level, which is to say, if this
16 were just a simply regulated industry, if the
17 SEC promulgated new rules for registered
18 broker-dealers, you'd expect the
19 broker-dealers, some of them, to come and sue
20 about those new rules. I think you wouldn't be
21 that worried that broker-dealers were coming in
22 and actually suing for rules that helped them.
23 The market sort of shifts --

24 JUSTICE SOTOMAYOR: That's the point,
25 though --

1 MR. CLEMENT: -- takes care of that.

2 JUSTICE SOTOMAYOR: -- that this
3 regulation is not of a broker-dealer. It's not
4 of a candidate. It's of voters. So it's not a
5 direct regulation.

6 But going back to your margin of
7 victory, in the case where we decided that a
8 campaign ad had standing, in that case, there
9 were affidavits that said these ads increased
10 the amount of revenue we receive or can
11 decrease it. So there was an affidavit that
12 said that.

13 Here, you don't even say that the
14 margin of error is going to affect -- you don't
15 have anybody saying anything close to that.
16 You're just saying the margin of error could
17 have a reflection on me. That's a generalized
18 statement with no support.

19 MR. CLEMENT: So two things, Your
20 Honor. First, just on the first point, if the
21 new broker-dealer regulations from the SEC
22 regulated the terms at which the customers
23 could deal with the broker-dealers, I think the
24 broker-dealers would still have standing to
25 challenge that.

1 JUSTICE SOTOMAYOR: But this is not
2 how they're dealing with the candidates.
3 They're still voting for the candidate.
4 They're not being deprived of their right to
5 get their voters to vote.

6 MR. CLEMENT: Well, but --

7 JUSTICE SOTOMAYOR: So I'm not sure --
8 the analogy doesn't work for me, Mr. Clement.

9 MR. CLEMENT: Well, I --

10 JUSTICE SOTOMAYOR: But let's go back
11 to my point that I'm not sure that someone who
12 says to the court below that his "injury" is
13 not based on the risk of losing the election.
14 Seems to me that he's forgone that argument
15 here, as he did below, and that the question
16 becomes whether this margin of victory issue is
17 enough.

18 MR. CLEMENT: So two things, Your
19 Honor. One, as we point out in our reply
20 brief -- and I would urge you to read the
21 Seventh Circuit briefing on this -- the
22 statement that my friend on the other side says
23 is where we waived this electoral outcome
24 argument was simply responding to their
25 argument that pocketbook injuries don't matter

1 if, in fact, you don't -- can't show that there
2 is this electoral outcome injury.

3 And what we said in response and what
4 we say in our reply brief here and remains
5 correct and waives nothing is that's actually
6 not right. The pocketbook injury is separate
7 from any electoral outcome. So there's no
8 waiver of any of this.

9 There was a declaration here. The
10 declaration does say that we risk -- that
11 Congressman Bost risks losing the election, but
12 it also then says but it's certainly going to
13 affect the margin of victory. And he also
14 alleges in his declaration that that margin of
15 victory is not just an abstract injury, but
16 that translates rather directly into
17 reputational injuries and financial
18 industries -- injuries.

19 And I think that corresponds with the
20 general sort of common sense of the matter. If
21 you ask -- if you ask candidates would you like
22 to win this election by 60 percent of the vote
23 or 51 percent of the vote, I think a hundred
24 percent of the candidates are going to say I'll
25 take the 60 percent.

1 JUSTICE JACKSON: Yeah, but that's not
2 how we ordinarily think about harm, and harm is
3 what you need in order to establish standing,
4 not preference for 60 percent or 59 percent or
5 whatever.

6 And so what I guess I'm a little
7 concerned about in your argument is the idea
8 that a candidate who wins and who wins by some
9 margin is harmed by a regulation of this nature
10 because of the potential decrease in his margin
11 of victory. I don't understand the harm that
12 necessarily comes from that.

13 MR. CLEMENT: So, if you start with
14 the premise that every candidate would prefer
15 to win 60 percent rather than 51 percent, and
16 then you challenge --

17 JUSTICE JACKSON: But why -- why do we
18 start with preference? That's what I -- I'm
19 saying that the -- the relevant metric for
20 standing is harm. So, yes, fine, you -- you
21 might be disappointed, but that's usually not
22 what we look at when we're determining whether
23 or not someone is actually harmed.

24 MR. CLEMENT: Well, I would say that
25 if a law improperly denies somebody their

1 preference, that is a harm. But, in all
2 events, I don't think you need to make it that
3 abstract. If the abstraction is what's
4 bothering you, he alleges in his declaration
5 that that is accompanied by reputational and
6 financial harms as well.

7 JUSTICE JACKSON: Isn't that
8 speculative? I mean, couldn't we also
9 speculate that a candidate who decreases the
10 margin of error or, excuse me, the margin of
11 victory, who wins by a smaller amount, people
12 would actually want to contribute more the next
13 time, as opposed to them not having
14 contributors?

15 I -- I don't necessarily see a
16 financial harm that comes from a smaller margin
17 of victory.

18 MR. CLEMENT: Well, on this -- I mean,
19 you know, I think this is the kind of issue
20 that at this stage of the case, where you have
21 a complaint and you have a declaration, you
22 haven't had any evidence, if -- if the other
23 side wants to come in and put on an expert that
24 says: Actually, Congressman Bost, who's run
25 successfully in Illinois, like, a dozen times,

1 doesn't know what he's talking about --

2 JUSTICE JACKSON: No, no. I'm just
3 saying --

4 MR. CLEMENT: -- and actually --

5 JUSTICE JACKSON: -- I'm saying it's
6 your burden. You're the Petitioner, and you
7 have to establish standing. You're the
8 plaintiff, so you have to show that you have a
9 non-speculative risk of harm here. And I just
10 don't understand how saying: Well, I would
11 prefer to win by more actually counts,
12 especially when you're winning by -- you know,
13 more or less is sort of speculative in this
14 context.

15 MR. CLEMENT: Well, with respect,
16 I think, if you're going to allow people to
17 challenge election rules at the beginning of
18 the election, which I actually think is
19 something that the standing doctrine should not
20 get in the way of because it avoids having
21 these disputes litigated at the worst possible
22 times, you're going to have to allow some room
23 for a little bit of speculation, I mean,
24 because the election hasn't happened yet.

25 But the way that this Court's cases

1 have generally dealt with that is you have to
2 show that there's a substantial risk of
3 something.

4 And, here, there's no question in my
5 mind that at this stage of the litigation,
6 between the allegations and the declarations,
7 he's done enough for the motion to dismiss
8 stage.

9 Again, you know, we all know that
10 standing law has to be sort of addressed at the
11 level of substantiality for every stage of the
12 litigation. And so, if they want to continue
13 to contest this, I suppose, at the summary
14 judgment stage, we could have competing experts
15 on some of this stuff.

16 But, frankly, I think that is a pretty
17 good advertisement for a broader, simpler rule
18 that simply says candidates have standing to
19 challenge the rules that govern the election.

20 JUSTICE KAVANAUGH: If it were --

21 JUSTICE BARRETT: Mr. Clement --

22 JUSTICE KAVANAUGH: -- if it were
23 after the election, how would that play out?

24 MR. CLEMENT: So I think --

25 JUSTICE KAVANAUGH: In other words,

1 if the litigation over issues like this were
2 funneled to post-election?

3 MR. CLEMENT: Well, I mean, there's --
4 there's a couple ways to think about that.

5 One analytical way to think about that
6 is I would say no matter what the margin of
7 victory is, if there are ballots that, under
8 Congressman Bost's theory, were illegally
9 counted --

10 JUSTICE KAVANAUGH: Yeah.

11 MR. CLEMENT: -- I think he would have
12 standing to bring the challenge.

13 Now the courts might want to apply in
14 the post-election context a --

15 JUSTICE KAVANAUGH: What do you --
16 what's the remedy? Do -- does the Court
17 there -- and this is -- I think blends into
18 your concern about post-election, but I just
19 want to play it out.

20 So let's say the losing candidate
21 sues, challenging this rule, and let's say
22 the Court finds it -- post-election, finds it
23 illegal. Do you -- and we faced this in 2020
24 in some of our many cases pre-election.

25 What -- what's the remedy?

1 MR. CLEMENT: Well, I -- I --

2 JUSTICE KAVANAUGH: Do you throw out
3 those votes? Because, if you do, some of those
4 voters might say: Oh, I actually would have
5 voted earlier if I had known.

6 I'm just trying to figure out how that
7 would play out.

8 MR. CLEMENT: So I think that would be
9 the right remedy. And I think that's kind of a
10 nightmare scenario for exactly the reason that
11 you point out.

12 And I don't think there's any reason
13 for the standing rules to basically say that
14 you have to decide all these issues in those
15 nightmare scenarios or even in the very closest
16 districts.

17 And the point I was trying to make is,
18 like, if you think about this case proceeding
19 past the pleading standard, the idea that you
20 would have, like, competing experts come in and
21 say: You know, Congressman Bost is kind of a
22 lousy candidate, so this one's going to be
23 pretty close.

24 And that would be my expert because
25 I'd have to show that the election is close in

1 order to have standing.

2 And then they'd come in and their
3 expert would say: No, Congressman Bost is the
4 best candidate there's ever been. He's going
5 to win this thing in a landslide.

6 JUSTICE KAGAN: But would you agree to
7 a rule like this one, which sort of makes this
8 question of do you have to show you would win
9 or do you have to show margin of victory a
10 little bit irrelevant, that what you have to
11 show -- you have to show something. It's not
12 enough to just walk in and say: Hi, I'm a
13 candidate and I'm suing.

14 But what you have to show is some kind
15 of substantial risk or substantial likelihood,
16 whatever the phrase may be from our standing
17 doctrine, that the new rule puts you at an
18 electoral disadvantage relative to the old rule
19 so that, you know, if the new rule has -- says
20 more mail-in ballots, then you just have to
21 plead that that's a kind of rule that puts
22 you to an electoral disadvantage and say
23 something, not a lot, but something to suggest
24 that that's right.

25 MR. CLEMENT: So I could live with

1 that rule. I don't know that it's the ideal
2 rule. I mean, I'm not coming in here asking
3 for a broad rule because I'd like to win this
4 case in the hardest possible way.

5 I'm asking for that because I actually
6 see advantages to it, namely, that even under
7 your view, you still, in theory, would have
8 at the summary judgment stage this, like,
9 debate in Article III courts about whether
10 late-arriving ballots help Republican
11 candidates or Democratic candidates.

12 And that makes me sufficiently
13 uncomfortable that I actually would prefer a
14 rule that says: No, Congressman Bost is coming
15 in and he's saying there are going to be
16 unlawful votes cast and they'll be ballots with
17 his name on it in his election.

18 That's enough. We're done. None of
19 these --

20 JUSTICE KAGAN: I mean, your rule
21 really does just take out the injury
22 requirement entirely. It just says you should
23 assume that if a candidate is there before the
24 court, the candidate has good reasons for being
25 there before the court.

1 And for the most part, I think we have
2 rejected that view of standing. I mean, for
3 example, we said there's no such thing as
4 doctor standing just a couple of years ago.

5 So too here it seems quite
6 inconsistent with our standing law to say: Oh,
7 we just have, like, an automatic rule for
8 candidate standing.

9 On the other hand, I'm sort of in
10 sympathy with the view that this bar should not
11 be all that high and that the bar shouldn't
12 have to -- like, you shouldn't have to say:
13 Here are the polls that show I could lose as a
14 result of this rule.

15 It's like all you have to do is come
16 in and say why it is that the rule puts you at
17 a disadvantage relative to what's come before.

18 MR. CLEMENT: So, Justice Kagan, I
19 don't think that much separates us, and so I
20 don't want to sort of die on any particular
21 hill here.

22 The reason that I'm hedging a little
23 bit, I'll say two things in response. One is I
24 don't think it's we're saying get rid of the
25 standing -- I mean the injury in fact

1 requirement. We're just saying unlawful
2 ballots being counted in your election is an
3 injury in fact. Is it a little abstract?
4 Sure. But it is an injury in fact, and then
5 everything else follows.

6 And then you don't even have to
7 get into the -- what I still think is an
8 uncomfortable prospect of competing expert
9 affidavits where one party says that, actually,
10 late -- late-breaking votes can actually be
11 good for Congressman Bost because people like
12 candidates with a B in their name --

13 JUSTICE GORSUCH: Well --

14 MR. CLEMENT: -- or something, and
15 then the other side says, no, they're actually
16 good for the Republicans.

17 JUSTICE GORSUCH: -- Mr. Clement,
18 though, if you could just answer whether you
19 could satisfy Justice Kagan's standard, I --
20 I -- I'd be grateful and whether you -- and it
21 doesn't require a competitive -- as I
22 understand the question, it doesn't require a
23 competitive disadvantage. It just says:
24 Compared to the law, what I understand the law
25 to have been, I am at a disadvantage.

1 MR. CLEMENT: Yes, we can satisfy
2 that.

3 JUSTICE GORSUCH: Would -- would --
4 can you spin that out?

5 MR. CLEMENT: Sure. I mean, we can
6 satisfy it in sort of two ways.

7 I mean, one, Congressman Bost, in his
8 declaration, has made clear that he thinks that
9 this rule will hurt his margin for victory.

10 And then the second thing he said, and
11 he maybe said this, frankly, more clearly, is
12 because he's -- you know, we have kind of the
13 unique benefit here of a candidate who was a
14 candidate under the old rules, and he has said
15 that this change in the rules has increased the
16 cost of running his campaign.

17 JUSTICE GORSUCH: Yeah.

18 MR. CLEMENT: So, on both those
19 two kind of classic injuries, I think the
20 declarations here are sufficient. Obviously,
21 we're just at the motion to dismiss stage, so
22 there --

23 JUSTICE GORSUCH: Thank you.

24 MR. CLEMENT: -- there could be more,
25 but I think they are satisfied.

1 JUSTICE BARRETT: Mr. Clement, when
2 you say these two classic injuries, how does --
3 how, if at all, does TransUnion affect this?

4 Do you have to show that there is some
5 sort of history and tradition that this is the
6 kind of injury, either the vote margin or the
7 risk of electoral loss that counts as a
8 cognizable injury?

9 MR. CLEMENT: So two thoughts on that.

10 I mean, one, if we have to, then I
11 think the pocketbook injury just makes it easy
12 because that's classic, go back, Blackacre,
13 White -- you know, whatever --

14 JUSTICE BARRETT: Yeah.

15 MR. CLEMENT: -- that's the classic
16 old-school injury.

17 The second thing I would say, though,
18 is I do think there's some artificiality in
19 some of these contexts to force everything to
20 be run through the pocketbook injury.

21 I mean, the -- Congressman Bost is
22 injured in the pocketbook, but that's because
23 he's a candidate in an election with a ballot
24 with his name on it. And I think, if you go
25 back to the relevant history here, I don't know

1 if 133 years counts, but I'd take you back to
2 McPherson v. Blacker, and that was a case
3 brought by presidential electors challenging
4 Michigan's change of the rules for the
5 presidential electors. Michigan went from
6 statewide to a district-by-district way of
7 having presidential electors.

8 This Court thought a lot about
9 justiciability in that opinion, didn't bat an
10 eye about standing. Of course, the
11 presidential electors are the right people to
12 challenge a change in the rules for
13 presidential electors.

14 And then I would also take the Court
15 back, not ancient history, but Crawford against
16 Indiana in the voter ID case. There was a
17 question about the standing of the Indiana
18 Democratic Party.

19 Justice Stevens, in Footnote 7,
20 dispatches it in two sentences. Of course, the
21 Indiana Democratic Party has challenge -- has
22 standing to challenge a voter ID law that they
23 think is going to be bad for Democratic
24 candidates.

25 And Justice Souter agreed with that,

1 so there's at least five votes for the
2 proposition that -- and his footnote was just
3 as short.

4 It's just common sense that in these
5 contexts, the candidates who are the ones, as
6 Judge Oldham said in his opinion, they take
7 time off from the elections, their names are on
8 the ballot.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 You've answered a lot of
12 hypotheticals. I just want to make sure I
13 understand what your opening submission is. It
14 is: Hi, I'm a candidate. These rules apply to
15 me, and I'm suing. Right?

16 MR. CLEMENT: And if that's not enough
17 for you --

18 CHIEF JUSTICE ROBERTS: No, but
19 that -- that is the opening pitch, right? That
20 he's the one that's affected by the -- well,
21 that's the question, I guess, whether is it --
22 is it enough to simply say, hi, I'm the
23 candidate and I'm suing?

24 MR. CLEMENT: So I want you to believe
25 that it is. If it's not enough, I have my two

1 fallback arguments, but I think the reason it
2 is enough is because, in every one of these
3 cases -- I mean, you can run it one step
4 further, which is what I tried to do with
5 Justice Kagan, and you could say it's not just
6 that I'm a candidate; I'm a candidate here and
7 I have an injury in fact, which is I think
8 there are going to be unlawful ballots counted
9 in my campaign.

10 CHIEF JUSTICE ROBERTS: Okay.

11 Justice Thomas?

12 JUSTICE THOMAS: When we had Lujan
13 some years ago, this Footnote 7 made a similar
14 point. Are you making the same point, that a
15 procedural right doesn't have the same
16 requirement for immediacy or redressability?

17 MR. CLEMENT: I think it's a related
18 point. I don't know that I would draw quite
19 the same sort of procedural/substantive
20 distinction.

21 JUSTICE THOMAS: Mm-hmm.

22 MR. CLEMENT: To me, you know, I sort
23 of think -- and, obviously, Justice Sotomayor
24 and I had a colloquy about the limits of
25 this --

1 JUSTICE THOMAS: Yeah.

2 MR. CLEMENT: -- but I sort of think
3 there is this kind of common-sense principle
4 that if you are in a highly regulated
5 enterprise and the government changes the
6 regulations and you think it hurts you, like,
7 you go in and you say -- like, even if it's
8 something that seems trivial to an outsider, if
9 a broker-dealer now has to do everything on
10 blue paper and it's going to change the way
11 they operate, I think they ought to have
12 standing to say it's arbitrary and capricious
13 for you to say everything has to be on blue
14 paper.

15 So I -- and I don't know why there
16 would be a special rule that makes it more
17 difficult in the electoral context. I mean,
18 you certainly don't have to worry about
19 generalized grievances here when there are only
20 going to be a handful of candidates in a
21 particular election.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: You have several
24 arguments, and I don't want to get into most of
25 them right now. But, on the issue of

1 competitive injury, it's not clear to me why
2 you couldn't have done a lot better than you
3 did in your complaint and alleged what I think
4 a lot of people believe to be true, which is
5 that loosening the rules for counting votes
6 like this generally hurts Republican
7 candidates, generally helps Democratic
8 candidates. Why didn't you pursue that? Why
9 didn't you try to do something with that?

10 MR. CLEMENT: So, Justice Alito, in
11 some respects, the answer is, when you plead a
12 case in district court, you don't expect to be
13 in the Supreme Court defending every pleading
14 that was sufficient under standing. And we
15 certainly thought when we pled this pleading
16 pocketbook injury, competitive injury, albeit
17 briefly, and that we're the candidate, why is
18 this so difficult, and relying on cases like
19 McPherson, we didn't really think we would have
20 to sort of plead more. And even when the
21 complaint was challenged, we sort of thought
22 that we'd done enough.

23 And then all I can say in response to
24 that is, of course, we could say that and we
25 said it all in our briefs in front of this

1 Court. So we could have said more, but, boy,
2 that's a weird inquiry to then think it's going
3 to stick around in the case.

4 That's the thing. It's like, if you
5 think about this only as, well, this is just
6 what you need to plead and then we're done with
7 standing forever, these cases, you know, seem
8 cleaner. But -- but that issue sticks -- stays
9 in the case.

10 JUSTICE ALITO: Okay. I -- I
11 understand. One final question, and I -- I
12 should have researched this myself beforehand.
13 When was this rule, new rule, enacted? And do
14 we know what the partisan breakdown in -- on
15 voting for the rule was? And could we take
16 judicial notice of that?

17 MR. CLEMENT: So I -- this rule was
18 2005. And I don't think there is robust data
19 that would allow you to -- you could take
20 judicial notice of this.

21 JUSTICE ALITO: Okay. All right.
22 Thank you.

23 MR. CLEMENT: And, you know, it's --
24 we said in the reply brief, like, you know, my
25 friend tries to make something of one data

1 point for one county in one election. We don't
2 even know what the kind of comparator is. So
3 I --

4 JUSTICE ALITO: Got you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

7 JUSTICE SOTOMAYOR: Mr. Clement, we
8 now have a whole body of law developing on the
9 fact that we're not going to give relief to
10 more than one plaintiff at a time so that the
11 relief should be tailored to the needs of the
12 plaintiff at issue.

13 Assume that you have a district -- and
14 there are some like this, maybe not your
15 clients', but that goes to the failure of
16 pleading in this case -- that there are some
17 districts where the Republican registered
18 parties are 98 percent, the Democrats are 2.

19 Your rule would say that that
20 candidate who has not just an insubstantial but
21 a statistically almost impossible chance of
22 winning -- of losing, that that candidate can
23 come in and seek a change of that rule.
24 Correct? That's your position?

25 MR. CLEMENT: That's correct. And, I

1 mean --

2 JUSTICE SOTOMAYOR: All right.

3 MR. CLEMENT: -- and I think --

4 JUSTICE SOTOMAYOR: Doesn't the
5 absurdity of that -- generally, we have said
6 that suits should be brought by people for whom
7 the harm is concrete in some meaningful way.
8 Losing, let's say, by 1 percent more or less
9 can't be meaningful on any scale.

10 So, as Justice Alito said, there are a
11 lot more things you could have said. You could
12 have even said, instead of saying I risk injury
13 if untimely and illegal ballots cause me to
14 lose my election, you didn't even say I risk
15 substantial injury, which is our standard,
16 substantial harm. So you didn't even track our
17 legal language. You didn't put in any facts,
18 as Justice Alito pointed out, about what the
19 turnout is, what your district is like, nothing
20 from which any plausible argument could be
21 drawn.

22 I'm also not sure what the battle of
23 the experts is about. This is on pleadings.
24 We have to give your expert, absent some
25 facially -- facial deficiency, take the

1 allegations in your favor. So I -- I'm -- I'm
2 not sure where this battle of the experts is
3 going to come in.

4 MR. CLEMENT: So I'll take the last
5 part first. The battle of the expert comes at
6 summary judgment. Just because we have
7 sufficient allegations doesn't mean we're done.
8 And all of the things that you talked about --

9 JUSTICE SOTOMAYOR: But this was
10 dismissed on a motion to dismiss, no?

11 MR. CLEMENT: This case is. But, if
12 we win because we allege all those details
13 about Republicans and Democrats and voting
14 patterns, that doesn't go away in the case.
15 That's still there at the summary judgment
16 stage, and that's where the battle of the
17 experts are.

18 But, as to the 2 percent voter, I'm
19 going to stand with the 2 percent candidate
20 and, you know, I stand in locked shoulder with
21 the Socialist Workers Party and however many
22 percentage votes John Anderson got, and they
23 were able to --

24 JUSTICE SOTOMAYOR: Those are
25 interesting bedfellows you're taking.

1 MR. CLEMENT: But I'm delighted to
2 have those bedfellows because that's the way we
3 think about elections in this country. We
4 don't think just give me the bottom-line
5 result, give me the binary result, winner or
6 loser.

7 JUSTICE SOTOMAYOR: Well, the problem
8 is, Mr. -- Mr. Clement, that our -- that our
9 case law and our standing law requires some
10 form of substantial harm that can be
11 articulated and shown. And what you're talking
12 about is a desire to implement the law with a
13 generalized grievance because it doesn't really
14 particularly harm you.

15 MR. CLEMENT: So, for the Socialist
16 Worker Parties, the difference between
17 2 percent and 2.5 percent might be not the
18 difference between getting some, like, on the
19 ballot the next time or federal, it might be
20 the difference between getting taken seriously
21 and, in the next election, getting to 3 percent
22 or 5 percent. I mean, you know, eventually, we
23 got rid of the Whig party. It takes a long
24 time, but those small differences do make a
25 difference.

1 And then the second thing I would say
2 is, just as a general matter, this is not a
3 generalized grievance. This is almost the
4 opposite. Like, when you have voters here with
5 standing, like, in a case like Lance, you worry
6 about generalized grievance because everybody's
7 a voter just like everybody's a taxpayer.

8 But, when you're talking about whether
9 candidates have standing, like, you've already
10 limited the universe to, like, a handful of
11 people. And so just like you limit the
12 universe, there aren't that many broker-dealers
13 in the world. So you're not going to flood the
14 courthouse with those suits, and you've already
15 limited this to people that have a much more
16 particularized interest in the issues.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: So I'm curious,
19 Mr. Clement -- and I am going to actually limit
20 this to Democrats and Republicans to -- for
21 purposes of this question.

22 I mean, in a lot of these suits, it's
23 the parties that sue, right? The RNC sues or
24 the DNC sues. And, as Justice Alito suggested,
25 it's usually fairly predictable what rules the

1 RNC is going to sue on and what rules the DNC
2 is going to sue on, and both have their
3 favorite rules and their disfavored rules.

4 And -- and, usually, we don't think
5 about standing in that area. But I'm wondering
6 whether you think, like, I would think that the
7 same standard should basically apply, that
8 whether we think about it or not, what we're
9 really asking is, is this the kind of rule that
10 is likely to put your candidate at a
11 disadvantage relative to where he was before?

12 And, I mean, do you think that there's
13 some separate inquiry for individuals, for
14 candidates, as opposed to parties when they sue
15 for these rules?

16 MR. CLEMENT: No. I mean, if
17 anything, I think the candidates are more
18 obvious, but I don't think it's a radically
19 different proposition.

20 But here's what I do want to say.
21 Usually, in these cases, when the party sues,
22 they often couple themselves with a candidate
23 or voters.

24 And one of the things that I think is
25 particularly problematic is -- you said it

1 yourself -- like, there are certain of these
2 rules that the Democrats don't like and certain
3 of these rules --

4 JUSTICE KAGAN: No question.

5 MR. CLEMENT: -- that the Republicans
6 don't like.

7 Well, the rules that the Democrats
8 don't like tend to operate negatively directly
9 on voters. And so, when the -- when the
10 Democrats come in, they can marry up with a
11 couple of voters and the Court can say the
12 voters have standing, so we're done, we don't
13 even have to think about the party or the
14 candidate.

15 The Republicans in a lot of these
16 cases are challenging rules that allow you to
17 keep counting ballots forever, keep the voting
18 place open forever.

19 JUSTICE KAGAN: Right. But that
20 doesn't prevent the Republicans from getting
21 into court and making their claim. It never
22 has. You know, the RNC challenges most of
23 these kinds of rules and, as far as I know,
24 nobody has ever kicked it out of court on
25 standing grounds.

1 MR. CLEMENT: I don't know if that's
2 true or not, but it's a lot harder for the
3 Republicans in some of these contexts because
4 they can't just marry themselves up with a
5 voter.

6 The other thing I would say is we
7 actually don't have that much history on any of
8 this because, until relatively recently,
9 everybody kind of just thought it was the most
10 obvious thing in the world that Crawford, I
11 mean, like I said, Justice Stevens spent two
12 sentences saying, of course, the Indiana
13 Democrats don't like voter ID laws, so they
14 have standing.

15 But it wasn't like a here's the injury
16 in fact, here's redressability, here's
17 traceability. And I -- I think, you know,
18 in -- in -- in a spate of recent cases, some
19 have been post-election, some have been
20 pre-election, like, all of a sudden standing's
21 gotten really complicated and created a circuit
22 split.

23 I'm here to urge let's return to
24 simplicity, let's return to McPherson v.
25 Blacker, you're a candidate, you're a party, of

1 course, you have standing.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 JUSTICE GORSUCH: I want to turn to
6 your colloquy with Justice Sotomayor for a
7 minute because it does seem to me that whatever
8 is required, it can't be a showing that you
9 would have won or lost the election as the
10 candidate. You pointed to Illinois Socialist
11 Workers case. Boy, they had zero chance of
12 winning the election, zero chance. So that
13 can't be the injury that's required, it seems
14 to me.

15 Likewise, FEC versus Davis, funding,
16 how much can your opponent get versus how much
17 you can spend, no allegation that the outcome
18 would have been different or number of margin
19 of victory would have been different. We
20 didn't require anything like that in those
21 kinds of cases.

22 Thoughts?

23 MR. CLEMENT: I mean, I -- I -- I
24 certainly agree that you didn't require that.
25 I think there are multiple reasons for doing

1 that. I think, ultimately, it comes down to
2 the -- just the common-sense intuition that, of
3 course, the candidate has the -- the standing
4 to challenge the rules that provide the
5 framework for the election.

6 I mean, I'll add to your list of cases
7 that in, you know, the -- the -- the Ted Cruz
8 for Senate case, this Court went out of its way
9 to say he probably could have brought this as a
10 prospective challenge. He didn't have to wait
11 until after the election and the money was,
12 like, \$10,000 short.

13 So this Court, I think, has always
14 said, like, this is pretty straightforward.
15 And I think there's another good practical
16 reason just to put on the table, which is it's
17 almost a little cruel to make candidates make
18 allegations that are going to be used against
19 them in the campaign.

20 And if Congressman Bost has to come in
21 and say, you know, there's a material change,
22 I'm going to lose this for this election.

23 JUSTICE GORSUCH: And, similarly, like
24 government contracting cases I -- I think of
25 and, as you point out, administrative cases, a

1 procedural -- you -- you change the rules in
2 government contracting, I don't know whether
3 that fellow's going to win or lose the bid, but
4 you're changing the rules of the game on him.
5 We find standing in those cases all the time.

6 MR. CLEMENT: You do find standing in
7 those cases all the time. If you're sort of
8 treated poorly by the -- the rules of the road,
9 you don't have to show that you'll win the
10 contract. You don't have to show that you'll
11 get into the law school of your choice.

12 And I'd add again one more to that,
13 which is, you know, we have all these cases
14 where voters have standing. Nobody says that
15 the voter has to come in and say: I'm going to
16 cast the decisive ballot.

17 JUSTICE GORSUCH: Right. On the other
18 hand, let -- let's suppose that the change in
19 regulation was, instead of ballots on white
20 paper, they have to be on cream paper. Then
21 it's harder to see an injury, right? So what
22 do we do about that?

23 MR. CLEMENT: So my recommendation to
24 you on that is to realize: Ah, that's a
25 theoretical problem, but we're not going going

1 to have to lose a lot of sleep over that
2 because --

3 JUSTICE GORSUCH: Because nobody will
4 ever bring those cases?

5 MR. CLEMENT: -- nobody will bring
6 that challenge.

7 JUSTICE GORSUCH: Yeah.

8 MR. CLEMENT: And I think, if you
9 go -- I don't need to tell you that if you go
10 through the federal regulations, there are lots
11 of silly provisions in there that have never
12 been challenged, but somebody had standing.

13 JUSTICE GORSUCH: Well, I -- I -- I'd
14 be happy to go through those with you someday,
15 Mr. Clement, but thank you.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?

19 JUSTICE KAVANAUGH: I think your
20 answers and colloquy with the Chief Justice and
21 Justice Gorsuch reveal that you're considering
22 this case in the bucket that the candidates are
23 objects, in essence, of the regulation, is that
24 right? And, thus, we have said repeatedly that
25 when you're the object of the regulation, you

1 don't need to say much more than you're the
2 object of the regulation.

3 And -- and we've said in cases like
4 the fuel producers last year, the -- the
5 schools in Pierce, the broadcasting network at
6 CBS, none of those were actually directly
7 regulated, but we still said, in essence, they
8 were the object.

9 Is that -- is that the analogy that
10 you're using in your answer to the Chief?

11 MR. CLEMENT: It is, except I might
12 add one word just to avoid a quibble --

13 JUSTICE KAVANAUGH: Okay.

14 MR. CLEMENT: -- which is I think
15 they're the objects of the regulatory regime.
16 Like, I think there's a fair argument and I
17 think Justice Sotomayor sort of baked it into
18 one of her questions that the object of the
19 ballot deadline might be thought of as being
20 the voter who gets the extra 14 days and not
21 the candidate. So it's not that the candidate
22 is the direct object --

23 JUSTICE KAVANAUGH: Is not the only
24 object.

25 MR. CLEMENT: Not the only. But

1 probably, you know, you --

2 JUSTICE KAVANAUGH: Yeah. It's like
3 the cars --

4 MR. CLEMENT: Look, if it helps me to
5 say they're the direct object, I'll say it.
6 But I do kind of think it's a --

7 JUSTICE KAVANAUGH: They're an -- an
8 object.

9 JUSTICE KAGAN: It might help you with
10 some people and not with other people.

11 MR. CLEMENT: Yeah.

12 (Laughter.)

13 JUSTICE KAVANAUGH: An -- an object.

14 MR. CLEMENT: But -- but -- but
15 where -- but what I -- like, I'm making --

16 JUSTICE KAVANAUGH: There's the fuel
17 producers and the car makers last year --

18 MR. CLEMENT: Yeah. No, I --

19 JUSTICE KAVANAUGH: -- in Diamond or
20 the --

21 MR. CLEMENT: Like, obviously, but --
22 but I'm making a slightly different point,
23 which is I think they are the object of the
24 whole regulatory regime.

25 JUSTICE KAVANAUGH: Yeah.

1 MR. CLEMENT: And they regulate some
2 other people incidentally, but it's all really
3 about the electoral process and who's going to
4 win the election and what their vote total is
5 going to be. And, again, like, Illinois
6 doesn't just certify a winner. They -- after
7 the 14 days, they certify the vote total. So
8 they care about those late-arriving ballots.
9 We care about those late-arriving ballots. We
10 think they're unlawful ballots. Right there, I
11 think that's enough of an injury.

12 JUSTICE KAVANAUGH: Then your --
13 your -- made a strong case that we need to
14 decide this connected to the real world of how
15 elections actually operate and not some
16 theoretical way. So, on your monetary injury
17 point, can you kind of play out how a campaign
18 operates and -- and how the monetary injury's
19 going to come to pass in a situation with this
20 particular regulation?

21 MR. CLEMENT: Sure. And what I would
22 say is, in some ways, it's -- you know, you
23 don't have to have any political
24 sophistication. It's just, if the -- if -- if
25 the campaign is going to be two weeks longer,

1 you've got to keep the campaign staff together
2 for two weeks longer, and that's going to be
3 more expensive.

4 And, you know, I think it's telling
5 that what -- what you'd be paying for in using
6 your volunteer resources for in that last two
7 weeks is the -- the -- the -- the -- the ballot
8 monitoring and the rest and the poll watching
9 as they count these late-arriving ballots, and,
10 you know, no less an authority than the League
11 of Women Voters at page 20 of their amicus
12 briefs says it would be political malpractice
13 not to do this.

14 So they're real expenses, and they're
15 essentially completely reasonable to use, kind
16 of like the formulation in Clapper. But one
17 other kind of practical point I want to make is
18 the distortion of this kind of thing starts
19 much earlier because, you -- you know, you
20 don't just say: Well, oh, it didn't occur to
21 me that there would be late-arriving ballots,
22 so now, in the last two weeks, I have to spend
23 some money.

24 If the election ends at Election Day,
25 you're going to spend your money throughout the

1 process differently. You're going to spend
2 less money at the margins, you're going to
3 spend less money directed at likely mail-in
4 voters. You're going to spend a little more
5 money at the margin on your voters who you
6 think are actually going to go to the polls.

7 I mean, the analogy I was thinking of
8 is, like, you know, if you have, like, a mile
9 race instead of a half-mile race, that doesn't
10 just change the last half mile. It changes the
11 way you run the first half mile.

12 So these election regulations, all of
13 them, have -- you know, this one has, like, the
14 most direct effect possible because it's like
15 an election that runs an extra two weeks is
16 going to cost more than one that ends earlier.

17 But I think almost all of these end up
18 having pocketbook injuries. And you could
19 trace it all to the pocketbook injury, but I
20 think it's a little artificial because the
21 reason the candidate has a pocketbook injury is
22 because he's a candidate or she's a candidate.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: So you make a lot of
2 practical arguments that I think have force.
3 What do you think -- what effect, if any, do
4 you think that adopting your theory would have
5 in other areas of standing law?

6 Because we've been pretty careful
7 about procedural injury. You know, an
8 excellent lawyer who argued TransUnion
9 convinced us to do that.

10 What do you think this -- you're
11 asking for something, as Justice -- Justice
12 Kagan points out, we don't fashion bespoke
13 rules for standing in particular contexts. So
14 what spillover effects would -- would we be
15 worried about in writing an opinion in your
16 favor if you win?

17 MR. CLEMENT: So I don't think we're
18 asking for a bespoke rule. I think, you know,
19 obviously, the parties fight about this in the
20 brief, but I think what we're asking for is the
21 application of the ordinary standing rules that
22 would be second nature in the context of a
23 regulatory -- a regulated industry to just
24 apply in the electoral context in the same way.

25 And, you know, you don't -- like, when

1 a company is, like, in a particular area of
2 regulation and the regulations change, you
3 know, you don't even think hard that, of
4 course, they have a basis to challenge the --
5 the change of the rules that they're going to
6 be operating under.

7 JUSTICE BARRETT: It's mostly because
8 of money. I mean, in Diamond Alternative, it
9 was too.

10 MR. CLEMENT: Yeah, but --

11 JUSTICE BARRETT: It was pocketbook.

12 MR. CLEMENT: But -- but, even if it's
13 just massive inconvenience and it, like,
14 doesn't translate, I mean, you know, I think,
15 like -- and you can imagine a situation where,
16 like, the SEC forces broker-dealers to shut
17 their doors at 4:00. It might -- you know,
18 like, it's anybody's guess whether they're
19 going to save more in wages than they're going
20 to lose for the people that they send home
21 early, than they're going to make in terms of
22 additional customers that come in in the last
23 hour of the day.

24 I don't think you need affidavits on
25 that. You'd say, look, we've been operating

1 our brokerage this way for a hundred years and
2 we close at 5. And now the heavy thumb of the
3 government's coming in and saying we have to
4 close at 4. I don't -- I'm sure you're right
5 that you could translate that into a pocketbook
6 injury, but I don't think you've ever had to.
7 And I don't think we're asking for anything
8 different here.

9 Now, like, if you're worried about
10 that, there are obviously off-ramps to rule
11 more narrowly, but I do think the one that is
12 going to be the simplest rule in the long run
13 that is going to eliminate the circuit split
14 between the Eighth Circuit and the Seventh
15 Circuit is to say candidates have standing to
16 challenge the rules of the electoral road. It
17 really is kind of that simple.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: So your broadest
21 theory, the one that you just articulated, does
22 really seem to be motivated by the idea that
23 the candidates are the object in the way that
24 Justice Kavanaugh explored with you. And I
25 guess -- I guess I wonder if -- if the response

1 or the reply to that is really, when you're
2 talking about an election, it's not the
3 candidates who are the object; it is the
4 voters, that really what an election is is the
5 opportunity for the people to decide who are
6 going to govern them.

7 And so, in that context, one could
8 argue that the voters would be able to make the
9 same kind of grievance that you say is
10 particular to the candidate here, right? You
11 say your grievance is that unlawful ballots are
12 being filed in this election.

13 And I wonder why that's particularized
14 to the candidate when, on my theory, the
15 election is really about the voters, and voters
16 could make that same argument, and why
17 shouldn't they be -- be able to? And if they
18 could, haven't we undermined your idea that
19 this is particularized to candidates in the way
20 that you're articulating?

21 MR. CLEMENT: So what I would say is
22 there are already, under your current doctrine,
23 lots of ways for voters to sue. And I -- you
24 know, I don't actually know -- if -- if -- if
25 Illinois decides we're going to reverse this

1 and we're going to close all the polls early
2 and we're going to get rid of mail-in voting, I
3 think any voter who comes in with a declaration
4 that says I want to vote by mail, I voted for
5 mail --

6 JUSTICE JACKSON: Right. But that's a
7 different hypothetical. What I'd like to do is
8 focus on your standing argument, which we've
9 said you have to have a particularized
10 grievance, not a generalized grievance.

11 And so my question is, why isn't
12 unlawful ballots are being counted in this
13 election a generalized grievance?

14 MR. CLEMENT: Well, here -- can I try
15 to answer it this way --

16 JUSTICE JACKSON: Yeah.

17 MR. CLEMENT: -- which is to say just
18 because a lot of people share a concern doesn't
19 mean somebody whose ox is specifically gored by
20 that concern is raising a generalized
21 grievance.

22 JUSTICE JACKSON: But -- but --

23 MR. CLEMENT: Like, right? Like, I --

24 JUSTICE JACKSON: -- but isn't the
25 function of identifying who is specifically

1 gored the harm requirement? Isn't the function
2 of making a candidate say, with all of these
3 extra unlawful ballots counted, I'm at risk of
4 losing, that's what gives him the particular
5 harm that then I would argue would entitle him
6 to bring a suit, as opposed to the generalized
7 grievance of there's an unlawful thing
8 happening with respect to this activity?

9 I mean, that's why it makes sense.

10 Your second theory to me makes perfect sense.
11 I'm not saying he wins. I'm not looking at the
12 record. I'm just saying, in terms of a theory
13 of why a candidate could say I'm harmed, it's
14 like the sort of Clapper idea that there's a
15 risk of injury to me in a real way and I'm
16 showing you where that is. To me, that doesn't
17 exist in the first theory, in the world where
18 you're just saying there's unlawful conduct
19 going on. That does not identify or
20 particularize him.

21 Can I -- can I direct you to the third
22 theory, the pocketbook theory? In a context,
23 assuming that the injury of a potential
24 election defeat, which I see as a real injury,
25 assuming that's not imminent, I don't

1 understand why additional polling costs isn't a
2 self-inflicted harm.

3 So, if you take Justice Sotomayor's
4 example where you have a candidate who has a
5 98 percent chance of winning based on
6 everything we know, based on all the polls,
7 whatever else, if he decides that he's going to
8 spend money for the two extra weeks of, you
9 know, counting, I don't understand why that's
10 not on him. There's really no risk of harm to
11 him to have that counting happen. And we've
12 talked about self-inflicted injuries in
13 Clapper, for example, as not being sufficient.

14 MR. CLEMENT: So I'd like to just
15 briefly talk about the first point and then get
16 to the --

17 JUSTICE JACKSON: Yes.

18 MR. CLEMENT: -- third theory.

19 Just on the first point, I -- I -- I
20 still say, you know, harm, injury, yes, we
21 think we've identified a specific injury
22 that -- that visits on the candidate
23 specifically. The fact that everybody cares
24 about the votes being accurate, I mean, I'd
25 like to think everybody cares about the

1 environment, but we let the person who's
2 directly downstream from the pollution -- we
3 say they're the ones that have standing to
4 bring the suit even though everybody might
5 care, everybody might be offended at some level
6 by the pollution that's in violation of the
7 law.

8 It's the same here. Everybody would
9 like the elections to be conducted lawfully and
10 in compliance with federal law, including the
11 voters, but the injury is visited more
12 specifically on the candidate. They're the
13 ones that --

14 JUSTICE JACKSON: Even though the
15 voter says my vote is diluted by all of these
16 other unlawful votes, right? Don't they have
17 a -- the same kind of injury you're talking
18 about --

19 MR. CLEMENT: Well --

20 JUSTICE JACKSON: -- by the extra
21 votes that come in?

22 MR. CLEMENT: -- I mean, ironically,
23 the -- the Petitioners here tried to make a
24 voting standing argument below as well, and
25 that was rejected. And we didn't --

1 JUSTICE JACKSON: Right. And so,
2 similarly --

3 MR. CLEMENT: -- we didn't --

4 JUSTICE JACKSON: -- shouldn't this
5 one be rejected on that same basis?

6 MR. CLEMENT: No, no. And what I
7 would say is the -- the candidate's different.
8 His or her name's on the ballot. Right there,
9 that just tells you there's something just
10 obviously different about it.

11 But then the other thing is, you know,
12 I think the reason that in a case like Lance
13 you're worried about voter standing is because
14 there are almost as many voters as taxpayers.

15 JUSTICE JACKSON: Can you speak to the
16 pocketbook injury?

17 MR. CLEMENT: The second?

18 JUSTICE JACKSON: Yes.

19 MR. CLEMENT: Yes, I'd be delighted
20 to. So, on the pocketbook injury, I do think
21 it is a mistake to think that -- and this is
22 really -- you know, Judge Scudder's dissent
23 handled this issue quite well, I think, and I
24 think it really gets down to the issue of is
25 this like Clapper.

1 And when it's -- when -- when the
2 injury itself isn't speculative, but the
3 government is going to do something and it is
4 going to happen, late-arriving ballots will be
5 counted, at that point, the only remaining
6 question, is the expenditure of resources
7 reasonable?

8 JUSTICE JACKSON: Yes. But the harm
9 in Clapper wasn't imminent because the rule
10 wouldn't necessarily apply. Here, the harm
11 isn't imminent because, even though the rule
12 will apply, he may not lose as a result.
13 There's still not a risk of him losing even
14 though this rule applies to him. They're
15 indistinguishable in that way.

16 MR. CLEMENT: With respect, I think
17 the reason the injury was so speculative in
18 Clapper is because the rule would never apply
19 to the Petitioners, the U.S. citizens. It was
20 a moral certainty it wasn't going to apply
21 directly to them. And then it was entirely
22 speculative as to whether it would implicate
23 their foreign clients at all.

24 Here, the -- what -- what is prompting
25 us to spend money is going to happen. Illinois

1 will count late-arriving ballots.

2 JUSTICE JACKSON: But, if you're a
3 98 percent candidate, what difference does that
4 make? I mean, it only harms you if you could
5 lose as a result of the new ballots being
6 counted, right?

7 MR. CLEMENT: So, with respect, as a
8 practical matter, the 98 percent candidate's
9 not going to bring the case, but the 70 percent
10 candidate, the 60 percent candidate, the
11 56 percent candidate, or even the 43 percent
12 candidate might bring the case, and those
13 margins of difference make a difference.

14 And we -- the whole election system
15 operates on the premise that we care about more
16 than the binary final outcome.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Talent.

21 ORAL ARGUMENT OF MICHAEL TALENT
22 FOR THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING THE PETITIONERS

24 MR. TALENT: Mr. Chief Justice, and
25 may it please the Court:

1 Candidates have standing to challenge
2 laws governing the -- the validity of ballots
3 cast in their election so long as there is a
4 risk that the ballots at issue could affect the
5 election's outcome for two but only two
6 reasons.

7 First, the risk of loss suffices
8 because candidates are not mere bystanders to
9 ballot-counting laws. Those laws determine
10 which candidate wins his race. They are aimed
11 at candidates' concrete interest in winning
12 office. And so the question "what's it to you"
13 answers itself.

14 Second, candidates have standing based
15 on reasonable costs they incur to mitigate the
16 risk posed by ballot-counting rules. This
17 narrow rule resolves this case and comports
18 with basic tenets of election law by ensuring
19 that the validity of ballot-counting rules can
20 be determined well in -- well in advance of an
21 election.

22 Furthermore, it does not require
23 courts to prognosticate about whether a race
24 will be close or effectively limit standing to
25 major parties.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Would there be a
3 difference if a race is a tight race? Because
4 it seems as though the problem we're having
5 here is that there's an argument that there was
6 no risk that this candidate would lose.

7 MR. TALENT: Justice Thomas, we do not
8 think it would matter if it's a tight race. If
9 a candidate -- in our -- in this scenario, the
10 candidate is a direct object of the -- of the
11 ballot-counting rules.

12 And what this Court's precedents teach
13 is that when a candidate is a direct object, a
14 small probability of risk is deemed to be -- is
15 deemed to be a substantial risk.

16 And the example we use in our brief is
17 the example of a Russian roulette hypothetical.
18 Even if the risk that the round in the chamber
19 is live, the very fact that in that context,
20 that the direct object of the -- of the game is
21 being forced to engage in that game means he
22 has a concrete interest, means he has standing
23 to -- to prevent that risk from happening.

24 CHIEF JUSTICE ROBERTS: Well, but when
25 you put it that way, it seems to me that you

1 are kind of buying into the what risk does the
2 candidate really have. I mean, in Russian
3 roulette, you've got a one out of six or
4 whatever it is risk.

5 But, if you're looking at risk and
6 it's, you know, 85 percent margin of victory,
7 I mean, is that your argument?

8 MR. TALENT: Our argument is that
9 the -- the substantial risk test in this
10 Court's precedents goes to the question of
11 whether a risk is speculative or not.

12 So, in the context of ballot-counting
13 laws, we know that the law is going to be
14 applied to the candidate. We know that the
15 law's purpose is -- is to determine which
16 candidate wins, so it's targeting the
17 candidate's concrete interest in winning --
18 winning his election. And so, therefore, there
19 is an actual risk that those ballots could sway
20 the outcome of the election, and a candidate --

21 CHIEF JUSTICE ROBERTS: Well, what if
22 there -- I mean, what if there isn't such a
23 risk? You know, he's won 10 elections in a row
24 by 85 percent. Maybe you can even tell from
25 the turnout before the mail -- mail -- mailing

1 in. I mean, does that make a difference under
2 your theory?

3 MR. TALENT: It would not make a
4 difference, Chief Justice Roberts. The -- we
5 pull this test, it -- it -- it comes from
6 this -- this Court's pre-enforcement standing
7 context.

8 In that context, this Court has deemed
9 a risk to be substantial even if there is
10 something like a credible threat of enforcement
11 or if the threat of enforcement is not
12 imaginary or wholly speculative. It's -- the
13 Court's never put a probability threshold on
14 the -- on -- on standing.

15 CHIEF JUSTICE ROBERTS: Yeah, but I
16 would say in my hypothetical none of those
17 adjectives fit it. There isn't a credible
18 threat that the guy is going to lose.

19 MR. TALENT: But it's still -- I mean,
20 it's part of the -- part of the issue is past
21 results don't guarantee future outcomes. So,
22 even in the Russian roulette hypothetical, even
23 if it's a one-in-a-hundred chance, the fact of
24 the matter is a person is forced to engage in
25 that gamble, and the concrete interest in the

1 "what's it to you" answer is avoiding the
2 gamble that implicates that person's concrete
3 risk.

4 A candidate is in a similar situation
5 because ex ante this -- ballot-counting rules
6 force them to take the risk that those ballots
7 will sway the outcome of their election.

8 JUSTICE KAVANAUGH: Can you -- I'm
9 sorry, are you done?

10 Can you address from the government's
11 perspective, if there isn't standing for these
12 kinds of challenges to ballot receipt deadlines
13 for U.S. House elections in their standing
14 pre-election and they're all forced
15 post-election, what it looks like next November
16 or December?

17 MR. TALENT: I mean, I think that it's
18 opening -- it's -- it's every -- it's all the
19 concerns Mr. Clement raised, that there's
20 going -- these elect -- these -- if there needs
21 to be a likelihood or if the test is the
22 ballots actually did make a difference, it's
23 going to force a lot of -- it's going to force
24 this litigation into the post-election context.
25 It's going to require -- and it's going to

1 force it into the post-election context for
2 hotly contested cases and will have -- I think
3 the practical effect of ensuring that only
4 major parties would be able to sue to
5 vindicate -- to protect their interests against
6 unlawfully counted ballots.

7 JUSTICE KAVANAUGH: And if the
8 deadlines were found to be unlawful, what --
9 what -- have you thought ahead to what the
10 remedy would be in a post-election context if
11 the deadlines were found to be unlawful, how
12 that would play out?

13 Because, if we're not thinking ahead
14 to that, we're going to walk into something.

15 MR. TALENT: I mean, I -- I can't --
16 I can't imagine it would be easy or good to
17 determine.

18 All the things I think you -- you --
19 you talked about with -- with Petitioner,
20 questions about remedy, questions about whether
21 voters are going to be disenfranchised because
22 they relied on -- on rules of the road, it's
23 simply a Gord- -- you know, it's a -- it's a
24 thicket that the Court doesn't need to get into
25 if it recognizes that candidates are direct

1 objects of these regulations.

2 And what this Court's precedents
3 indicate is that when a candidate is -- or when
4 a plaintiff is a direct object of the
5 regulation and the harm immediately flows from
6 the challenge being conduct -- being
7 challenged, then that is a substantial risk of
8 harm.

9 JUSTICE KAVANAUGH: I might quibble
10 with "the direct" and just "an" -- "an
11 object" --

12 MR. TALENT: "An direct," yes, yes.

13 JUSTICE KAVANAUGH: -- or analogous to
14 an object just so we're --

15 MR. TALENT: The indefinite article,
16 yes.

17 JUSTICE KAVANAUGH: Yeah.

18 JUSTICE SOTOMAYOR: Counsel, what --
19 you -- your entire presentation, as did Mr.
20 Clement, takes out our regular articulation of
21 standing.

22 In Meese versus Keene, we said a
23 candidate has standing when the defendant's
24 conduct would substantially harm his chances
25 for re-election.

1 We -- in Clapper, we said substantial
2 risk of harm.

3 In Murthy, we said substantial risk
4 that in the near future the plaintiff will
5 suffer an injury.

6 Both of you are sort of ignoring that
7 language because you're saying -- you're almost
8 arguing in a circle. It's always a substantial
9 risk because it might happen, which is --
10 plausibility is never what we've accepted.

11 Maybe Justice Kagan is right.

12 Let's talk about what the electoral
13 disadvantage is here.

14 What do you see if we use something
15 like -- that accounts for the cases that
16 Mr. Clement argued, like whether or not I will
17 have to pay a greater amount or accept a lesser
18 amount. That's electoral disadvantage.
19 Someone else might pay less and I might pay
20 more.

21 But where is the electoral
22 disadvantage here?

23 MR. TALENT: So --

24 JUSTICE SOTOMAYOR: Meaning all the
25 voters, Democrat and Republicans, get the same

1 chance to have their vote counted. So it's not
2 a harm to either side that the people voting
3 for them are going to be equally treated.

4 MR. TALENT: So I just want to push
5 back on -- on the premise. We're not saying
6 just because a risk may happen there's a
7 substantial risk. The plaintiff has to be a
8 direct object, and the harm has to immediately
9 flow from --

10 JUSTICE SOTOMAYOR: That's where we go
11 back to is it -- is he or she the direct
12 object.

13 MR. TALENT: So --

14 JUSTICE SOTOMAYOR: We're going to
15 have to now change our standing to say indirect
16 objects or people who are part of the scheme
17 in any way.

18 But, even in Diamond, the fuel
19 manufacturers were not part of the regulatory
20 scheme.

21 MR. TALENT: But, in -- in the
22 electoral context, and I think the electoral
23 context is -- and especially rules governing
24 the validity of ballots is unique in this sense
25 because the purpose of those rules -- almost

1 the only purpose for a rule saying this ballot
2 counts but this ballot doesn't is to -- is to
3 determine which candidate wins the election.

4 So it is targeting the candidate's
5 concrete interest.

6 JUSTICE SOTOMAYOR: So can you answer
7 the question, what's the electoral disadvantage
8 in this case --

9 MR. TALENT: Well --

10 JUSTICE SOTOMAYOR: -- given the
11 allegations of the complaint? Let's deal with
12 that.

13 MR. TALENT: The --

14 JUSTICE SOTOMAYOR: What can you show
15 me in the complaint that articulates electoral
16 disadvantage?

17 MR. TALENT: So the -- our rule
18 doesn't turn on electoral disadvantage partly
19 because vote counting rules ex ante, it -- it's
20 impossible to know which way they will break or
21 often it's unknown which way they will break.
22 So this --

23 JUSTICE SOTOMAYOR: Justice Alito said
24 you could. You could have a long history of --
25 you have proof since 2005 of where these things

1 have broken, and you could have alleged that.

2 MR. TALENT: Our rule is not -- our
3 rule doesn't exclude standing based on
4 electoral advantage.

5 I -- I think one of the things our
6 rule gets at, to the extent electoral advantage
7 feeds into our rule, part of the gamble -- so
8 two answers.

9 Part of the gamble or -- or part of
10 the reason it's a concrete particularized harm
11 to candidates is, if they don't expend
12 resources to mitigate the cost of -- of this
13 substantial risk, then they are getting a
14 potential electoral disadvantage.

15 JUSTICE SOTOMAYOR: Thank you,
16 counsel.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: How would candidates
21 for very minor parties fare under your rule
22 where they have no chance whatsoever of
23 winning?

24 MR. TALENT: Because they're direct
25 objects and the harm immediately flows to them,

1 they would have standing.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 Justice Kagan?

6 JUSTICE KAGAN: Mr. Talent, I have a
7 sense that this whole suit is a little bit of
8 a -- it's, like, in search of a problem. I
9 mean, in fact, we all the time allow suits
10 pre-election to challenge election laws. I --
11 I -- I mean, there's hardly an election rule
12 that gets passed in any battleground state that
13 isn't challenged. It's usually by a party.

14 And we've, you know, I think, always
15 allowed those kinds of suits because the party
16 has suggested in plain English, and it's not so
17 hard to do, why it is that the new rule will
18 harm them, why it is that, you know, they'll --
19 they would prefer the old rules in terms of
20 their electoral status.

21 So why isn't the same thing true here?
22 I mean, I guess I just sort of think, like,
23 what's the problem here?

24 MR. TALENT: The -- the problem here
25 and what our rule gets to is the fact that

1 candidates are forced to gamble that these
2 ballots are going to affect the outcome of
3 their -- their election.

4 JUSTICE KAGAN: I don't think we've
5 ever actually asked the RNC or the DNC to do
6 anything like that. What we've asked the --
7 the parties to do is to -- and this is why you
8 don't get these cases thrown out on standing
9 grounds, because there are perfectly easy ways
10 for a party to say why a new rule is going to
11 harm them in the electoral game.

12 You know, when -- when Sunday
13 ballot -- when Sunday voting is shut down, the
14 Democratic Party rolls into court and says this
15 is going to harm us and the suit goes forward,
16 and similarly for the Republican side on
17 different kinds of rules.

18 I mean, I feel as though you're --
19 we're asking to create a whole new set of rules
20 when everything has been proceeding just fine,
21 that everybody who actually is harmed or is
22 likely going to be harmed by a new election
23 rule has had the chance to sue.

24 MR. TALENT: So we -- we -- our rule
25 addresses a situation where a candidate is

1 coming in and ex ante they're being forced to
2 gamble on whether or not a --

3 JUSTICE KAGAN: All of these suits are
4 ex ante. I mean, every time we have an
5 election, I mean, every battleground state, we
6 get -- we get to see how litigation plays out,
7 mostly brought by the RNC and the DNC prior to
8 the election, asserting that a new rule is
9 invalid for some reason or other, and those
10 suits are never tossed because of standing
11 because -- because there are easy assertions to
12 make in a complaint about why a new rule is --
13 is going to hurt you in the electoral process.

14 MR. TALENT: I think a candidate can
15 make those allegations here with a -- with a --
16 based on the fact that these -- these rules
17 govern the counting of votes in their election.
18 They're forced to gamble that these rules are
19 not going to affect the outcome.

20 So whether -- you know, as to the
21 competitive injury, just to kind of make an
22 example, you know, even though it may benefit
23 them, they still have to put on the line their
24 concrete risk at winning because it may not
25 benefit them.

1 It's different for the RNC and DNC
2 because I don't think they as neatly fit into
3 the paradigm of -- of being a direct object of
4 these rules. It's really the candidates --

5 JUSTICE KAGAN: Thank you.

6 MR. TALENT: -- because these rules
7 are targeted at their electoral success.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: Just are you not
12 seeing a candidate different from a party, I
13 gather?

14 MR. TALENT: I think we are. A
15 candidate is definitely a direct object of a --
16 of a rule governing --

17 JUSTICE KAVANAUGH: Well --

18 MR. TALENT: -- the counting of
19 ballots in an election.

20 JUSTICE KAVANAUGH: -- I guess you're
21 saying then, if a party has standing, a
22 fortiori, a candidate should have standing for
23 similar reasons. Is that what you're saying in
24 response to Justice Kagan?

25 MR. TALENT: What I'm saying in

1 response to Justice Kagan is that the reason we
2 need the narrow rule we have now is to deal
3 with candidates who want to challenge these
4 rules. In this case, the RNC, for whatever
5 reason, did not become a party plaintiff.

6 But the reason a candidate has
7 standing in this context is because they are a
8 direct object and because they're forced to
9 take that gamble. Whether the RNC comes in and
10 alleges competitive standing, that may be a
11 separate theory of standing in that case, but
12 in this case, the reason really is the
13 candidate is being forced to gamble that the
14 rule is not going to cost him his election.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 Justice Jackson?

19 JUSTICE JACKSON: I guess I don't
20 understand the gamble/harm theory at all. I
21 mean, in every election, there -- candidates --
22 candidates voluntarily put themselves up for
23 election and there's a risk that they will win
24 or lose, right?

25 MR. TALENT: Yes. But the -- the

1 gamble here is that an allegedly unlawful law
2 is going to put at -- put at risk their odds of
3 winning or losing. They have -- they have --

4 JUSTICE JACKSON: So why don't they
5 have to establish as a part of that harm that
6 they actually have a risk of winning or losing
7 or losing as a result of this? That's the part
8 that's -- your rule sort of said so long as
9 there's a risk that the extra ballots could
10 make a difference. And I said, aha, okay,
11 that's exactly what we're saying needs to be
12 established. And yet you're saying, no, it
13 doesn't if you're a direct object of the
14 regulation.

15 So you've sort of taken away the very
16 thing that you're now saying is necessary to
17 show harm in this situation.

18 MR. TALENT: Well, so two answers to
19 that. On a -- the doctrinal answer is that
20 when a -- when a plaintiff is a direct object
21 of the harm, like -- like in the
22 pre-enforcement cases, this Court hasn't
23 required them to meet some type of strict
24 probability threshold. It's a fact that there
25 is a threat of harm that immediately flows from

1 the challenged conduct.

2 In the context of elections, ex ante
3 it may not be possible to know how a rule will
4 affect the outcome of -- of the race. So our
5 rule -- this harm -- our rule harmonizes or
6 comports with the basic tenet of election law,
7 which is you don't want to --

8 JUSTICE JACKSON: And so we don't have
9 to -- we don't have to -- you're saying we
10 don't have to assess the realistic nature or
11 the plausibility of the threat?

12 MR. TALENT: I'm saying the fact there
13 are --

14 JUSTICE JACKSON: In any particular
15 candidate's situation, we don't have to care
16 that there really isn't a risk for the
17 98 percent candidate? We still just -- the
18 theory, the fact that there could be for some
19 candidate the ability to lose as a result of
20 this is enough to give the 98 percent
21 candidate --

22 MR. TALENT: It's the factor there's
23 that -- it's -- it's -- it's that Russian
24 roulette hypothetical, even if the bullet --

25 JUSTICE JACKSON: Got it. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Ms. Notz.

4 ORAL ARGUMENT OF JANE E. NOTZ
5 ON BEHALF OF THE RESPONDENTS

6 MS. NOTZ: Mr. Chief Justice, and may
7 it please the Court:

8 Rather than address the record the
9 parties developed below, Petitioners first
10 argue that candidates always have standing to
11 challenge the rules that govern their elections
12 because any election rule can cause a single
13 vote change in the final tally. Petitioners'
14 blanket candidate standing rule would cause
15 chaos for election officials while saddling
16 federal courts with resolving abstract policy
17 disputes. This Court should hold candidates to
18 the same standing requirements as every other
19 plaintiff.

20 And when those requirements are
21 applied to this record, Congressman Bost
22 doesn't come close to showing standing. His
23 invocation of the possibility of a -- of a
24 reduced margin of victory fails at the start.
25 As the United States put it in its brief,

1 Bost's desire to run up the score is not a
2 concrete injury that history and tradition
3 shows can support standing to sue.

4 And Petitioners' reliance on harms
5 that are legally cognizable fares no better.
6 Petitioners repeatedly told the Seventh Circuit
7 that Bost is not at risk of losing an election.
8 And this concession to one side, in his
9 declaration, Bost used the words "if" and "may"
10 without any explanation when referring to the
11 possibility of an election loss or reputational
12 harm. These conclusory and incomplete
13 statements describe the mere theoretical
14 possibility of injury. They are not evidence
15 of a substantial risk of harm.

16 Finally, as for Petitioners'
17 pocketbook theory, while the cost of
18 precautions may be an Article III injury, this
19 Court has recognized standing on this theory
20 only when the underlying harm sought to be
21 avoided is itself legally cognizable. Any
22 other rule would water down Article III's
23 requirements in cases alleging future injury.
24 And because Petitioners identified no legally
25 cognizable future harm, their efforts to

1 repackage that failed theory into a present
2 injury theory should be rejected.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: How close would an
5 election have to be in order for there to be a
6 sufficient substantial risk of harm?

7 MS. NOTZ: Sure. I -- I think it's
8 always -- it would always be easier in cases
9 where elections are close, but I would also
10 point out that this Court has never attached a
11 metric to substantial harm, and I don't think
12 the Court needs to do so in this case because I
13 think, under any metric, the assertions in this
14 declaration fail because they don't show any
15 risk of harm at all. They simply describe the
16 mere theoretical possibility of harm.

17 And this Court has said in cases like
18 Summers that standing is not an exercise in
19 what is merely conceivable. It requires a
20 showing of substantial risk of harm, and the
21 burden is on --

22 CHIEF JUSTICE ROBERTS: Well --

23 JUSTICE THOMAS: Yeah.

24 CHIEF JUSTICE ROBERTS: I'm sorry.
25 Look, the -- what you're sketching out for us

1 is a potential disaster. In other words,
2 you're saying, if the candidate's going to win
3 by 65 percent, no standing. But, if the
4 candidate, you know, hopes to win by a dozen
5 votes -- and there are places in the country
6 where that happens over and over again -- then
7 he has standing. But we're not going to know
8 that until we get very close to the election,
9 right?

10 And so it's going to be in the middle,
11 the most fraught time for the Court to get
12 involved in electoral politics. That's when
13 you say we should jump in, as opposed to the
14 more general, broad rule, Mr. Clement's
15 broadest rule, I guess, is, look, he's a
16 candidate. He's challenging a rule in the
17 election. You know, isn't -- isn't that
18 enough?

19 And one reason, as I say, we'll be
20 deciding that case then, you know, six months,
21 nine months, maybe two years before the
22 election, as opposed to the day after the votes
23 have been counted.

24 MS. NOTZ: So I -- I -- I don't think
25 that is an accurate description of our position

1 for a couple of reasons. I don't think that
2 there is a concern that standing will only be
3 available right before an election and only in
4 close cases, and that's for two reasons.

5 The first is that the evidence that
6 a -- a candidate plaintiff could use to show
7 standing isn't simply sort of limited to -- to
8 polling data. I think Meese versus Keene is
9 very helpful on this point.

10 In Meese versus Keene, the Court
11 described two types of information that the
12 candidate used to establish standing. One was
13 polling data. One was, you know, the expertise
14 of a political advisor. But I don't even think
15 that those things are necessary in a case like
16 this one, where we are dealing with a very
17 experienced and successful candidate.

18 Congressman Bost has been successfully
19 running for election for 30 years. At the
20 time --

21 JUSTICE GORSUCH: Well, I --

22 JUSTICE KAVANAUGH: You know, when
23 they -- when you run for election for 30 years
24 and win, sometimes, you know, you get -- you --
25 you act as if you have no risk of losing. And

1 you know what happens then? You lose. A
2 candidate who acts as if there's no risk of
3 losing often -- often loses.

4 I don't know -- and then you say rely
5 on polling data. Are polls always reliable?

6 MS. NOTZ: My point is simply that in
7 response to the Chief Justice's question, I
8 think that there's a lot of information
9 Congressman Bost could have brought to the
10 table. I don't think it's limited to polling
11 data.

12 JUSTICE KAVANAUGH: But -- okay. I --
13 respectfully, bring the table, okay, so we
14 bring to the table polling data that shows
15 you're down 20. Candidates that are down 20
16 sometimes make late -- late breaks for it and
17 win. Happens all the time.

18 And -- and -- and you said expertise
19 of campaign advisors. I respect them as much
20 as anyone, but they can be wrong and they don't
21 have perfect crystal balls either.

22 I don't understand a standing rule
23 that therefore depends on prognostication, is
24 my only point, and so you can respond to that
25 as you think best.

1 MS. NOTZ: Yeah. Thank you, Your
2 Honor.

3 I -- I think that in -- in any
4 standing case where a plaintiff is alleging
5 future injury, courts are required to make some
6 sort of prediction. Now, but, of course, the
7 prediction is a substantial risk of harm. It's
8 not certainty of harm.

9 And my point is merely that there is a
10 lot of information that was available to
11 Congressman Bost. He wouldn't even need to
12 turn to the type of information that the Court
13 credited in Meese versus Keene. He could have
14 relied on, you know, the eight election cycles
15 that he had participated --

16 CHIEF JUSTICE ROBERTS: Well, there
17 was a lot of --

18 JUSTICE GORSUCH: You --

19 CHIEF JUSTICE ROBERTS: -- there was a
20 lot of information for, you know, Tom Dewey and
21 Charles Evans Hughes, and, you know, they both
22 went to bed thinking they were -- were
23 President. And it just seems to me that the
24 ability to predict has -- is -- is not -- has
25 not been proven to be infallible.

1 And yet you're going to tell somebody
2 two weeks before the election, no, you -- you
3 won last time by whatever margin. By the way,
4 what margin are you looking for?

5 MS. NOTZ: Again --

6 CHIEF JUSTICE ROBERTS: Prior races he
7 won by what and then that's enough to get
8 standing?

9 MS. NOTZ: So, again, this Court has
10 not attached a metric. It uses the substantial
11 risk test across the mine-run of standing
12 cases. It has never attached a metric.

13 What it has said is that you look --
14 you know, the burden is on the plaintiff and
15 you look at the facts --

16 CHIEF JUSTICE ROBERTS: Yeah. No,
17 that's --

18 MS. NOTZ: -- in the record, which is
19 why I called the Court's attention to the
20 declaration.

21 CHIEF JUSTICE ROBERTS: No, that's
22 right, but it depends on what sort of things
23 you're talking about, the risk that the -- you
24 know, the car is going to explode or whatever.
25 But, if it's a risk of elections and all that

1 counts is the -- the number you get, it does
2 seem to me that it would fall upon the court to
3 give some idea.

4 MS. NOTZ: Again, I do think that when
5 he submitted this declaration, he had
6 successfully participated in eight election
7 cycles under the ballot receipt deadline.

8 JUSTICE GORSUCH: Ms. Notz, you -- you
9 keep going back --

10 MS. NOTZ: Yeah.

11 JUSTICE GORSUCH: -- to the facts of
12 this case and I appreciate -- appreciate why.

13 MS. NOTZ: Mm-hmm.

14 JUSTICE GORSUCH: I would too.

15 But I think what the Chief Justice is
16 getting at and what would help me, certainly,
17 is, okay, if a probability of -- of loss needs
18 to be shown to secure standing, what's that
19 probability? Is it 50 percent? Is it
20 60 percent?

21 You've resisted giving us a number,
22 and I -- I -- I would just ask you if you could
23 what you think that threshold should be. And
24 then, along the way, is there something
25 unseemly about federal courts making

1 prognostications about a candidate's chance of
2 success immediately before an election that
3 itself might influence the election? Thoughts?

4 MS. NOTZ: Yes. So -- so I -- I --
5 I hear maybe two -- two questions in there.
6 And I am resisting giving a number because that
7 is consistent with this Court's cases. The
8 Court has said --

9 JUSTICE GORSUCH: Okay. So no number.
10 You're not going to give us a number. How
11 about the second part of the question?

12 MS. NOTZ: Sure. And -- and maybe
13 could you repeat that for one to --

14 JUSTICE GORSUCH: Yeah. Is there
15 something unseemly about a federal court in the
16 middle of an election saying you don't have
17 standing because you're going to win or you do
18 have standing because you're going -- you might
19 lose and that that itself might influence the
20 electoral process?

21 MS. NOTZ: So, again, I don't -- I --
22 I -- I think it is common across all of the
23 Court's cases -- we're just asking for the same
24 election rule --

25 JUSTICE GORSUCH: And I'm talking

1 about in this context. And I'm sorry to
2 interrupt.

3 MS. NOTZ: Yeah.

4 JUSTICE GORSUCH: But, in the election
5 context, is there something particularly
6 potentially unseemly about that, or are you not
7 concerned about that?

8 MS. NOTZ: I don't think it's more
9 unseemly than in other cases where a plaintiff
10 seeks to -- to establish standing based on a
11 substantial --

12 JUSTICE GORSUCH: All right.

13 MS. NOTZ: -- risk of a future harm.

14 JUSTICE KAGAN: I mean, Ms. Notz --

15 JUSTICE GORSUCH: Then I -- then I
16 just want to run a couple of hypotheticals by
17 you if I might before I let you go and I'll let
18 you go quickly, I promise.

19 But imagine a law like the one in
20 Janus or Illinois Socialist Workers where a
21 state requires, you know, a lot of signatures
22 to get on the ballot, minor party candidate has
23 no chance of winning. Standing, you think?

24 MS. NOTZ: I mean, yes, because, I
25 mean, that case as I hear it describes a direct

1 regulation of the candidate. And this Court
2 has long distinguished, you know, decades of
3 cases between --

4 JUSTICE GORSUCH: We've never looked
5 to the probability of success in those kinds of
6 cases, have we?

7 MS. NOTZ: No, no, the Court has not.
8 It's -- it's in cases like this one where the
9 challenged law doesn't directly regulate the
10 plaintiff, it regulates third parties. And in
11 cases like these, the Court has held that the
12 plaintiff needs to show a substantial risk of
13 harm.

14 JUSTICE GORSUCH: Okay, okay. So
15 let's take an example that meets that, I think.

16 Say the election officials decide to
17 count only a hundred votes from each precinct
18 and declare the winner based on that, and
19 assume the candidates don't know which side
20 that random sample will benefit. Standing?
21 Doesn't regulate them directly. It's just a
22 rule about counting ballots.

23 MS. NOTZ: So, as I understand the
24 hypothetical, the election authority has
25 announced in advance they're only going to

1 count a small number of ballots. They're going
2 to just disregard all the other ones?

3 JUSTICE GORSUCH: Yep.

4 MS. NOTZ: So I think actually, in
5 Meese versus Keene, the Court, in addition to
6 talking about loss of an election as a
7 cognizable harm for candidates, also talked
8 about damage to the candidate's reputation in
9 the community.

10 And I think the circumstance you're
11 describing, like a pre-election announcement
12 that we are just not going to count all the
13 ballots, is the type of extreme circumstance
14 where a candidate could say, if I win in that
15 circumstance, my -- my victory is completely
16 illegitimate.

17 JUSTICE GORSUCH: Well, why? Or -- or
18 say -- say -- say we're going to count ballots
19 for three months after the election, and you
20 don't know who -- who that's going to benefit.
21 I can't prove that I'm going to win or lose.
22 Or I'm going to count them for a year.

23 Standing?

24 MS. NOTZ: So I -- I -- so that -- I
25 mean, that probably would kind of run -- run

1 into other Illinois laws and -- and federal
2 laws that would --

3 JUSTICE GORSUCH: Oh. Well, that's
4 the allegation here, is that this runs into
5 other laws, the practice here. And so I'm
6 giving you other examples, undercounting,
7 overcounting, whatever -- however you want to
8 phrase it, in which you don't know how it's
9 going to affect the candidate, but, you know,
10 it -- one wonders.

11 MS. NOTZ: So I do think, in that type
12 of circumstance, to me, that probably isn't the
13 type of extreme circumstance where a candidate
14 could claim, you know, reputational harm.

15 JUSTICE GORSUCH: Okay. Thank you.

16 JUSTICE KAVANAUGH: What's
17 reputation -- I mean --

18 MS. NOTZ: Yeah.

19 JUSTICE KAVANAUGH: -- you're
20 referring to reputational harm. I'm trying to
21 figure out, what's the reputational harm that
22 distinguishes the sampling hypothetical that
23 Justice Gorsuch asked from this case, where the
24 allegation is that illegally cast ballots will
25 be counted? How is that different?

1 MS. NOTZ: So --

2 JUSTICE KAVANAUGH: That's the
3 allegation.

4 MS. NOTZ: So, to me, there's a -- a
5 distinction and -- between a situation where a
6 candidate could perhaps plausibly allege that
7 even if he were elected, you know, under this
8 process, the election would be so illegitimate
9 that nobody would credit him as the successful
10 candidate.

11 And I don't think this circumstance
12 meets that standard because, of course,
13 Candidate Bost has successfully run for
14 election now 10 times under the ballot receipt
15 deadline, and I don't understand him ever to
16 have suggested that he somehow was
17 illegitimately elected.

18 And the reputational harm component I
19 do think comes from Meese versus Keene, which
20 is a candidate standing case in which the Court
21 described, you know, two types of injuries a
22 candidate could have, and one was the risk of
23 an election loss and the other was the
24 possibility of, you know, adverse impact on
25 their reputation in the community.

1 JUSTICE ALITO: I mean, I --

2 JUSTICE KAGAN: Suppose that --

3 JUSTICE ALITO: Oh, go ahead.

4 I don't want to create a bespoke
5 standing rule. However, this case involves the
6 question of injury in a particular context
7 which is different from other contexts, and
8 that is injury in a competition.

9 So, along those lines, let me give you
10 a hypothetical. Suppose that eight runners
11 qualify for the U.S. finals to go to the
12 Olympics in the hundred-meter dash, and when
13 they show up for the competition, they find
14 that actually they're going to have to run 105
15 meters.

16 Does anybody have -- does -- does --
17 do any -- can any of them show injury in fact?

18 MS. NOTZ: So I think, in that
19 circumstance, you know, if this Court were, you
20 know, to apply the competitive standing cases,
21 the Court would, you know, ask was, you know,
22 any -- any potential plaintiff, as compared to
23 a direct competitor, were they substantially
24 disadvantaged by that? And so, yes, they would
25 need to show some sort of harm.

1 JUSTICE ALITO: So they would have
2 to -- an individual runner would have to show
3 videotapes of other races and show I -- I -- I
4 start to lose steam at the -- you know, the
5 97th meter, so making me go 105 yards is going
6 to hurt me in relation to others?

7 MS. NOTZ: I mean, I think the
8 standard is one of plausibility. And I don't
9 know that one would need to present that type
10 of evidence to make --

11 JUSTICE ALITO: Well, then what --

12 MS. NOTZ: -- the assertion plausible.

13 JUSTICE ALITO: -- then what -- are
14 any of them going to be able to challenge this?

15 MS. NOTZ: I -- I think, actually, it
16 probably could be fairly easy to challenge if
17 they could --

18 JUSTICE ALITO: How?

19 MS. NOTZ: They could say --

20 JUSTICE ALITO: How would they
21 challenge?

22 MS. NOTZ: I mean, presumably, I could
23 imagine a plausible assertion that, you know, I
24 have, you know, trained for a hundred-meter
25 race and a 105-meter race makes some sort of

1 difference that puts me at a substantial
2 disadvantage.

3 But I guess I -- I -- you know, and I
4 know the Court is resisting going back to the
5 declaration, but standing cases are
6 fact-specific.

7 JUSTICE ALITO: Well, this is -- in
8 this specific situation, what would be wrong
9 with a rule that says four competitors in a
10 competition where there's going to be a winner
11 and there's going to be one or more losers,
12 when the rules of competition are changed in a
13 way that produces a risk that can't readily be
14 measured, then all the competitors have
15 standing?

16 MS. NOTZ: So --

17 JUSTICE ALITO: Doesn't that --
18 doesn't that make sense?

19 MS. NOTZ: So I don't think that it
20 makes sense to adopt a blanket standing rule
21 for candidates because I think it would create
22 two problems.

23 First, it would create chaos for
24 election officials. It is very easy to be a
25 candidate. Any self-declared candidate could

1 challenge any election rule that they happen to
2 have a policy disagreement with, even if that
3 rule were entirely harmless. And election
4 officials who are tasked with actually running
5 elections would have to divert their time and
6 energy and litigate, you know, these
7 policy-based disputes. And then federal
8 courts, in turn, would be put in the position
9 of -- of resolving these, you know, disputes
10 via advisory opinions, which is exactly what
11 this Court's standing cases have dictated
12 should not happen.

13 JUSTICE KAGAN: So suppose that there
14 was some change in rule that had a very high
15 probability of cutting into a candidate's vote
16 total by a fairly small amount, so let's say
17 very high probability that this will cut into
18 your vote total by 2 percent. Standing?

19 MS. NOTZ: So I think, in that case,
20 the candidate would have to be able to
21 plausibly allege that that sort of 2 percent
22 change in the margin harms him in some way.
23 So --

24 JUSTICE KAGAN: Okay. So that
25 seems -- that seems not right to me, that, you

1 know, then you're going to force people to come
2 into court and show a bunch of polls and how
3 that 2 percent margin might or might not make a
4 difference in the end when what you have is
5 quite clear. What you have is a voting rule
6 that harms somebody relative to what's come
7 before.

8 And that is a usual standing inquiry.
9 And, you know, it's not a bespoke anything.
10 It's like this is a new rule. It's going to
11 harm me relative to what's come before. I have
12 a right to complain about it. Why isn't just
13 that's enough?

14 MS. NOTZ: I actually don't think we
15 would have any problem at all with that rule.
16 I think the problem is, is that Congressman
17 Bost can't show standing based on that rule
18 because then I would go back to the
19 declaration --

20 JUSTICE KAGAN: I think he could show
21 standing. Whether he did show standing is
22 another thing entirely, right? That this is
23 a -- is a complaint that sort of seems a little
24 bit to be created in order to test a "I don't
25 have to show injury at all" theory.

1 But -- but it would be very easy for
2 Congressman Bost to write a complaint that
3 satisfied my rule.

4 MS. NOTZ: I mean, I don't disagree
5 with you and I, I guess, maybe appreciate you
6 sort of re- -- appropriately reframing. My
7 point is that what he wrote at page 68 and 69
8 of his declaration does not satisfy that rule
9 because, when asked about electoral loss, he
10 used the word "if." He -- that -- that's a
11 mere theoretical possibility of harm. He
12 provides no explanation why he thinks he
13 plausibly could lose his election. And when
14 asked about a diminished margin of victory, he
15 uses the word "may," which suffers from the
16 same problem.

17 He had a wealth of information
18 available to him. I know I keep going back to
19 the fact that he's an experienced candidate,
20 but it matters. He had lived through, at the
21 time he prepared this declaration, eight
22 elections under the ballot receipt deadline.
23 He said in his declaration: I send poll
24 watchers every single time. So he would have
25 known at the end of the day on Election Day how

1 many votes were cast on the unofficial --

2 JUSTICE KAGAN: But what you're saying
3 to me -- you know, I think that what you're
4 saying to me is a little bit different than
5 from what you said to the Chief Justice,
6 because what you're -- because I agree with the
7 Chief Justice. You do not want candidates to
8 have to walk into federal court and show that
9 they're -- you know, they're up in the polls by
10 X amount or that they've won the last five
11 elections by X amount.

12 You're just saying he didn't say
13 anything to show that he's going to be harmed
14 at all by the new rule.

15 MS. NOTZ: That -- that's exactly our
16 position. And, you know, the burden is on the
17 plaintiff and -- and standing is fact-specific
18 and you look at the record that the parties
19 developed.

20 JUSTICE KAVANAUGH: You're walking
21 away from a lot of your brief there.

22 JUSTICE JACKSON: Yes, you are.

23 JUSTICE KAVANAUGH: You're walking
24 away from most of your brief with that answer,
25 which is -- yeah, that's your choice.

1 You've mentioned the word "chaos" a
2 few times. I guess I'm worried about the chaos
3 of post-election litigation and how would that
4 play out in a circumstance like a challenge to
5 this particular ballot-counting rule. In
6 particular, let's suppose post-election
7 challenge; therefore, no real issue of standing
8 in a real close election, and the rule is found
9 invalid. Have you thought about what the
10 remedy would be in that circumstance?

11 MS. NOTZ: So I -- I --

12 JUSTICE KAVANAUGH: And it presumably
13 comes to this Court.

14 MS. NOTZ: Yeah.

15 JUSTICE KAVANAUGH: Maybe the House
16 elections ride on it, so we know -- we know
17 which way we rule what the impact will be,
18 which is never a good position.

19 MS. NOTZ: So I guess I would push
20 back on the idea that there -- it necessarily
21 would have to be resolved post-election. I'd
22 go back to the point it's -- it's only
23 substantial risk.

24 There -- there is no need for
25 certainty. He would simply, you know, have to

1 show a substantial risk of some legally
2 cognizable harm that could include losing the
3 election. It could also, according to Meese,
4 you know, include, you know, harms that rise to
5 the level of a reputational --

6 JUSTICE KAVANAUGH: You --

7 MS. NOTZ: -- harm. And I don't --
8 I'm sorry. I just --

9 JUSTICE KAVANAUGH: Keep going.
10 Sorry.

11 MS. NOTZ: I just wanted to point the
12 Court's attention, as the Court is probably
13 aware, to the Watson case out of the Fifth
14 Circuit that challenges a very similar law.
15 You know, in that case, the political party was
16 found to have standing. It -- it did include,
17 you know, different allegations, better
18 allegations. So, for example, it included an
19 allegation that if Mississippi's ballot receipt
20 deadline was enforced, that would impair the
21 party's ability to elect their Republican
22 candidates.

23 So I -- I do think that it is --
24 standing is not hard to establish. I just
25 think that this candidate did not establish it

1 based on these -- the statements in the
2 declaration.

3 JUSTICE KAVANAUGH: And the two things
4 that --

5 JUSTICE ALITO: What about the --

6 JUSTICE KAVANAUGH: Oh, sorry.

7 JUSTICE ALITO: Go ahead.

8 JUSTICE KAVANAUGH: The two things I
9 think you've relied on are how close the
10 election might be -- you did say polling data
11 earlier -- and candidate -- expert candidates,
12 and you've relied on how experienced the
13 candidate is or how many terms. If a
14 candidate's been elected twice, does that
15 candidate have -- in a better position for
16 standing?

17 MS. NOTZ: So, I mean, I think that
18 candidate -- I -- I think the experience is
19 relevant here just because Congressman Bost had
20 so much personal knowledge about how the ballot
21 receipt deadline works or doesn't work in his
22 favor, about, you know, what these
23 late-arriving ballots look like and whether
24 they harm him or not.

25 I think a newer candidate may not have

1 that wealth of information, but they could
2 certainly, I think, you know, rely on other
3 information. Again, Meese talked about the
4 experience of political advisors, of polling.
5 I -- I really -- I don't --

6 JUSTICE ALITO: Are you seriously
7 arguing that whether or not the allegations
8 here are sufficient requires an analysis of the
9 particular background and experience of the
10 candidate who files the complaint?

11 MS. NOTZ: No, not at --

12 JUSTICE ALITO: This case would come
13 out differently if this was somebody who had
14 never run before?

15 MS. NOTZ: My -- my point is simply
16 that Congressman Bost had a lot of information
17 available to him that he could have used to
18 explain.

19 He could have said, for example, you
20 know, I've been through eight election cycles
21 under this deadline. This is a --

22 JUSTICE ALITO: Well, then you are --
23 I mean, then you are referring to the
24 particulars of his situation.

25 In any event, let me talk -- ask you

1 about the pocketbook injury.

2 Why isn't that straightforward?

3 Mr. Clement says, look, it's -- it's political
4 malpractice not to continue poll watching and
5 related activities until the -- the final bell
6 actually tolls. That costs money. If you
7 extend the period, it costs me more money.
8 That's a pocketbook injury.

9 And your answer is, well, he didn't
10 have to spend that, right? That's your answer?

11 MS. NOTZ: So, I mean, our answer
12 is that when this Court has found standing
13 basically based on a expenditure of
14 resources -- that's, you know, his position --
15 the Court has required the plaintiff to
16 demonstrate that that resource expenditure was
17 undertaken to avoid a risk of harm that is
18 itself legally cognizable.

19 And I think that that rule makes good
20 sense because, if I think -- if the rule were
21 otherwise, the plaintiff could simply take a
22 failed future injury theory of harm where they
23 couldn't show a substantial risk of harm --

24 JUSTICE ALITO: Wait.

25 MS. NOTZ: -- and --

1 JUSTICE ALITO: You think -- you think
2 the risk of losing the election is not legally
3 cognizable?

4 MS. NOTZ: Well, of course,
5 Congressman Bost has not established a
6 substantial risk he might lose an election.
7 And, in fact, he told the Seventh Circuit
8 multiple times that he is not at risk of losing
9 an election.

10 I do think had he adequately
11 established, you know, a substantial risk of
12 losing an election, then, certainly, the
13 pocketbook injury would be viable.

14 JUSTICE ALITO: So it turns on the
15 risk of losing the election, not the risk of
16 a -- a less favorable result, less -- a smaller
17 margin?

18 MS. NOTZ: I think it turns on a --
19 a -- a substantial risk of a legally cognizable
20 harm, and I don't think that a diminished
21 margin of victory in and of itself is a legally
22 cognizable harm.

23 JUSTICE ALITO: But we're talking
24 about injury in fact. Isn't a smaller margin
25 of victory an injury in fact?

1 MS. NOTZ: I don't think so because,
2 unless it's coupled with something else, a
3 smaller margin of victory has no real-world
4 consequences.

5 JUSTICE ALITO: It has no real-world
6 consequences? Really?

7 MS. NOTZ: I mean, unless a candidate
8 could plausibly --

9 JUSTICE ALITO: It makes no difference
10 if you win by 50.00000 percent versus
11 80 percent? No, it doesn't matter, a win is
12 a win?

13 MS. NOTZ: I think, under those
14 circumstances, a candidate probably could
15 plausibly establish that a diminished margin
16 of victory, you know, has a reputational or
17 other competitive consequence that matters.
18 But I don't think that under circumstances
19 where the change in the margin is a vote or --
20 or a handful of votes, that that's a legally
21 cognizable harm.

22 And I think that's also consistent
23 with the historical cases. I mean, if you look
24 at the historical circumstances under which a
25 candidate could obtain an election recount,

1 those were always circumstances where the
2 recount was likely to change the outcome.

3 JUSTICE KAVANAUGH: The question
4 Justice Alito started with was monetary injury.
5 And I -- I thought that the likelihood of
6 winning the election was really irrelevant to
7 that.

8 You have to hire staff for an extra
9 two weeks. And a good campaign is going to try
10 to end up on Election Day with close to zero
11 left in the bank to leave it all on the field.
12 If you have to extend it two weeks, you're
13 going to be reallocating your resources and
14 potentially have to raise more money.

15 But, at a minimum, you're going to
16 have to spend more money, which is just obvious
17 standing, isn't it, without getting into all
18 this other stuff? That's just obvious
19 standing. You have to -- you have to spend
20 more money to staff an extra two weeks.

21 MS. NOTZ: So -- so I -- I don't think
22 so. I think what this Court's cases stand
23 for -- and this is cases like Clapper and
24 Alliance versus Hippocratic Medicine -- is the
25 proposition that if a plaintiff is going to

1 rely on the expenditure of resources to
2 establish standing, the plaintiff needs to show
3 that that expenditure was necessary to avoid a
4 substantial risk of an injury that is itself
5 legally cognizable.

6 And I think that that makes sense
7 because I think that if the rule were
8 otherwise, the requirements for showing
9 standing on a future injury theory would be
10 watered down.

11 JUSTICE KAVANAUGH: I thought the --

12 JUSTICE JACKSON: Can we just be --

13 JUSTICE KAVANAUGH: Oh, sorry.

14 JUSTICE JACKSON: Oh, sorry.

15 JUSTICE KAVANAUGH: Just one
16 follow-up.

17 JUSTICE JACKSON: Mm-hmm.

18 JUSTICE KAVANAUGH: I thought the test
19 was is it part of your core activities, your
20 ordinary activities, if the expenditure is part
21 of that.

22 And I would think, for a campaign,
23 as -- as the amicus brief, the ACLU, and the
24 League of Women Voters was quoted before, and
25 I had -- I had it too, political malpractice

1 not to -- not to be ready for that, to staff
2 that.

3 MS. NOTZ: So I think that -- so -- so
4 Petitioners here have not sort of proceeded
5 under that organizational standing theory, but
6 I think, if you applied that theory here, we
7 would still prevail because I think that
8 Congressman Bost's core mission is to win
9 elections. He's -- he's never told us that
10 he has another -- I mean, maybe some other
11 candidate would have some other core mission.
12 A minor party candidate's core mission might
13 be, you know, to bring attention to its
14 message.

15 But, because he's never --

16 JUSTICE KAVANAUGH: Well --

17 MS. NOTZ: -- proceeded under this
18 theory --

19 JUSTICE KAVANAUGH: One more, sorry.

20 JUSTICE JACKSON: Sure.

21 JUSTICE KAVANAUGH: But spending money
22 to get out the vote, monitor the polls, have
23 staff that does all that, which is going to be
24 necessary for an additional two weeks is --

25 JUSTICE JACKSON: But just to be --

1 JUSTICE KAVANAUGH: -- part of the
2 campaign.

3 JUSTICE JACKSON: I guess that -- that
4 was my clarifying --

5 JUSTICE KAVANAUGH: Yeah.

6 JUSTICE JACKSON: -- question because,
7 with respect to this regulation, it's not the
8 campaign that is extended for two weeks, is
9 that correct?

10 I mean, I understood what is happening
11 in this regulation is that it's just the
12 counting of the votes that have been post- --
13 that come in postmarked, but the campaign is
14 not continuing, right?

15 MS. NOTZ: So, I mean, all this
16 regulation means, and it doesn't even actually
17 extend the time period for counting votes
18 because we would be count -- the state would be
19 counting provisional ballots during that 14-day
20 period regardless.

21 JUSTICE JACKSON: So there's already
22 counting going on. So the costs are really
23 reduced.

24 I mean, as I understand this
25 regulation, what is happening is that the state

1 has decided that it's going to count ballots
2 that it receives in the mail that are
3 postmarked as of Election Day for the next
4 two weeks.

5 So, really, what is the expenditure
6 that is happening here? I guess Mr. Bost is
7 saying: I have to have people to continue to
8 monitor the counting. But you say counting is
9 happening anyway because of the provisional
10 ballots. So I don't understand this great big
11 cost that is suddenly happening.

12 MS. NOTZ: I mean, I -- I -- I -- I
13 mean, I don't mean to fight the question.
14 That's probably a question for the Congressman.
15 I mean, we did, you know, for purposes of this
16 point in the proceeding, you know, take at his
17 word that he has, you know, engaged, you know,
18 additional resources to engage in further -- or
19 in monitoring the counting.

20 But I do agree with Your Honor's
21 observation that the time period for the
22 counting is not extended at all.

23 And if I could, I see I'm short on
24 time, but I'd like to, you know, briefly
25 address, I think, Justice Kavanaugh, you know,

1 raised the legal malpractice point, that sort
2 of colorful phrase.

3 I do think that Clapper is helpful on
4 this point because, in Clapper, you know, there
5 was no question that the lawyers there had
6 diverted resources. They were traveling
7 overseas to meet with their clients and they
8 were doing that because they wanted to avoid
9 the risk of unlawful surveillance associated
10 with the challenged federal law.

11 I don't think there was any question
12 that those decisions were reasonable because
13 there -- if you look at the Second Circuit's
14 decision, there was an affidavit submitted by a
15 legal ethicist, and the ethicist explained that
16 if the lawyers didn't take precautions like
17 these, they actually would be violating their
18 duties as attorneys, essentially --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MS. NOTZ: -- committing --

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas, anything further?

24 Justice Alito?

25 JUSTICE ALITO: You think that

1 monitoring the counting of paper ballots is
2 either not important or doesn't require the
3 expenditure of resources?

4 MS. NOTZ: No. That's not our
5 position. Of course, Congressman Bost is free
6 to monitor countering -- you know, counting,
7 you know, consistent with Illinois law.

8 Our position is simply that when a
9 plaintiff has -- seeks to establish standing
10 based on a resource-expenditure theory, the
11 question isn't whether that decision was
12 reasonable. The question isn't whether it
13 was prudent.

14 The question is whether -- were those
15 resources expended to avoid a substantial risk
16 of harm that is itself legally cognizable.

17 And, as I mentioned, I think the
18 rule makes sense because, if the rule were
19 otherwise, a plaintiff could simply take a
20 failed future-injury theory of standing where
21 they couldn't show a substantial risk of harm
22 and repackage it as a -- as a present-injury
23 theory of standing based on resource
24 expenditures.

25 JUSTICE ALITO: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 Justice Kagan?

4 Justice Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: Just one question.

7 Justice Scalia once wrote -- and I
8 know you're going to say that this case doesn't
9 implicate this, but I just want to understand
10 if you agree with the principle that he said,
11 which was: "Count first and rule upon legality
12 afterwards is not a recipe for producing
13 election results that have the public
14 acceptance democratic stability requires."

15 Do you agree with that?

16 MS. NOTZ: I think -- theoretically,
17 I think it -- it makes sense, you know, not
18 to -- if -- if I understood the statement, I --
19 I think that post-election challenges are
20 probably not ideal. Did I understand the
21 statement correctly?

22 But I don't think that our position,
23 which, again, is how the Court treats standing
24 across all cases, requires that because the
25 test is simply substantial risk. And

1 Congressman Bost's declaration simply doesn't
2 show substantial risk by any metric.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 Justice Jackson?

7 JUSTICE JACKSON: So I'm a little bit
8 worried about your concession to Justice Kagan
9 that the -- that you'd be okay with a rule that
10 says that if the harm -- if it harms -- the
11 challenged regulation harms someone relative to
12 what had come before, that would be enough.

13 And the reason I think is because that
14 would implicate situations like even the one
15 Justice Kagan posited, which is a person who
16 has lost the election significantly but who
17 claims something about the two-week period
18 would change their margin, or -- lost or won,
19 say, change their margin, would -- would be
20 harmed by that.

21 And I guess I don't understand that.
22 It seems to me that it might -- that the extra
23 counting of ballots might change your position,
24 but it only harms you if it would make a
25 difference in the election. And I thought that

1 was your bottom line. I thought it was sort of
2 what the government was saying -- the -- the --
3 the SG was saying a little bit.

4 But it seems to me crucial to uphold
5 this idea that harm is required for standing
6 purposes. And I worry a little bit practically
7 if we accept that kind of thought, the idea
8 that a candidate is harmed if their margin of
9 error changes even if it doesn't make a
10 difference in the election, that we're actually
11 opening up avenues for a lot of post-election
12 challenges that we wouldn't otherwise have,
13 people who have lost the election but they want
14 their margin of defeat to be different or they
15 think it might have been, and so now we have
16 litigation over the counting as a result of
17 that.

18 Can you --

19 MS. NOTZ: Yeah.

20 JUSTICE JACKSON: -- respond?

21 MS. NOTZ: So I appreciate the
22 question. Thank you.

23 I certainly did not mean to suggest,
24 if I did, that a diminished margin of victory
25 by itself in our view is a legally cognizable

1 harm. So maybe it would kind of be, you know,
2 helpful just to describe what we think our
3 legally cognizable harms for candidates, and I
4 think they come from history, and I think they
5 come from Meese versus Keene.

6 The easy one is the risk, the
7 substantial risk of losing an election. Then
8 there are other concrete electoral consequences
9 that are probably more available to minority
10 party candidates, but that would be like a
11 substantial risk of not getting on the ballot,
12 a substantial risk of not qualifying for public
13 fund -- public fund -- public funding or maybe
14 sort of other fund-raising injuries.

15 And then there is the statement in
16 Meese versus Keene which talks about
17 reputational harms, and I think that in extreme
18 circumstances, a candidate could plausibly
19 allege in advance of an election that even if I
20 win, I know I'm going to win, even if I win,
21 under this election scheme, my victory will be
22 so illegitimate that -- that my reputation will
23 be harmed.

24 JUSTICE JACKSON: And so, to
25 summarize, those are the kinds of harms --

1 MS. NOTZ: Exactly.

2 JUSTICE JACKSON: -- that Justice
3 Kagan says have been routinely alleged and
4 courts have accepted and are pretty easy to
5 make, and so then you get on the -- then you go
6 on with your lawsuit, right?

7 MS. NOTZ: Yes. Thank you.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, Mr. Clement?

12 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
13 ON BEHALF OF THE PETITIONERS

14 MR. CLEMENT: Thank you, Mr. Chief
15 Justice. Just a few points in rebuttal.

16 First, I just want to make the point
17 that I don't think you should just contract all
18 this out to the RNC and the DNC. There are
19 cases where the RNC has lost on standing. On
20 page -- page 16 of our petition, RNC against
21 Burgess is one. But I also don't think you
22 want to put the candidate in the position that
23 they have to convince the national committee to
24 support their challenge if they actually think
25 they're being harmed either by the pocketbook

1 or their electoral prospects or that unlawful
2 ballots are going to be counted.

3 Second, I think it's important when
4 you look at this complaint -- and people are
5 complaining about the threadbare nature of the
6 complaint -- keep in mind one of the things
7 that is in the complaint, and this is at 85a of
8 the Petition Appendix, is the state's own
9 statement before the previous election that
10 said, hey, reporters, don't get too excited
11 about Election Day results because the
12 late-arriving ballots can change the results,
13 so stay tuned, essentially, for 14 days.

14 Now the state didn't say, oh, but
15 don't worry about Congressman Bost's district.
16 That one's different. That's a state seat.
17 And, of course, the state would never say that
18 because that would put state election officials
19 in a ridiculous position of, before the
20 election, deciding that certain seats are safe
21 seats and certain states -- seats are tossups.
22 But yet the state wants to put the federal
23 courts in the same position. They want you to
24 look at this declaration and say, well, you
25 know, he's a 10-time incumbent, so he's got a

1 higher standard of showing how these ballots
2 are going to hurt him. Or maybe it's easier
3 for different -- for a different incumbent.

4 That way lies madness, with all due
5 respect. I mean, they're asking for
6 essentially an Article III determination that
7 Congressman Bost is in a safe seat. And the
8 Article III equivalent of the Cook Report seems
9 like something that should be avoided at all
10 costs.

11 Now let me just finish on one point,
12 which is part of the debate here is who's
13 asking for a special rule of standing. And
14 with respect, I think it's the state that's
15 asking for a special rule of standing to the
16 effect that only an electoral disadvantage that
17 can threaten your win or loss at the end of the
18 day counts and maybe some stuff that I'm,
19 frankly, confused about about Meese and one or
20 two things. But it's really like you got to go
21 in there and say this is going to be
22 outcome-determinative in the election.

23 That is a special rule for elections.
24 They say pocketbook injuries don't count in
25 this context. That -- that's not the law. I

1 mean, if the government says to me, Clement,
2 give me 500 bucks, that's a pocketbook injury.
3 I don't have to point to some other injury that
4 complements the pocketbook injury.

5 Now there are certain cases where
6 there's a very speculative primary injury, and
7 then this Court has said, well, you can't spend
8 yourself into standing. But that's not this
9 case. It's perfectly reasonable to spend this
10 money on these -- poll watching. Political
11 malpractice not to do it.

12 Let me finish with one thought, is it
13 seems like we have three different standard --
14 tests here, three different theories, but they
15 all come down to a simple common-sense
16 proposition. A candidate is not a bystander in
17 his or her own election. Their name's on the
18 ballot, they put their lives on hold, so they
19 have a special interest in what's on the
20 ballot.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:48 a.m., the case
25 was submitted.)

Official - Subject to Final Review

\$ \$10,000 ^[1] 38:12 1 1 ^[1] 30:8 10 ^[2] 59:23 89:14 10-time ^[1] 116:25 10:04 ^[2] 1:16 4:2 105 ^[2] 90:14 91:5 105-meter ^[1] 91:25 11:48 ^[1] 118:24 115 ^[1] 3:14 133 ^[1] 23:1 14 ^[3] 41:20 43:7 116:13 14-day ^[1] 107:19 16 ^[1] 115:20 2 2 ^[7] 29:18 31:18,19 32:17 93 18,21 94:3 2.5 ^[1] 32:17 20 ^[3] 44:11 80:15,15 2005 ^[2] 28:18 66:25 2020 ^[1] 15:23 2025 ^[1] 1:12 24-568 ^[1] 4:4 3 3 ^[1] 32:21 30 ^[2] 79:19,23 4 4 ^[2] 3:4 48:4 4:00 ^[1] 47:17 43 ^[1] 56:11 5 5 ^[2] 32:22 48:2 50 ^[1] 83:19 50.00000 ^[1] 103:10 500 ^[1] 118:2 51 ^[2] 10:23 11:15 56 ^[2] 3:8 56:11 59 ^[1] 11:4 6 60 ^[6] 10:22,25 11:4,15 56:10 83:20 65 ^[1] 78:3 68 ^[1] 95:7 69 ^[1] 95:7 7 7 ^[2] 23:19 25:13 70 ^[1] 56:9 75 ^[1] 3:11 8 8 ^[1] 1:12 80 ^[1] 103:11 85 ^[2] 59:6,24 85a ^[1] 116:7 9 97th ^[1] 91:5 98 ^[6] 29:18 52:5 56:3,8 74:17,20	17,20 A a.m ^[3] 1:16 4:2 118:24 ability ^[3] 74:19 81:24 98:21 able ^[8] 7:8,9 31:23 49:8,17 62:4 91:14 93:20 above-entitled ^[1] 1:14 absent ^[1] 30:24 abstract ^[4] 10:15 12:3 20:3 75:16 abstraction ^[1] 12:3 absurdity ^[1] 30:5 accept ^[2] 64:17 113:7 acceptance ^[1] 111:14 accepted ^[2] 64:10 115:4 access ^[1] 5:11 accompanied ^[1] 12:5 according ^[1] 98:3 accounts ^[1] 64:15 accurate ^[2] 52:24 78:25 acknowledging ^[1] 5:18 ACLU ^[1] 105:23 across ^[3] 82:11 84:22 111:24 act ^[1] 79:25 activities ^[3] 101:5 105:19,20 activity ^[2] 7:5 51:8 acts ^[1] 80:2 actual ^[1] 59:19 actually ^[38] 5:4 6:19,22 7:7,22 10:5 11:23 12:12,24 13:4,11,18 16:4 18:5,13 20:9,10,15 33:19 36:7 41:6 43:15 45:6 49:24 61:22 69:5,21 73:6 87:4 90:14 91:15 93:4 94:14 101:6 107:16 109:17 113:10 115:24 ad ^[1] 8:8 add ^[3] 38:6 39:12 41:12 addition ^[1] 87:5 additional ^[6] 6:23 7:10 47:22 52:1 106:24 108:18 address ^[4] 5:21 61:10 75:8 108:25 addressed ^[1] 14:10 addresses ^[1] 69:25 adequately ^[1] 102:10 adjectives ^[1] 60:17 administrative ^[1] 38:25 adopt ^[1] 92:20 adopting ^[1] 46:4 ads ^[1] 8:9 advance ^[3] 57:20 86:25 114:19 advantage ^[3] 7:10 67:4,6 advantages ^[1] 18:6 adverse ^[1] 89:24 advertisement ^[1] 14:17 advisor ^[1] 79:14 advisors ^[2] 80:19 100:4	advisory ^[1] 93:10 affect ^[8] 8:14 10:13 22:3 57:4 69:2 70:19 74:4 88:9 affected ^[2] 7:6 24:20 affidavit ^[2] 8:11 109:14 affidavits ^[3] 8:9 20:9 47:24 afterwards ^[1] 111:12 ago ^[2] 19:4 25:13 agree ^[6] 17:6 37:24 96:6 108:20 111:10,15 agreed ^[1] 23:25 Ah ^[1] 39:24 aha ^[1] 73:10 ahead ^[4] 62:9,13 90:3 99:7 aimed ^[1] 57:10 AL ^[2] 1:3,7 albeit ^[1] 27:16 Alexandria ^[1] 2:2 Alito ^[37] 26:22,23 27:10 28:10,21 29:4 30:10,18 33:24 66:23 67:19,20 68:2 90:1,3 91:1,11,13,18,20 92:7,17 99:5,7 100:6,12,22 101:24 102:1,14,23 103:5,9 104:4 109:24,25 110:25 allegation ^[5] 37:17 88:4,24 89:3 98:19 allegations ^[9] 14:6 31:1,7 38:18 66:11 70:15 98:17,18 100:7 allege ^[4] 31:12 89:6 93:21 114:19 alleged ^[4] 7:11 27:3 67:1 115:3 allegedly ^[1] 73:1 alleges ^[3] 10:14 12:4 72:10 alleging ^[2] 76:23 81:4 Alliance ^[1] 104:24 allow ^[5] 13:16,22 28:19 35:16 68:9 allowed ^[1] 68:15 almost ^[7] 29:21 33:3 38:17 45:17 54:14 64:7 65:25 already ^[4] 33:9,14 49:22 107:21 Alternative ^[1] 47:8 amicus ^[5] 2:6 3:7 44:11 56:22 105:23 amount ^[7] 8:10 12:11 64:17,18 93:16 96:10,11 analogous ^[1] 63:13 analogy ^[3] 9:8 41:9 45:7 analysis ^[1] 100:8 analytical ^[1] 15:5 ancient ^[1] 23:15 Anderson ^[1] 31:22 announced ^[1] 86:25 announcement ^[1] 87:11 another ^[3] 38:15 94:22 106:10 answer ^[11] 20:18 27:11	41:10 50:15 61:1 66:6 73:19 96:24 101:9,10,11 answered ^[1] 24:11 answers ^[4] 40:20 57:13 67:8 73:18 ante ^[5] 61:5 66:19 70:1,4 74:2 anybody ^[2] 8:15 90:16 anybody's ^[1] 47:18 anytime ^[1] 7:3 anyway ^[1] 108:9 APPEARANCES ^[1] 2:1 Appendix ^[1] 116:8 application ^[1] 46:21 applied ^[3] 59:14 75:21 106:6 applies ^[1] 55:14 apply ^[9] 15:13 24:14 34:7 46:24 55:10,12,18,20 90:20 appreciate ^[4] 83:12,12 95:5 113:21 appropriately ^[1] 95:6 arbitrary ^[1] 26:12 area ^[2] 34:5 47:1 areas ^[1] 46:5 aren't ^[1] 33:12 argue ^[4] 6:22 49:8 51:5 75:10 argued ^[2] 46:8 64:16 arguing ^[2] 64:8 100:7 argument ^[22] 1:15 3:2,5,9,12 4:4,8 9:14,24,25 11:7 30:20 41:16 49:16 50:8 53:24 56:21 58:5 59:7,8 75:4 115:12 arguments ^[3] 25:1 26:24 46:2 around ^[1] 28:3 Article ^[6] 18:9 63:15 76:18,22 117:6,8 articulated ^[2] 32:11 48:21 articulates ^[1] 66:15 articulating ^[1] 49:20 articulation ^[1] 63:20 artificial ^[1] 45:20 artificiality ^[1] 22:18 asserting ^[1] 70:8 assertion ^[2] 91:12,23 assertions ^[2] 70:11 77:13 assess ^[1] 74:10 Assistant ^[1] 2:4 associated ^[1] 109:9 assume ^[3] 18:23 29:13 86:19 assuming ^[2] 51:23,25 attached ^[3] 77:10 82:10,12 attention ^[3] 82:19 98:12 106:13 attorneys ^[1] 109:18 authority ^[2] 44:10 86:24 automatic ^[1] 19:7 available ^[5] 79:3 81:10 95:18 100:17 114:9	avenues ^[1] 113:11 avoid ^[5] 41:12 101:17 105:3 109:8 110:15 avoided ^[2] 76:21 117:9 avoiding ^[1] 61:1 avoids ^[1] 13:20 aware ^[1] 98:13 away ^[4] 31:14 73:15 96:21,24 B back ^[14] 8:6 9:10 22:12,25 23:1,15 65:5,11 83:9 92:4 94:18 95:18 97:20,22 background ^[1] 100:9 bad ^[1] 23:23 baked ^[1] 41:17 ballot ^[21] 5:5 22:23 24:8 32:19 39:16 41:19 44:7 54:8 61:12 66:1,2 69:13 83:7 85:22 89:14 95:22 98:19 99:20 114:11 118:18,20 ballot-counting ^[7] 57:9,16,19 58:11 59:12 61:5 97:5 ballots ^[48] 4:12,19,19 5:21 15:7 17:20 18:10,16 20:2 25:8 30:13 35:17 39:19 43:8,9,10 44:9,21 49:11 50:12 51:3 55:4 56:1,5 57:2,4 59:19 61:6,22 62:6 65:24 69:2 71:19 73:9 86:22 87:1,13,18 88:24 99:23 107:19 108:1,10 110:1 112:23 116:2,12 117:1 balls ^[1] 80:21 bank ^[1] 104:11 bar ^[2] 19:10,11 bare ^[1] 5:22 BARRETT ^[9] 14:21 22:1,14 45:25 46:1 47:7,11 72:17 112:5 based ^[13] 9:13 52:5,6 57:14 67:3 70:16 85:10 86:18 94:17 99:1 101:13 110:10,23 basic ^[2] 57:18 74:6 basically ^[3] 16:13 34:7 101:13 basis ^[2] 47:4 54:5 bat ^[1] 23:9 battle ^[4] 30:22 31:2,5,16 battleground ^[2] 68:12 70:5 become ^[1] 72:5 becomes ^[1] 19:16 bed ^[1] 81:22 bedfellows ^[2] 31:25 32:2 beforehand ^[1] 28:12 beginning ^[1] 13:17 behalf ^[8] 2:3,9 3:4,11,14 4:9 75:5 115:13 believe ^[2] 24:24 27:4
--	---	---	---	---

Official - Subject to Final Review

bell ^[1] 101:5 below ^[5] 4:25 9:12,15 53:24 75:9 benefit ^[7] 6:22 7:1 21:13 70:22,25 86:20 87:20 bespoke ^[4] 46:12,18 90:4 94:9 best ^[2] 17:4 80:25 better ^[9] 5:17 7:7,8,9 27:2 76:5 98:17 99:15 between ^[7] 14:6 32:16,18, 20 48:14 86:3 89:5 bid ^[1] 39:3 big ^[1] 108:10 binary ^[2] 32:5 56:16 bit ^[9] 13:23 17:10 19:23 68:7 94:24 96:4 112:7 113:3, 6 Blackacre ^[1] 22:12 Blacker ^[2] 23:2 36:25 blanket ^[2] 75:14 92:20 blends ^[1] 15:17 blue ^[2] 26:10,13 BOARD ^[2] 1:6 4:5 body ^[1] 29:8 BOST ^[30] 1:3 4:5,20,24 5:25 7:11 10:11 12:24 16:21 17:3 18:14 20:11 21:7 22:21 38:20 75:21 76:7,9 79:18 80:9 81:11 89:13 94:17 95:2 99:19 100:16 102:5 108:6 110:5 117:7 Bost's ^[5] 15:8 76:1 106:8 112:1 116:15 both ^[4] 21:18 34:2 64:6 81:21 bothering ^[1] 12:4 bottom ^[1] 113:1 bottom-line ^[1] 32:4 boy ^[2] 28:1 37:11 break ^[2] 66:20,21 breakdown ^[1] 28:14 breaks ^[1] 80:16 brief ^[9] 9:20 10:4 28:24 46:20 58:16 75:25 96:21,24 105:23 briefing ^[1] 9:21 briefly ^[3] 27:17 52:15 108:24 briefs ^[2] 27:25 44:12 bring ^[10] 15:12 40:4,5 51:6 53:4 56:9,12 80:13,14 106:13 broad ^[2] 18:3 78:14 broadcasting ^[1] 41:5 broader ^[1] 14:17 broadest ^[2] 48:20 78:15 broken ^[1] 67:1 broker-dealer ^[3] 8:3,21 26:9 broker-dealers ^[7] 7:18, 19,21 8:23,24 33:12 47:16 brokerage ^[1] 48:1 brought ^[5] 23:3 30:6 38:9	70:7 80:9 bucket ^[1] 40:22 bucks ^[1] 118:2 bullet ^[1] 74:24 bunch ^[1] 94:2 burden ^[4] 13:6 77:21 82:14 96:16 Burgess ^[1] 115:21 buying ^[1] 59:1 bystander ^[1] 118:16 bystanders ^[2] 5:5 57:8 C called ^[1] 82:19 came ^[1] 1:14 campaign ^[16] 4:22 5:23, 23 8:8 21:16 25:9 38:19 43:17,25 44:1 80:19 104:9 105:22 107:2,8,13 candidate ^[108] 6:9,12,17 8:4 9:3 11:8,14 12:9 15:20 16:22 17:4,13 18:23,24 19:8 21:13,14 22:23 24:14,23 25:6,6 27:17 29:20,22 31:19 34:10,22 35:14 36:25 37:10 38:3 41:21,21 45:21, 22,22 49:10,14 51:2,13 52:4,22 53:12 56:3,10,10,11, 12 57:10 58:6,9,10,13 59:2, 14,16,20 61:4 63:3,23 66:3 69:25 70:14 71:12,15,22 72:6,13 74:17,19,21 75:14 78:4,16 79:6,12,17 80:2 85:22 86:1 87:14 88:9,13 89:6,10,13,20,22 92:25,25 93:20 95:19 98:25 99:11, 13,15,18,25 100:10 103:7, 14,25 106:11 113:8 114:18 115:22 118:16 candidate's ^[11] 54:7 56:8 59:17 66:4 74:15 78:2 84:1 87:8 93:15 99:14 106:12 candidates ^[46] 5:2,11,18 9:2 10:21,24 14:18 18:11, 11 20:12 23:24 24:5 26:20 27:7,8 33:9 34:14,17 38:17 40:22 48:15,23 49:3,19 57:1,8,14 62:25 67:11,20 69:1 71:4 72:3,21,22 75:10,17 80:15 86:19 87:7 92:21 96:7 98:22 99:11 114:3, 10 candidates' ^[1] 57:11 capricious ^[1] 26:12 car ^[2] 42:17 82:24 care ^[7] 6:17 8:1 43:8,9 53:5 56:15 74:15 careful ^[1] 46:6 cares ^[3] 6:12 52:23,25 cars ^[1] 42:3 Case ^[45] 4:4 8:7,8 12:20 16:18 18:4 23:2,16 27:12 28:3,9 29:16 31:11,14 32:9 33:5 37:11 38:8 40:22	43:13 54:12 56:9,12 57:17 66:8 72:4,11,12 77:12 78:20 79:15 81:4 83:12 85:25 88:23 89:20 90:5 93:19 98:13,15 100:12 111:8 118:9, 23,24 cases ^[42] 13:25 15:24 25:3 27:18 28:7 34:21 35:16 36:18 37:21 38:6,24,25 39:5,7,13 40:4 41:3 62:2 64:15 69:8 73:22 76:23 77:8, 17 79:4 82:12 84:7,23 85:9 86:3,6,8,11 90:20 92:5 93:11 103:23 104:22,23 111:24 115:19 118:5 cast ^[5] 18:16 39:16 57:3 88:24 96:1 cause ^[3] 30:13 75:12,14 CBS ^[1] 41:6 certain ^[5] 35:1,2 116:20, 21 118:5 certainly ^[8] 10:12 26:18 27:15 37:24 83:16 100:2 102:12 113:23 certainty ^[3] 55:20 81:8 97:25 certify ^[2] 43:6,7 challenge ^[25] 8:25 11:16 13:17 14:19 15:12 23:12, 21,22 38:4,10 40:6 47:4 48:16 57:1 63:6 68:10 72:3 75:11 91:14,16,21 93:1 97:4,7 115:24 challenged ^[8] 27:21 40:12 63:7 68:13 74:1 86:9 109:10 112:11 challenges ^[5] 35:22 61:12 98:14 111:19 113:12 challenging ^[4] 15:21 23:3 35:16 78:16 chamber ^[1] 58:18 chance ^[10] 29:21 37:11,12 52:5 60:23 65:1 67:22 69:23 84:1 85:23 chances ^[1] 63:24 change ^[21] 21:15 23:4,12 26:10 29:23 38:21 39:1,18 45:10 47:2,5 65:15 75:13 93:14,22 103:19 104:2 112:18,19,23 116:12 changed ^[1] 92:12 changes ^[4] 7:4 26:5 45:10 113:9 changing ^[1] 39:4 chaos ^[4] 75:15 92:23 97:1, 2 Charles ^[1] 81:21 Chicago ^[1] 2:8 CHIEF ^[44] 4:3,10 24:9,18 25:10 26:22 29:5 33:17 37:3 40:17,20 41:10 45:24 48:18 56:18,24 58:24 59:21 60:4,15 67:17 68:3 71:8 72:16 75:1,6 77:22,24 80:	7 81:16,19 82:6,16,21 83:15 96:5,7 109:19,22 111:1 112:4 115:9,14 118:22 choice ^[2] 39:11 96:25 circle ^[1] 64:8 Circuit ^[8] 9:21 36:21 48:13,14,15 76:6 98:14 102:7 Circuit's ^[1] 109:13 circumstance ^[9] 87:10, 13,15 88:12,13 89:11 90:19 97:4,10 circumstances ^[5] 103:14, 18,24 104:1 114:18 citizens ^[1] 55:19 claim ^[2] 35:21 88:14 claims ^[1] 112:17 Clapper ^[10] 44:16 51:14 52:13 54:25 55:9,18 64:1 104:23 109:3,4 clarifying ^[1] 107:4 classic ^[5] 5:24 21:19 22:2, 12,15 cleaner ^[1] 28:8 clear ^[3] 21:8 27:1 94:5 clearly ^[1] 21:11 CLEMENT ^[99] 2:2 3:3,13 4:7,8,10 6:4,7,24 7:3 8:1, 19 9:6,8,9,18 11:13,24 12:18 13:4,15 14:21,24 15:3, 11 16:1,8 17:25 19:18 20:14,17 21:1,5,18,24 22:1,9, 15 24:16,24 25:17,22 26:2 27:10 28:17,23 29:7,25 30:3 31:4,11 32:1,8,15 33:19 34:16 35:5 36:1 37:23 39:6,23 40:5,8,15 41:11,14,25 42:4,11,14,18,21 43:1,21 46:17 47:10,12 49:21 50:14,17,23 52:14,18 53:19, 22 54:3,6,17,19 55:16 56:7 61:19 63:20 64:16 101:3 115:11,12,14 118:1 Clement's ^[1] 78:14 clients ^[2] 55:23 109:7 clients' ^[1] 29:15 close ^[15] 8:15 16:23,25 48:2,4 50:1 57:24 75:22 77:4, 9 78:8 79:4 97:8 99:9 104:10 closest ^[2] 5:12 16:15 cognizable ^[15] 22:8 76:5, 21,25 87:7 98:2 101:18 102:3,19,22 103:21 105:5 110:16 113:25 114:3 colloquy ^[3] 25:24 37:6 40:20 colorful ^[1] 109:2 come ^[24] 7:19 12:23 16:20 17:2 19:15,17 29:23 31:3 35:10 38:20 39:15 43:19 47:22 53:21 75:22 94:1,6, 11 100:12 107:13 112:12 114:4,5 118:15 comes ^[9] 11:12 12:16 31:	5 38:1 50:3 60:5 72:9 89:19 97:13 coming ^[5] 7:21 18:2,14 48:3 70:1 committee ^[1] 115:23 committing ^[1] 109:21 common ^[3] 10:20 24:4 84:22 common-sense ^[3] 26:3 38:2 118:15 community ^[2] 87:9 89:25 company ^[1] 47:1 comparator ^[1] 29:2 Compared ^[2] 20:24 90:22 competing ^[3] 14:14 16:20 20:8 competition ^[4] 90:8,13 92:10,12 competitive ^[10] 6:6 7:2 20:21,23 27:1,16 70:21 72:10 90:20 103:17 competitor ^[1] 90:23 competitors ^[2] 92:9,14 complain ^[1] 94:12 complaining ^[1] 116:5 complaint ^[12] 12:21 27:3, 21 66:11,15 70:12 94:23 95:2 100:10 116:4,6,7 complements ^[1] 118:4 completely ^[2] 44:15 87:15 compliance ^[1] 53:10 complicated ^[2] 6:2 36:21 component ^[1] 89:18 comports ^[2] 57:17 74:6 conceivable ^[1] 77:19 concern ^[4] 15:18 50:18, 20 79:2 concerned ^[2] 11:7 85:7 concerns ^[1] 61:19 concession ^[2] 76:8 112:8 conclusion ^[1] 5:1 conclusory ^[1] 76:12 concrete ^[12] 5:19 30:7 57:11 58:22 59:17 60:25 61:2 66:5 67:10 70:24 76:2 114:8 conduct ^[4] 51:18 63:6,24 74:1 conducted ^[1] 53:9 confused ^[1] 117:19 Congressman ^[29] 4:20, 23 5:25 7:11 10:11 12:24 15:8 16:21 17:3 18:14 20:11 21:7 22:21 38:20 75:21 79:18 80:9 81:11 94:16 95:2 99:19 100:16 102:5 106:8 108:14 110:5 112:1 116:15 117:7 connected ^[1] 43:14 consequence ^[1] 103:17 consequences ^[3] 103:4, 6 114:8 considering ^[1] 40:21
---	---	---	---	---

Official - Subject to Final Review

consistent ^[3] 84:7 103:22 110:7 contend ^[1] 4:14 contest ^[1] 14:13 contested ^[1] 62:2 context ^[23] 5:13 13:14 15:14 26:17 46:22,24 49:7 51:22 58:19 59:12 60:7,8 61:24 62:1,10 65:22,23 72:7 74:2 85:1,5 90:6 117:25 contexts ^[5] 22:19 24:5 36:3 46:13 90:7 continue ^[3] 14:12 101:4 108:7 continuing ^[1] 107:14 contract ^[2] 39:10 115:17 contracting ^[2] 38:24 39:2 contribute ^[1] 12:12 contributors ^[1] 12:14 controlling ^[1] 4:14 convince ^[1] 115:23 convinced ^[1] 46:9 Cook ^[1] 117:8 core ^[4] 105:19 106:8,11,12 correct ^[4] 10:5 29:24,25 107:9 correctly ^[1] 111:21 corresponds ^[1] 10:19 cost ^[7] 4:19 21:16 45:16 67:12 72:14 76:17 108:11 costs ^[7] 7:9 52:1 57:15 101:6,7 107:22 117:10 couldn't ^[4] 12:8 27:2 101:23 110:21 counsel ^[8] 24:10 56:19 63:18 67:16 75:2 109:20 115:10 118:23 count ^[11] 44:9 56:1 86:17 87:1,12,18,22 107:18 108:1 111:11 117:24 counted ^[13] 5:22 15:9 20:2 25:8 50:12 51:3 55:5 56:6 62:6 65:1 78:23 88:25 116:2 countering ^[1] 110:6 counting ^[21] 4:18 27:5 35:17 52:9,11 66:19 70:17 71:18 86:22 107:12,17,19,22 108:8,8,19,22 110:1,6 112:23 113:16 country ^[2] 32:3 78:5 counts ^[7] 4:12 13:11 22:7 23:1 66:2 83:1 117:18 county ^[1] 29:1 couple ^[6] 15:4 19:4 34:22 35:11 79:1 85:16 coupled ^[1] 103:2 course ^[12] 23:10,20 27:24 36:12 37:1 38:3 47:4 81:6 89:12 102:4 110:5 116:17 COURT ^[53] 1:1,15 4:11,24 9:12 15:16,22 18:24,25 23:8,14 27:12,13 28:1 35:11,21,24 38:8,13 56:25 60:8	62:24 69:14 73:22 75:7,17 76:19 77:10,12,17 78:11 79:10 81:12 82:9 83:2 84:8,15 86:1,7,11 87:5 89:20 90:19,21 92:4 94:2 96:8 97:13 98:12 101:12,15 111:23 118:7 Court's ^[16] 5:1 6:3 13:25 58:1,12 59:10 60:6,13 63:2 77:3 82:19 84:7,23 93:11 98:12 104:22 courthouse ^[1] 33:14 courts ^[11] 5:9,15 15:13 18:9 57:23 75:16 81:5 83:25 93:8 115:4 116:23 Crawford ^[2] 23:15 36:10 cream ^[1] 39:20 create ^[4] 69:19 90:4 92:21,23 created ^[2] 36:21 94:24 credible ^[2] 60:10,17 credit ^[1] 89:9 credited ^[2] 4:17 81:13 crucial ^[1] 113:4 cruel ^[1] 38:17 Cruz ^[1] 38:7 crystal ^[1] 80:21 curiae ^[3] 2:6 3:8 56:22 curious ^[1] 33:18 current ^[1] 49:22 customers ^[2] 8:22 47:22 cut ^[1] 93:17 cutting ^[1] 93:15 cycles ^[3] 81:14 83:7 100:20 D D.C ^[2] 1:11 2:5 damage ^[1] 87:8 dangerous ^[1] 5:8 dash ^[1] 90:12 data ^[8] 28:18,25 79:8,13 80:5,11,14 99:10 Davis ^[1] 37:15 Day ^[10] 4:13 44:24 47:23 78:22 95:25,25 104:10 108:3 116:11 117:18 days ^[3] 41:20 43:7 116:13 deadline ^[7] 41:19 83:7 89:15 95:22 98:20 99:21 100:21 deadlines ^[3] 61:12 62:8,11 deal ^[3] 8:23 66:11 72:2 dealing ^[2] 9:2 79:16 dealt ^[1] 14:1 debate ^[2] 18:9 117:12 decades ^[1] 86:2 December ^[1] 61:16 decide ^[4] 16:14 43:14 49:5 86:16 decided ^[2] 8:7 108:1 decides ^[2] 49:25 52:7 deciding ^[2] 78:20 116:20	decision ^[3] 5:7 109:14 110:11 decisions ^[1] 109:12 decisive ^[1] 39:16 declaration ^[20] 6:10 10:9,10,14 12:4,21 21:8 50:3 76:9 77:14 82:20 83:5 92:5 94:19 95:8,21,23 99:2 112:1 116:24 declarations ^[2] 14:6 21:20 declare ^[1] 86:18 decrease ^[2] 8:11 11:10 decreases ^[1] 12:9 deemed ^[3] 58:14,15 60:8 deeply ^[1] 6:12 defeat ^[3] 6:15 51:24 113:14 defendant's ^[1] 63:23 defending ^[1] 27:13 deficiency ^[1] 30:25 definitely ^[1] 71:15 delighted ^[2] 32:1 54:19 Democrat ^[1] 64:25 Democratic ^[7] 18:11 23:18,21,23 27:7 69:14 111:14 Democrats ^[7] 29:18 31:13 33:20 35:2,7,10 36:13 demonstrate ^[1] 101:16 denies ^[1] 11:25 denying ^[1] 5:10 Department ^[1] 2:5 depends ^[2] 80:23 82:22 deprived ^[1] 9:4 describe ^[3] 76:13 77:15 114:2 described ^[2] 79:11 89:21 describes ^[1] 85:25 describing ^[1] 87:11 description ^[1] 78:25 desire ^[2] 32:12 76:1 details ^[1] 31:12 determination ^[1] 117:6 determine ^[4] 57:9 59:15 62:17 66:3 determined ^[1] 57:20 determining ^[1] 11:22 developed ^[2] 75:9 96:19 developing ^[1] 29:8 Dewey ^[1] 81:20 Diamond ^[3] 42:19 47:8 65:18 dictated ^[1] 93:11 die ^[1] 19:20 difference ^[17] 32:16,18,20,25 56:3,13,13 58:3 60:1,4 61:22 73:10 92:1 94:4 103:9 112:25 113:10 differences ^[1] 32:24 different ^[21] 34:19 37:18,19 42:22 48:8 50:7 54:7,10 69:17 71:1,12 88:25 90:7 96:4 98:17 113:14 116:	16 117:3,3 118:13,14 differently ^[2] 45:1 100:13 difficult ^[2] 26:17 27:18 diluted ^[1] 53:15 diminished ^[4] 95:14 102:20 103:15 113:24 direct ^[22] 8:5 41:22 42:5 45:14 51:21 58:10,13,20 62:25 63:4,10,12 65:8,11 67:24 71:3,15 72:8 73:13,20 85:25 90:23 directed ^[1] 45:3 directly ^[7] 10:16 35:8 41:6 53:2 55:21 86:9,21 disadvantage ^[15] 17:18,22 19:17 20:23,25 34:11 64:13,18,22 66:7,16,18 67:14 92:2 117:16 disadvantaged ^[1] 90:24 disagree ^[1] 95:4 disagreement ^[1] 93:2 disappointed ^[1] 11:21 disaster ^[1] 78:1 disenfranchised ^[1] 62:21 disfavored ^[1] 34:3 dismiss ^[3] 14:7 21:21 31:10 dismissed ^[1] 31:10 dispatches ^[1] 23:20 disputes ^[6] 5:12,14 13:21 75:17 93:7,9 disregard ^[1] 87:2 dissent ^[1] 54:22 distinction ^[2] 25:20 89:5 distinguished ^[1] 86:2 distinguishes ^[1] 88:22 distortion ^[1] 44:18 district ^[4] 27:12 29:13 30:19 116:15 district-by-district ^[1] 23:6 districts ^[2] 16:16 29:17 divert ^[1] 93:5 diverted ^[1] 109:6 DNC ^[6] 33:24 34:1 69:5 70:7 71:1 115:18 doctor ^[1] 19:4 doctrinal ^[1] 73:19 doctrine ^[3] 13:19 17:17 49:22 doing ^[2] 37:25 109:8 done ^[8] 14:7 18:18 27:2,22 28:6 31:7 35:12 61:9 doors ^[1] 47:17 down ^[8] 38:1 54:24 69:13 76:22 80:15,15 105:10 118:15 downstream ^[1] 53:2 dozen ^[2] 12:25 78:4 draw ^[1] 25:18 drawn ^[1] 30:21 due ^[1] 117:4 during ^[1] 107:19	duties ^[1] 109:18 E each ^[1] 86:17 earlier ^[4] 16:5 44:19 45:16 99:11 early ^[2] 47:21 50:1 easier ^[2] 77:8 117:2 easy ^[9] 22:11 62:16 69:9 70:11 91:16 92:24 95:1 114:6 115:4 effect ^[4] 45:14 46:3 62:3 117:16 effectively ^[1] 57:24 effects ^[1] 46:14 efforts ^[1] 76:25 eight ^[5] 81:14 83:6 90:10 95:21 100:20 Eighth ^[1] 48:14 either ^[5] 22:6 65:2 80:21 110:2 115:25 elect ^[2] 61:20 98:21 elected ^[3] 89:7,17 99:14 Election ^[118] 4:13,20 5:3,12,13,14 6:9,13 9:13 10:11,22 13:17,18,24 14:19,23 16:25 18:17 20:2 22:23 26:21 29:1 30:14 32:21 37:9,12 38:5,11,22 43:4 44:24,24 45:12,15 49:2,4,12,15 50:13 51:24 56:14 57:3,18,21 59:18,20 61:7 66:3 68:10,11 69:3,22 70:5,8,17 71:19 72:14,21,23 74:6 75:12,15 76:7,11 77:5 78:8,17,22 79:3,19,23 81:14 82:2 83:6 84:2,3,16,24 85:4 86:16,24 87:6,19 89:8,14,23 92:24 93:1,3 95:13,25 97:8 98:3 99:10 100:20 102:2,6,9,12,15 103:25 104:6,10 108:3 111:13 112:16,25 113:10,13 114:7,19,21 116:9,11,18,20 117:22 118:17 election's ^[1] 57:5 ELECTIONS ^[19] 1:6 4:6 6:19 24:7 32:3 43:15 53:9 59:23 61:13 74:2 75:11 77:9 82:25 93:5 95:22 96:11 97:16 106:9 117:23 electoral ^[32] 5:20 9:23 10:2,7 17:18,22 22:7 26:17 43:3 46:24 48:16 64:12,18,21 65:22,22 66:7,15,18 67:4,6,14 68:20 69:11 70:13 71:7 78:12 84:20 95:9 114:8 116:1 117:16 electors ^[5] 23:3,5,7,11,13 eliminate ^[1] 48:13 enacted ^[1] 28:13 end ^[5] 45:17 94:4 95:25 104:10 117:17 ends ^[2] 44:24 45:16 energy ^[1] 93:6
---	---	---	--	--

Heritage Reporting Corporation

higher ^[1] 117:1 highly ^[2] 7:4 26:4 hill ^[1] 19:21 Hippocratic ^[1] 104:24 hire ^[1] 104:8 historical ^[2] 103:23,24 history ^[7] 22:5,25 23:15 36:7 66:24 76:2 114:4 hold ^[2] 75:17 118:18 home ^[1] 47:20 Honor ^[3] 8:20 9:19 81:2 Honor's ^[1] 108:20 hopes ^[1] 78:4 hotly ^[1] 62:2 hour ^[1] 47:23 House ^[2] 61:13 97:15 however ^[3] 31:21 88:7 90:5 Hughes ^[1] 81:21 hundred ^[3] 10:23 48:1 86:17 hundred-meter ^[2] 90:12 91:24 hurt ^[5] 7:12 21:9 70:13 91:6 117:2 hurts ^[2] 26:6 27:6 hypothetical ^[8] 50:7 58:17 60:16,22 74:24 86:24 88:22 90:10 hypotheticals ^[2] 24:12 85:16 I ID ^[3] 23:16,22 36:13 idea ^[10] 6:16 11:7 16:19 48:22 49:18 51:14 83:3 97:20 113:5,7 ideal ^[2] 18:1 111:20 identified ^[2] 52:21 76:24 identify ^[1] 51:19 identifying ^[1] 50:25 ignoring ^[1] 64:6 III ^[4] 18:9 76:18 117:6,8 III's ^[1] 76:22 illegal ^[2] 15:23 30:13 illegally ^[2] 15:8 88:24 illegitimate ^[3] 87:16 89:8 114:22 illegitimately ^[1] 89:17 ILLINOIS ^[13] 1:6 2:8 4:5, 12,18 12:25 37:10 43:5 49:25 55:25 85:20 88:1 110:7 imaginary ^[1] 60:12 imagine ^[4] 47:15 62:16 85:19 91:23 immediately ^[1] 25:16 immediately ^[5] 63:5 65:8 67:25 73:25 84:2 imminent ^[3] 51:25 55:9, 11 impact ^[2] 89:24 97:17 impair ^[1] 98:20 implement ^[1] 32:12 implicate ^[3] 55:22 111:9	112:14 implicates ^[1] 61:2 important ^[2] 110:2 116:3 impossible ^[2] 29:21 66:20 improperly ^[1] 11:25 incidentally ^[1] 43:2 include ^[3] 98:2,4,16 included ^[1] 98:18 including ^[1] 53:10 incomplete ^[1] 76:12 inconsistent ^[1] 19:6 inconvenience ^[1] 47:13 increased ^[2] 8:9 21:15 incumbent ^[2] 116:25 117:3 incur ^[2] 7:8 57:15 indefinite ^[1] 63:15 Indiana ^[4] 23:16,17,21 36:12 indicate ^[1] 63:3 indirect ^[1] 65:15 indistinguishable ^[1] 55:15 individual ^[1] 91:2 individuals ^[1] 34:13 industries ^[1] 10:18 industry ^[2] 7:16 46:23 infallible ^[1] 81:25 influence ^[2] 84:3,19 information ^[9] 79:11 80:8 81:10,12,20 95:17 100:1,3, 16 injects ^[1] 5:8 injured ^[1] 22:22 injuries ^[10] 9:25 10:17,18 21:19 22:2 45:18 52:12 89:21 114:14 117:24 injury ^[65] 5:24 9:12 10:2,6, 15 18:21 19:25 20:3,4 22:6,8,11,16,20 25:7 27:1,16, 16 30:12,15 36:15 37:13 39:21 43:11,16 45:19,21 46:7 48:6 51:15,23,24 52:20,21 53:11,17 54:16,20 55:2,17 64:5 70:21 76:2, 14,18,23 77:2 81:5 90:6,8, 17 94:25 101:1,8,22 102:13,24,25 104:4 105:4,9 118:2,3,4,6 injury's ^[1] 43:18 inquiry ^[4] 6:1 28:2 34:13 94:8 instead ^[3] 30:12 39:19 45:9 insubstantial ^[1] 29:20 interest ^[8] 5:19 33:16 57:11 58:22 59:17 60:25 66:5 118:19 interesting ^[1] 31:25 interests ^[1] 62:5 interrupt ^[1] 85:2 intuition ^[1] 38:2 invalid ^[2] 70:9 97:9	invocation ^[1] 75:23 involved ^[1] 78:12 involves ^[1] 90:5 ironically ^[1] 53:22 irrelevant ^[2] 17:10 104:6 Isn't ^[23] 12:7 50:11,24 51:1 52:1 55:2,11 59:22 60:17 61:11 68:13,21 74:16 78:17,17 79:7 88:12 94:12 101:2 102:24 104:17 110:11,12 issue ^[10] 9:16 12:19 26:25 28:8 29:12 54:23,24 57:4 60:20 97:7 issues ^[3] 15:1 16:14 33:16 itself ^[10] 55:2 57:13 76:21 84:3,19 101:18 102:21 105:4 110:16 113:25 J JACKSON ^[42] 11:1,17 12:7 13:2,5 48:19,20 50:6,16, 22,24 52:17 53:14,20 54:1, 4,15,18 55:8 56:2,17 72:18, 19 73:4 74:8,14,25 96:22 105:12,14,17 106:20,25 107:3,6,21 112:6,7 113:20 114:24 115:2,8 JANE ^[3] 2:8 3:10 75:4 Janus ^[1] 85:20 John ^[1] 31:22 Judge ^[2] 24:6 54:22 judgment ^[4] 14:14 18:8 31:6,15 judicial ^[3] 5:10 28:16,20 jump ^[1] 78:13 Justice ^[296] 2:5 4:3,10 6:4, 21,25 7:24 8:2 9:1,7,10 11:1,17 12:7 13:2,5 14:20,21, 22,25 15:10,15 16:2 17:6 18:20 19:18 20:13,17,19 21:3,17,23 22:1,14 23:19, 25 24:9,18 25:5,10,11,12, 21,23 26:1,22,22,23 27:10 28:10,21 29:4,5,5,7 30:2,4, 10,18 31:9,24 32:7 33:17, 17,18,24 35:4,19 36:11 37:2,3,3,5,6 38:23 39:17 40:3, 7,13,17,17,19,20,21 41:13, 17,23 42:2,7,9,13,16,19,25 43:12 45:23,24,24 46:1,11, 11 47:7,11 48:18,18,20,24 50:6,16,22,24 52:3,17 53:14,20 54:1,4,15,18 55:8 56:2,17,18,24 58:2,7,24 59:21 60:4,15 61:8 62:7 63:9,13, 17,18 64:11,24 65:10,14 66:6,10,14,23,23 67:15,17, 18,19,20 68:2,3,3,5,6 69:4 70:3 71:5,8,8,10,11,17,20, 24 72:1,15,16,16,18,19 73:4 74:8,14,25 75:1,6 77:4, 22,23,24 79:21,22 80:12	81:16,18,19 82:6,16,21 83:8,11,14,15 84:9,14,25 85:4, 12,14,15 86:4,14 87:3,17 88:3,15,16,19,23 89:2 90:1, 2,3 91:1,11,13,18,20 92:7, 17 93:13,24 94:20 96:2,5,7, 20,22,23 97:12,15 98:6,9 99:3,5,6,7,8 100:6,12,22 101:24 102:1,14,23 103:5, 9 104:3,4 105:11,12,13,14, 15,17,18 106:16,19,20,21, 25 107:1,3,5,6,21 108:25 109:19,22,22,24,25 110:25 111:1,1,3,4,5,6,7 112:3,4,4, 6,7,8,15 113:20 114:24 115:2,2,8,9,15 118:22 Justice's ^[1] 80:7 justiciability ^[1] 23:9 K KAGAN ^[29] 17:6 18:20 19:18 25:5 33:17,18 35:4,19 37:2 42:9 46:12 64:11 68:5,6 69:4 70:3 71:5,24 72:1 85:14 90:2 93:13,24 94:20 96:2 111:3 112:8,15 115:3 Kagan's ^[1] 20:19 KAVANAUGH ^[57] 14:20, 22,25 15:10,15 16:2 40:18, 19 41:13,23 42:2,7,13,16, 19,25 43:12 45:23 48:24 61:8 62:7 63:9,13,17 71:10,11,17,20 72:15 79:22 80:12 88:16,19 89:2 96:20, 23 97:12,15 98:6,9 99:3,6, 8 104:3 105:11,13,15,18 106:16,19,21 107:1,5 108:25 111:5,6 112:3 Keene ^[8] 63:22 79:8,10 81:13 87:5 89:19 114:5,16 keep ^[7] 35:17,17 44:1 83:9 95:18 98:9 116:6 kicked ^[1] 35:24 kind ^[25] 12:19 16:9,21 17:14,21 21:12,19 22:6 26:3 29:2 34:9 36:9 42:6 43:17 44:15,17,18 48:17 49:9 53:17 59:1 70:21 87:25 113:7 114:1 kinds ^[7] 35:23 37:21 61:12 68:15 69:17 86:5 114:25 knowledge ^[1] 99:20 known ^[2] 16:5 95:25 L Lance ^[2] 33:5 54:12 landslide ^[1] 17:5 language ^[2] 30:17 64:7 last ^[9] 31:4 41:4 42:17 44:6,22 45:10 47:22 82:3 96:10 late ^[3] 20:10 80:16,16 late-arriving ^[9] 18:10 43:	8,9 44:9,21 55:4 56:1 99:23 116:12 late-breaking ^[1] 20:10 Laughter ^[2] 40:16 42:12 law ^[25] 4:15 11:25 14:10 19:6 20:24,24 23:22 29:8 32:9,9,12 39:11 46:5 53:7, 10 57:18 59:13 73:1 74:6 85:19 86:9 98:14 109:10 110:7 117:25 law's ^[1] 59:15 lawfully ^[1] 53:9 laws ^[9] 36:13 57:2,9,9 59:13 68:10 88:1,2,5 lawsuit ^[1] 115:6 lawyer ^[1] 46:8 lawyers ^[2] 109:5,16 League ^[2] 44:10 105:24 least ^[2] 4:20 24:1 leave ^[1] 104:11 left ^[1] 104:11 legal ^[3] 30:17 109:1,15 legality ^[1] 111:11 legally ^[13] 76:5,21,24 98:1 101:18 102:2,19,21 103:20 105:5 110:16 113:25 114:3 less ^[8] 13:13 30:8 44:10 45:2,3 64:19 102:16,16 lesser ^[1] 64:17 level ^[4] 7:15 14:11 53:5 98:5 lies ^[1] 117:4 likelihood ^[3] 17:15 61:21 104:5 likely ^[4] 34:10 45:3 69:22 104:2 Likewise ^[1] 37:15 limit ^[3] 33:11,19 57:24 limited ^[4] 33:10,15 79:7 80:10 limits ^[1] 25:24 line ^[2] 70:23 113:1 lines ^[1] 90:9 list ^[1] 38:6 litigate ^[1] 93:6 litigated ^[1] 13:21 litigation ^[7] 14:5,12 15:1 61:24 70:6 97:3 113:16 little ^[14] 11:6 13:23 17:10 19:22 20:3 38:17 45:4,20 68:7 94:23 96:4 112:7 113:3,6 live ^[2] 17:25 58:19 lived ^[1] 95:20 lives ^[1] 118:18 locked ^[1] 31:20 long ^[7] 4:15 32:23 48:12 57:3 66:24 73:8 86:2 longer ^[3] 5:23 43:25 44:2 look ^[14] 11:22 42:4 47:25 77:25 78:15 82:13,15 96:18 99:23 101:3 103:23 109:13 116:4,24
--	---	---	---	--

Official - Subject to Final Review

looked ^[1] 86:4 looking ^[3] 51:11 59:5 82:4 looks ^[1] 61:15 loosening ^[1] 27:5 lose ^[18] 19:13 30:14 38:22 39:3 40:1 47:20 55:12 56:5 58:6 60:18 72:24 74:19 80:1 84:19 87:21 91:4 95:13 102:6 loser ^[1] 32:6 losers ^[1] 92:11 loses ^[1] 80:3 losing ^[19] 9:13 10:11 15:20 29:22 30:8 51:4 55:13 73:3,6,7 76:7 79:25 80:3 98:2 102:2,8,12,15 114:7 loss ^[9] 6:18 22:7 57:7 76:11 83:17 87:6 89:23 95:9 117:17 lost ^[6] 4:25 37:9 112:16,18 113:13 115:19 lot ^[21] 17:23 23:8 24:11 27:2,4 30:11 33:22 35:15 36:2 40:1 46:1 50:18 61:23 80:8 81:10 17:20 85:21 96:21 100:16 113:11 lots ^[2] 40:10 49:23 lousy ^[1] 16:22 Lujan ^[1] 25:12 M made ^[3] 21:8 25:13 43:13 madness ^[1] 117:4 mail ^[5] 50:4,5 59:25,25 108:2 mail-in ^[4] 4:12 17:20 45:3 50:2 mailing ^[1] 59:25 major ^[2] 57:25 62:4 makers ^[1] 42:17 malpractice ^[5] 44:12 101:4 105:25 109:1 118:11 manufacturers ^[1] 65:19 many ^[6] 15:24 31:21 33:12 54:14 96:1 99:13 maps ^[1] 6:18 margin ^[39] 4:21 6:14,15 7:13 8:6,14,16 9:16 10:13,14 11:9,10 12:10,10,16 15:6 17:9 21:9 22:6 37:18 45:5 59:6 75:24 82:3,4 93:22 94:3 95:14 102:17,21,24 103:3,15,19 112:18,19 113:8,14,24 margins ^[2] 45:2 56:13 market ^[1] 7:23 marry ^[2] 35:10 36:4 massive ^[1] 47:13 material ^[1] 38:21 matter ^[10] 1:14 7:14 9:25 10:20 15:6 33:2 56:8 58:8 60:24 103:11 matters ^[2] 95:20 103:17 McPherson ^[3] 23:2 27:19	36:24 mean ^[72] 6:9,24 12:8,18 13:23 15:3 18:2,20 19:2,25 21:5,7 22:10,21 25:3 26:17 30:1 31:7 32:22 33:22 34:12,16 36:11 37:23 38:6 45:7 47:8,14 50:19 51:9 52:24 53:22 56:4 59:2,7,22 60:1,19 61:17 62:15 68:9,11,22 69:18 70:4,5 72:21 85:14,24,25 87:25 88:17 90:1 91:7,22 95:4 99:17 100:23 101:11 103:7,23 106:10 107:10,15,24 108:12,13,13,15 113:23 117:5 118:1 Meaning ^[1] 64:24 meaningful ^[2] 30:7,9 means ^[4] 4:23 58:21,22 107:16 measured ^[1] 92:14 Medicine ^[1] 104:24 Meese ^[11] 63:22 79:8,10 81:13 87:5 89:19 98:3 100:3 114:5,16 117:19 meet ^[2] 73:23 109:7 meets ^[2] 86:15 89:12 mentioned ^[2] 97:1 110:17 mere ^[5] 5:5 57:8 76:13 77:16 95:11 merely ^[2] 77:19 81:9 merits ^[1] 4:16 message ^[1] 106:14 meter ^[1] 91:5 meters ^[1] 90:15 metric ^[6] 11:19 77:11,13 82:10,12 112:2 MICHAEL ^[4] 1:3 2:4 3:6 56:21 Michigan ^[1] 23:5 Michigan's ^[1] 23:4 middle ^[2] 78:10 84:16 might ^[28] 11:21 15:13 16:4 32:17,19 41:11,19 42:9 47:17 53:4,5 56:12 63:9 64:9,19,19 84:3,18,19 85:17 94:3,3 99:10 102:6 106:12 112:22,23 113:15 mile ^[3] 45:8,10,11 mind ^[2] 14:5 116:6 mine-run ^[1] 82:11 minimum ^[2] 5:22 104:15 minor ^[4] 5:11 67:21 85:22 106:12 minority ^[1] 114:9 minute ^[1] 37:7 misperceiving ^[1] 5:2 misreading ^[1] 5:1 mission ^[3] 106:8,11,12 Mississippi's ^[1] 98:19 mistake ^[1] 54:21 mitigate ^[2] 57:15 67:12 Mm-hmm ^[3] 25:21 83:13 105:17	monetary ^[3] 43:16,18 104:4 money ^[16] 38:11 44:23,25 45:2,3,5 47:8 52:8 55:25 101:6,7 104:14,16,20 106:21 118:10 monitor ^[3] 106:22 108:8 110:6 monitoring ^[3] 44:8 108:19 110:1 months ^[3] 78:20,21 87:19 moral ^[1] 55:20 morning ^[1] 4:4 most ^[7] 19:1 26:24 35:22 36:9 45:14 78:11 96:24 mostly ^[2] 47:7 70:7 motion ^[3] 14:7 21:21 31:10 motivated ^[1] 48:22 Ms ^[68] 75:3,6 77:7 78:24 80:6 81:1 82:5,9,18 83:4,8,10,13 84:4,12,21 85:3,8,13,14,24 86:7,23 87:4,24 88:11,18 89:1,4 90:18 91:7,12,15,19,22 92:16,19 93:19 94:14 95:4 96:15 97:11,14,19 98:7,11 99:17 100:11,15 101:11,25 102:4,18 103:1,7,13 104:21 106:3,17 107:15 108:12 109:21 110:4 111:16 113:19,21 115:1,7 much ^[9] 19:19 33:15 36:7 37:16,16 41:1 44:19 80:19 99:20 multiple ^[2] 37:25 102:8 Murthy ^[1] 64:3 must ^[1] 4:17 myself ^[1] 28:12 N name ^[3] 18:17 20:12 22:24 name's ^[2] 54:8 118:17 namely ^[1] 18:6 names ^[2] 5:4 24:7 narrow ^[2] 57:17 72:2 narrowly ^[1] 48:11 national ^[1] 115:23 nature ^[4] 11:9 46:22 74:10 116:5 near ^[1] 64:4 neatly ^[1] 71:2 necessarily ^[4] 11:12 12:15 55:10 97:20 necessary ^[4] 73:16 79:15 105:3 106:24 need ^[15] 6:1 7:14 11:3 12:2 28:6 40:9 41:1 43:13 47:24 62:24 72:2 81:11 90:25 91:9 97:24 needlessly ^[1] 5:8 needs ^[7] 29:11 61:20 73:11 77:12 83:17 86:12 105:2	2 negatively ^[1] 35:8 network ^[1] 41:5 never ^[14] 35:21 40:11 55:18 60:13 64:10 70:10 77:10 82:12 86:4 97:18 100:14 106:9,15 116:17 new ^[16] 7:6,17,20 8:21 17:17,19 28:13 56:5 68:17 69:10,19,22 70:8,12 94:10 96:14 newer ^[1] 99:25 next ^[5] 12:12 32:19,21 61:15 108:3 nightmare ^[2] 16:10,15 nine ^[1] 78:21 nobody ^[5] 35:24 39:14 40:3,5 89:9 non-speculative ^[1] 13:9 None ^[3] 18:18 41:6 60:16 nothing ^[2] 10:5 30:19 notice ^[2] 28:16,20 NOTZ ^[71] 2:8 3:10 75:3,4,6 77:7 78:24 80:6 81:1 82:5,9,18 83:4,8,10,13 84:4,12,21 85:3,8,13,14,24 86:7,23 87:4,24 88:11,18 89:1,4 90:18 91:7,12,15,19,22 92:16,19 93:19 94:14 95:4 96:15 97:11,14,19 98:7,11 99:17 100:11,15 101:11,25 102:4,18 103:1,7,13 104:21 106:3,17 107:15 108:12 109:21 110:4 111:16 113:19,21 115:1,7 November ^[1] 61:15 number ^[7] 37:18 83:1,21 84:6,9,10 87:1 O object ^[25] 40:25 41:2,8,18,22,24 42:5,8,13,23 48:23 49:3 58:10,13,20 63:4,11,14 65:8,12 71:3,15 72:8 73:13,20 objects ^[5] 40:23 41:15 63:1 65:16 67:25 observation ^[1] 108:21 obtain ^[1] 103:25 obvious ^[4] 34:18 36:10 104:16,18 obviously ^[7] 6:10 21:20 25:23 42:21 46:19 48:10 54:10 occur ^[1] 44:20 October ^[1] 1:12 odds ^[1] 73:2 off-ramps ^[1] 48:10 offended ^[1] 53:5 office ^[1] 57:12 officials ^[5] 75:15 86:16 92:24 93:4 116:18 often ^[4] 34:22 66:21 80:3,3	Okay ^[14] 25:10 28:10,21 41:13 73:10 80:12,13 83:17 84:9 86:14,14 88:15 93:24 112:9 old ^[3] 17:18 21:14 68:19 old-school ^[1] 22:16 Oldham ^[1] 24:6 Olympics ^[1] 90:12 once ^[1] 111:7 One ^[51] 9:19 15:5 17:7 19:23 20:9 21:7 22:10 24:20 25:2,3 28:11,25 29:1,1,10 34:24 39:12 41:12,18 44:16 45:13,16 48:11,21 49:7 54:5 59:3 67:5 76:8 78:19 79:12,13,16 84:13 85:19 86:8 88:10 89:22 91:8,9 92:11 105:15 106:19 111:6 112:14 114:6 115:21 116:6 117:11,19 118:12 one's ^[2] 16:22 116:16 one-in-a-hundred ^[1] 60:23 ones ^[5] 5:4 24:5 53:3,13 87:2 only ^[20] 5:1,7 26:19 28:5 41:23,25 55:5 56:4 57:5 62:3 66:1 76:20 79:2,3 80:24 86:17,25 97:22 112:24 117:16 open ^[1] 35:18 opening ^[4] 24:13,19 61:18 113:11 operate ^[4] 6:19 26:11 35:8 43:15 operates ^[2] 43:18 56:15 operating ^[2] 47:6,25 opinion ^[3] 23:9 24:6 46:15 opinions ^[1] 93:10 opponent ^[1] 37:16 opportunity ^[1] 49:5 opposed ^[5] 12:13 34:14 51:6 78:13,22 opposite ^[1] 33:4 oral ^[7] 1:15 3:2,5,9 4:8 56:21 75:4 order ^[4] 11:3 17:1 77:5 94:24 ordinarily ^[1] 11:2 ordinary ^[2] 46:21 105:20 organizational ^[1] 106:5 other ^[33] 9:22 12:22 14:25 19:9 20:15 36:6 39:17 42:10 43:2 44:17 46:5 53:16 54:11 70:9 75:18 76:22 78:1 85:9 87:2 88:1,5,6 89:23 90:7 91:3 100:2 103:17 104:18 106:10,11 114:8,14 118:3 others ^[1] 91:6 otherwise ^[4] 101:21 105:8 110:19 113:12 ought ^[1] 26:11
---	--	--	--	---

Official - Subject to Final Review

out ^[28] 9:19 14:23 15:19 16:2,6,7,11 18:21 21:4 30: 18 35:24 38:8,25 43:17 46: 12 59:3 62:12 63:20 69:8 70:6 77:10,25 88:21 97:4 98:13 100:13 106:22 115: 18 outcome ^[13] 6:13 9:23 10: 2,7 37:17 56:16 57:5 59: 20 61:7 69:2 70:19 74:4 104:2 outcome-determinative ^[1] 117:22 outcomes ^[1] 60:21 outsider ^[1] 26:8 over ^[4] 4:24 15:1 40:1 78: 6,6 113:16 overcounting ^[1] 88:7 overseas ^[1] 109:7 own ^[2] 116:8 118:17 ox ^[1] 50:19 P PAGE ^[5] 3:2 44:11 95:7 115:20,20 paper ^[5] 26:10,14 39:20, 20 110:1 paradigm ^[1] 71:3 part ^[16] 19:1 31:5 60:20,20 65:16,19 67:7,9,9 73:5,7 84:11 105:19,20 107:1 117:12 participated ^[2] 81:15 83: 6 particular ^[12] 19:20 26:21 43:20 46:13 47:1 49:10 51: 4 74:14 90:6 97:5,6 100:9 particularize ^[1] 51:20 particularized ^[6] 5:19 33: 16 49:13,19 50:9 67:10 particularly ^[3] 32:14 34: 25 85:5 particulars ^[1] 100:24 parties ^[12] 29:18 32:16 33: 23 34:14 46:19 57:25 62:4 67:21 69:7 75:9 86:10 96: 18 partisan ^[1] 28:14 partly ^[1] 66:18 party ^[20] 5:11 20:9 23:18, 21 31:21 32:23 34:21 35: 13 36:25 68:13,15 69:10, 14 71:12,21 72:5 85:22 98: 15 106:12 114:10 party's ^[1] 98:21 pass ^[1] 43:19 passed ^[1] 68:12 past ^[2] 16:19 60:20 patterns ^[1] 31:14 PAUL ^[5] 2:2 3:3,13 4:8 115:12 pay ^[4] 4:21 64:17,19,19 paying ^[1] 44:5 people ^[22] 6:19 7:6 12:11	13:16 20:11 23:11 27:4 30: 6 33:11,15 42:10,10 43:2 47:20 49:5 50:18 65:2,16 94:1 108:7 113:13 116:4 percent ^[35] 10:22,23,24, 25 11:4,4,15,15 29:18 30:8 31:18,19 32:17,17,21,22 52:5 56:3,8,9,10,11,11 59: 6,24 74:17,20 78:3 83:19, 20 93:18,21 94:3 103:10, 11 percentage ^[1] 31:22 perfect ^[2] 51:10 80:21 perfectly ^[2] 69:9 118:9 perhaps ^[1] 89:6 period ^[5] 101:7 107:17,20 108:21 112:17 person ^[3] 53:1 60:24 112: 15 person's ^[1] 61:2 personal ^[1] 99:20 perspective ^[1] 61:11 petition ^[2] 115:20 116:8 Petitioner ^[3] 6:5 13:6 62: 19 Petitioners ^[16] 1:4 2:3,7 3:4,8,14 4:9,14 53:23 55: 19 56:23 75:9 76:6,24 106: 4 115:13 Petitioners' ^[4] 4:16 75:13 76:4,16 phrase ^[3] 17:16 88:8 109: 2 pick ^[1] 5:16 Pierce ^[1] 41:5 pitch ^[1] 24:19 place ^[1] 35:18 places ^[1] 78:5 plain ^[1] 68:16 plaintiff ^[23] 13:8 29:10,12 63:4 64:4 65:7 72:5 73:20 75:19 79:6 81:4 82:14 85: 9 86:10,12 90:22 96:17 101:15,21 104:25 105:2 110:9,19 plausibility ^[3] 64:10 74: 11 91:8 plausible ^[3] 30:20 91:12, 23 plausibly ^[6] 89:6 93:21 95: 13 103:8,15 114:18 play ^[6] 14:23 15:19 16:7 43:17 62:12 97:4 plays ^[1] 70:6 plead ^[4] 17:21 27:11,20 28:6 pleading ^[4] 16:19 27:13, 15 29:16 pleadings ^[1] 30:23 please ^[3] 4:11 56:25 75:7 pled ^[1] 27:15 pocketbook ^[23] 5:24 9:25 10:6 22:11,20,22 27:16 45: 18,19,21 47:11 48:5 51:22	54:16,20 76:17 101:1,8 102:13 115:25 117:24 118: 2,4 point ^[32] 7:24 8:20 9:11,19 16:11,17 25:14,14,18 29:1 38:25 42:22 43:17 44:17 52:15,19 55:5 77:10 79:9 80:6,24 81:9 95:7 97:22 98:11 100:15 108:16 109: 1,4 115:16 117:11 118:3 pointed ^[2] 30:18 37:10 points ^[2] 46:12 115:15 policy ^[2] 75:16 93:2 policy-based ^[1] 93:7 political ^[10] 5:9,16 43:23 44:12 79:14 98:15 100:4 101:3 105:25 118:10 politics ^[1] 78:12 poll ^[4] 44:8 95:23 101:4 118:10 polling ^[8] 52:1 79:8,13 80: 5,10,14 99:10 100:4 polls ^[8] 19:13 45:6 50:1 52:6 80:5 94:2 96:9 106: 22 pollution ^[2] 53:2,6 poorly ^[1] 39:8 posed ^[1] 57:16 posited ^[1] 112:15 position ^[15] 5:15 29:24 78: 25 93:8 96:16 97:18 99:15 101:14 110:5,8 111:22 112:23 115:22 116:19,23 possibility ^[6] 75:23 76:11, 14 77:16 89:24 95:11 possible ^[5] 5:13 13:21 18: 4 45:14 74:3 post ^[1] 107:12 post-election ^[14] 15:2,14, 18,22 36:19 61:15,24 62:1, 10 97:3,6,21 111:19 113: 11 postmarked ^[2] 107:13 108:3 potential ^[5] 11:10 51:23 67:14 78:1 90:22 potentially ^[2] 85:6 104:14 pour ^[1] 5:3 practical ^[5] 38:15 44:17 46:2 56:8 62:3 practically ^[1] 113:6 practice ^[1] 88:5 pre-election ^[5] 15:24 36: 20 61:14 68:10 87:11 pre-enforcement ^[2] 60:6 73:22 precautions ^[2] 76:18 109: 16 precedents ^[4] 5:2 58:12 59:10 63:2 precinct ^[1] 86:17 predict ^[1] 81:24 predictable ^[1] 33:25 prediction ^[2] 81:6,7	prefer ^[4] 11:14 13:11 18: 13 68:19 preference ^[3] 11:4,18 12: 1 premise ^[3] 11:14 56:15 65:5 prepared ^[1] 95:21 present ^[2] 77:1 91:9 present-injury ^[1] 110:22 presentation ^[1] 63:19 President ^[1] 81:23 presidential ^[5] 23:3,5,7, 11,13 presumably ^[2] 91:22 97: 12 pretty ^[5] 14:16 16:23 38: 14 46:6 115:4 prevail ^[1] 106:7 prevent ^[2] 35:20 58:23 previous ^[1] 116:9 primary ^[1] 118:6 principle ^[2] 26:3 111:10 prior ^[2] 70:7 82:6 probability ^[8] 58:14 60:13 73:24 83:17,19 86:5 93:15, 17 probably ^[10] 38:9 42:1 87: 25 88:12 91:16 98:12 103: 14 108:14 111:20 114:9 problem ^[9] 32:7 39:25 58: 4 68:8,23,24 94:15,16 95: 16 problematic ^[1] 34:25 problems ^[1] 92:22 procedural ^[3] 25:15 39:1 46:7 procedural/substantive ^[1] 25:19 proceeded ^[2] 106:4,17 proceeding ^[3] 16:18 69: 20 108:16 process ^[5] 43:3 45:1 70: 13 84:20 89:8 producers ^[2] 41:4 42:17 produces ^[1] 92:13 producing ^[1] 111:12 prognosticate ^[1] 57:23 prognostication ^[1] 80:23 prognostications ^[1] 84:1 prognosticators ^[1] 5:10 promise ^[1] 85:18 prompting ^[1] 55:24 promulgated ^[1] 7:17 proof ^[1] 66:25 proposition ^[4] 24:2 34:19 104:25 118:16 prospect ^[1] 20:8 prospective ^[1] 38:10 prospects ^[1] 116:1 protect ^[1] 62:5 prove ^[1] 87:21 proven ^[1] 81:25 provide ^[1] 38:4 provides ^[1] 95:12	provisional ^[2] 107:19 108: 9 provisions ^[1] 40:11 prudent ^[1] 110:13 public ^[4] 111:13 114:12, 13,13 pull ^[1] 60:5 purpose ^[3] 59:15 65:25 66:1 purposes ^[3] 33:21 108:15 113:6 pursue ^[1] 27:8 push ^[2] 65:4 97:19 put ^[17] 6:10 12:23 30:17 34:10 38:16 58:25 60:13 70:23 72:22 73:2,2 75:25 93:8 115:22 116:18,22 118:18 puts ^[4] 17:17,21 19:16 92: 1 Q qualify ^[1] 90:11 qualifying ^[1] 114:12 question ^[28] 9:15 14:4 17: 8 20:22 23:17 24:21 28:11 33:21 35:4 50:11 55:6 57: 12 59:10 66:7 80:7 84:11 90:6 104:3 107:6 108:13, 14 109:5,11 110:11,12,14 111:6 113:22 questions ^[7] 6:3 41:18 58: 1 62:20,20 77:3 84:5 quibble ^[2] 41:12 63:9 quickly ^[1] 85:18 quite ^[4] 19:5 25:18 54:23 94:5 quoted ^[1] 105:24 R race ^[10] 45:9,9 57:10,23 58:3,3,8 74:4 91:25,25 races ^[3] 5:13 82:6 91:3 radically ^[1] 34:18 raise ^[1] 104:14 raised ^[2] 61:19 109:1 raising ^[1] 50:20 random ^[1] 86:20 rather ^[3] 10:16 11:15 75:8 re ^[1] 95:6 re-election ^[1] 63:25 read ^[1] 9:20 readily ^[1] 92:13 ready ^[1] 106:1 real ^[6] 43:14 44:14 51:15, 24 97:7,8 real-world ^[2] 103:3,5 realistic ^[1] 74:10 realize ^[1] 39:24 reallocating ^[1] 104:13 really ^[24] 18:21 27:19 32: 13 34:9 36:21 43:2 48:17, 22 49:1,4,15 52:10 54:22, 24 59:2 71:4 72:12 74:16
---	---	--	--	---

Official - Subject to Final Review

100:5 103:6 104:6 107:22 108:5 117:20 reason [16] 16:10,12 19:22 25:1 38:16 45:21 54:12 55:17 67:10 70:9 72:1,5,6,12 78:19 112:13 reasonable [6] 44:15 55:7 57:15 109:12 110:12 118:9 reasons [6] 18:24 37:25 57:6 71:23 79:1,4 REBUTTAL [4] 3:12 115:11,12,15 receipt [6] 61:12 83:7 89:14 95:22 98:19 99:21 receive [1] 8:10 received [1] 4:13 receives [1] 108:2 recent [1] 36:18 recently [1] 36:8 recipe [1] 111:12 recognized [1] 76:19 recognizes [1] 62:25 recommendation [1] 39:23 record [5] 51:12 75:8,21 82:18 96:18 recount [2] 103:25 104:2 redressability [2] 25:16 36:16 reduce [1] 4:21 reduced [2] 75:24 107:23 referring [3] 76:10 88:20 100:23 reflection [1] 8:17 reframing [1] 95:6 regardless [1] 107:20 regime [2] 41:15 42:24 registered [2] 7:17 29:17 regular [1] 63:20 regulate [3] 43:1 86:9,21 regulated [6] 7:5,16 8:22 26:4 41:7 46:23 regulates [1] 86:10 regulation [17] 8:3,5 11:9 39:19 40:23,25 41:2 43:20 47:2 63:5 73:14 86:1 107:7,11,16,25 112:11 regulations [7] 7:6 8:21 26:6 40:10 45:12 47:2 63:1 regulatory [4] 41:15 42:24 46:23 65:19 rejected [4] 19:2 53:25 54:5 77:2 related [2] 25:17 101:5 relation [1] 91:6 relative [6] 17:18 19:17 34:11 94:6,11 112:11 relatively [1] 36:8 relevant [3] 11:19 22:25 99:19 reliable [1] 80:5 reliance [1] 76:4	relied [4] 62:22 81:14 99:9,12 relief [2] 29:9,11 rely [3] 80:4 100:2 105:1 relying [1] 27:18 remaining [1] 55:5 remains [1] 10:4 remedy [6] 15:16,25 16:9 62:10,20 97:10 repackage [2] 77:1 110:22 repeat [1] 84:13 repeatedly [2] 40:24 76:6 reply [4] 9:19 10:4 28:24 49:1 Report [1] 117:8 reporters [1] 116:10 Republican [5] 18:10 27:6 29:17 69:16 98:21 Republicans [8] 20:16 31:13 33:20 35:5,15,20 36:3 64:25 reputation [4] 87:8 88:17 89:25 114:22 reputational [10] 10:17 12:5 76:11 88:14,20,21 89:18 98:5 103:16 114:17 require [7] 20:21,22 37:20,24 57:22 61:25 110:2 required [6] 37:8,13 73:23 81:5 101:15 113:5 requirement [4] 18:22 20:1 25:16 51:1 requirements [4] 75:18,20 76:23 105:8 requires [7] 5:18 32:9 77:19 85:21 100:8 111:14,24 researched [1] 28:12 resisted [1] 83:21 resisting [2] 84:6 92:4 resolved [1] 97:21 resolves [1] 57:17 resolving [2] 75:16 93:9 resource [2] 101:16 110:23 resource-expenditure [1] 110:10 resources [10] 44:6 55:6 67:12 101:14 104:13 105:1 108:18 109:6 110:3,15 respect [8] 13:15 51:8 55:16 56:7 80:19 107:7 117:5,14 respectfully [1] 80:13 respects [2] 6:8 27:11 respond [2] 80:24 113:20 Respondents [4] 1:8 2:9 3:11 75:5 responding [1] 9:24 response [7] 10:3 19:23 27:23 48:25 71:24 72:1 80:7 rest [1] 44:8 result [10] 4:16 19:14 32:5,5 55:12 56:5 73:7 74:19	102:16 113:16 results [4] 60:21 111:13 116:11,12 return [2] 36:23,24 reveal [1] 40:21 revenue [1] 8:10 reverse [1] 49:25 rid [3] 19:24 32:23 50:2 ride [1] 97:16 ridiculous [1] 116:19 rise [1] 98:4 risk [8] 6:6 7:1 9:13 10:10 13:9 14:2 17:15 22:7 30:12,14 51:3,15 52:10 55:13 57:4,7,16 58:6,14,15,18,23 59:1,4,5,9,11,19,23 60:9 61:3,6 63:7 64:2,3,9 65:6,7 67:13 70:24 72:23 73:2,6,9 74:16 76:7,15 77:6,15,20 79:25 80:2 81:7 82:11,23,25 85:13 86:12 89:22 92:13 97:23 98:1 101:17,23 102:2,6,8,11,15,15,19 105:4 109:9 110:15,21 111:25 112:2 114:6,7,11,12 risks [2] 5:10 10:11 RNC [1] 33:23 34:1 35:22 69:5 70:7 71:1 72:4,9 115:18,19,20 road [4] 5:20 39:8 48:16 62:22 ROBERTS [34] 4:3 24:9,18 25:10 26:22 29:5 33:17 37:3 40:17 45:24 48:18 56:18 58:24 59:21 60:4,15 67:17 68:3 71:8 72:16 75:1 77:22,24 81:16,19 82:6,16,21 109:19,22 111:1 112:4 115:9 118:22 robust [1] 28:18 role [1] 5:9 rolls [1] 69:14 room [1] 13:22 roulette [4] 58:17 59:3 60:22 74:24 round [1] 58:18 routinely [1] 115:3 row [1] 59:23 rule [89] 14:17 15:21 17:7,17,18,19,21 18:1,2,3,14,20 19:7,14,16 21:9 26:16 28:13,13,15,17 29:19,23 34:9 46:18 48:10,12 55:9,11,14,18 57:17 66:1,17 67:2,3,6,7,21 68:11,17,25 69:10,23,24 70:8,12 71:16 72:2,14 73:8 74:3,5,5 75:12,14 76:22 78:14,15,16 80:22 84:24 86:22 90:5 92:9,20 93:1,3,14 94:5,10,15,17 95:3,8 96:14 97:5,8,17 101:19,20 105:7 110:18,18 111:11 112:9 117:13,15,23	rules [50] 5:20 7:4,17,20,22 13:17 14:19 16:13 21:14,15 23:4,12 24:14 27:5 33:25 34:1,3,3,15 35:2,3,7,16,23 38:4 39:1,4,8 46:13,21 47:5 48:16 57:16,19 58:11 61:5 62:22 65:23,25 66:19 68:19 69:17,19 70:16,18 71:4,6 72:4 75:11 92:12 run [13] 12:24 22:20 25:3 45:11 48:12 76:1 79:23 85:16 87:25,25 89:13 90:14 100:14 runner [1] 91:2 runners [1] 90:10 running [3] 21:16 79:19 93:4 runs [2] 45:15 88:4 Russian [4] 58:17 59:2 60:22 74:23 S saddling [1] 75:15 safe [2] 116:20 117:7 same [16] 25:14,15,19 34:7 46:24 49:9,16 53:8,17 54:5 64:25 68:21 75:18 84:23 95:16 116:23 sample [1] 86:20 sampling [1] 88:22 satisfied [2] 21:25 95:3 satisfy [4] 20:19 21:1,6 95:8 save [1] 47:19 saying [34] 8:15,16 11:19 13:3,5,10 18:15 19:24 20:1 30:12 36:12 48:3 51:11,12,18 64:7 65:5 66:1 71:21,23,25 73:11,12,16 74:9,12 78:2 84:16 96:2,4,12 108:7 113:2,3 says [21] 9:12,22 10:12 12:24 14:18 17:19 18:14,22 20:9,15,23 39:14 44:12 50:4 53:15 69:14 92:9 101:3 112:10 115:3 118:1 scale [1] 30:9 Scalia [1] 111:7 scenario [2] 16:10 58:9 scenarios [1] 16:15 scheme [3] 65:16,20 114:21 school [1] 39:11 schools [1] 41:5 score [1] 76:1 Scudder's [1] 54:22 search [1] 68:8 seat [2] 116:16 117:7 seats [3] 116:20,21,21 SEC [7] 7:17 8:21 47:16 second [10] 21:10 22:17 33:1 46:22 51:10 54:17 57:14 84:11 109:13 116:3 secure [1] 83:18	see [7] 12:15 18:6 39:21 51:24 64:14 70:6 108:23 seeing [1] 71:12 seek [1] 29:23 seeks [2] 85:10 110:9 seem [4] 28:7 37:7 48:22 83:2 Seems [14] 9:14 19:5 26:8 37:13 58:4,25 81:23 93:25,25 94:23 112:22 113:4 117:8 118:13 self-declared [1] 92:25 self-inflicted [2] 52:2,12 Senate [1] 38:8 send [2] 47:20 95:23 sense [12] 10:20 24:4 51:9,10 65:24 68:7 92:18,20 101:20 105:6 110:18 111:17 sentences [2] 23:20 36:12 separate [3] 10:6 34:13 72:11 separates [1] 19:19 seriously [2] 32:20 100:6 set [1] 69:19 Seventh [4] 9:21 48:14 76:6 102:7 several [1] 26:23 SG [1] 113:3 share [1] 50:18 she's [1] 45:22 shifts [1] 7:23 short [3] 24:3 38:12 108:23 shoulder [1] 31:20 shouldn't [4] 19:11,12 49:17 54:4 show [35] 10:1 13:8 14:2 16:25 17:8,9,11,11,14 19:13 22:4 39:9,10 66:14 73:17 77:14 79:6 86:12 90:13,17,25 91:2,3 94:2,17,20,21,25 96:8,13 98:1 101:23 105:2 110:21 112:2 showing [6] 37:8 51:16 75:22 77:20 105:8 117:1 shown [2] 32:11 83:18 shows [2] 76:3 80:14 shuffles [1] 5:12 shut [2] 47:16 69:13 side [7] 9:22 12:23 20:15 65:2 69:16 76:8 86:19 sight [1] 4:25 signatures [1] 85:21 significantly [1] 112:16 silly [1] 40:11 similar [4] 25:13 61:4 71:23 98:14 similarly [3] 38:23 54:2 69:16 simple [2] 48:17 118:15 simpler [1] 14:17 simplest [1] 48:12 simplicity [1] 36:24 simply [16] 5:17 7:16 9:24
---	--	--	--	---

Official - Subject to Final Review

14:18 24:22 62:23 77:15 79:7 80:6 97:25 100:15 101:21 110:8,19 111:25 112:1 since [1] 66:25 single [2] 75:12 95:24 situation [9] 43:19 47:15 61:4 69:25 73:17 74:15 89: 5 92:8 100:24 situations [1] 112:14 six [2] 59:3 78:20 sketching [1] 77:25 sleep [1] 40:1 slightly [1] 42:22 small [4] 32:24 58:14 87:1 93:16 smaller [5] 12:11,16 102: 16,24 103:3 Socialist [4] 31:21 32:15 37:10 85:20 Solicitor [2] 2:4,8 somebody [6] 11:25 40:12 50:19 82:1 94:6 100:13 someday [1] 40:14 somehow [1] 89:16 someone [5] 6:25 9:11 11: 23 64:19 112:11 sometimes [2] 79:24 80: 16 sophistication [1] 43:24 sorry [9] 61:9 77:24 85:1 98:8,10 99:6 105:13,14 106:19 sort [35] 7:8,12,23 10:20 13: 13 14:10 17:7 19:9,20 21: 6 22:5 25:19,22 26:2 27: 20,21 39:7 41:17 51:14 64: 6 68:22 73:8,15 79:7 81:6 82:22 90:25 91:25 93:21 94:23 95:6 106:4 109:1 113:1 114:14 SOTOMAYOR [26] 7:24 8: 2 9:1,7,10 25:23 29:6,7 30: 2,4 31:9,24 32:7 37:6 41: 17 63:18 64:24 65:10,14 66:6,10,14,23 67:15 68:4 111:2 Sotomayor's [1] 52:3 sought [1] 76:20 Souter [1] 23:25 spate [1] 36:18 special [5] 26:16 117:13, 15,23 118:19 specific [2] 52:21 92:8 specifically [4] 50:19,25 52:23 53:12 speculate [1] 12:9 speculation [1] 13:23 speculative [8] 12:8 13:13 55:2,17,22 59:11 60:12 118:6 spend [13] 37:17 44:22,25 45:1,3,4 52:8 55:25 101: 10 104:16,19 118:7,9	spending [1] 106:21 spent [1] 36:11 spillover [1] 46:14 spin [1] 21:4 split [2] 36:22 48:13 stability [1] 111:14 staff [6] 4:22 44:1 104:8,20 106:1,23 stage [8] 12:20 14:5,8,11, 14 18:8 21:21 31:16 stand [3] 31:19,20 104:22 standard [8] 16:19 20:19 30:15 34:7 89:12 91:8 117: 1 118:13 standing [123] 4:18,24 5: 25 6:1 8:8,24 11:3,20 13:7, 19 14:10,18 15:12 16:13 17:1,16 19:2,4,6,8,25 23: 10,17,22 26:12 27:14 28:7 32:9 33:5,9 34:5 35:12,25 36:14 37:1 38:3 39:5,6,14 40:12 46:5,13,21 48:15 50: 8 53:3,24 54:13 57:1,14,24 58:22 60:6,14 61:11,13 63: 21,23 65:15 67:3 68:1 69: 8 70:10 71:21,22 72:7,10, 11 75:10,14,18,22 76:3,19 77:18 78:3,7 79:2,7,12 80: 22 81:4 82:8,11 83:18 84: 17,18 85:10,23 86:20 87: 23 89:20 90:5,20 92:5,15, 20 93:11,18 94:8,17,21,21 96:17 97:7 98:16,24 99:16 101:12 104:17,19 105:2,9 106:5 110:9,20,23 111:23 113:5 115:19 117:13,15 118:8 standing's [1] 36:20 start [4] 11:13,18 75:24 91: 4 started [1] 104:4 starts [1] 44:18 STATE [13] 1:6 4:5 68:12 70:5 85:21 107:18,25 116: 14,16,17,18,22 117:14 state's [1] 116:8 statement [6] 8:18 9:22 111:18,21 114:15 116:9 statements [2] 76:13 99:1 STATES [7] 1:1,16 2:6 3:7 56:22 75:25 116:21 statewide [1] 23:6 statistically [1] 29:21 status [1] 68:20 stay [1] 116:13 stays [1] 28:8 steam [1] 91:4 step [1] 25:3 Stevens [2] 23:19 36:11 stick [1] 28:3 sticks [1] 28:8 still [12] 8:24 9:3 18:7 20:7 31:15 41:7 52:20 55:13 60: 19 70:23 74:17 106:7	straightforward [3] 4:25 38:14 101:2 strict [1] 73:23 strong [1] 43:13 stuff [3] 14:15 104:18 117: 18 submission [1] 24:13 submitted [4] 83:5 109:14 118:23,25 substantial [38] 14:2 17: 15,15 30:15,16 32:10 58: 15 59:9 60:9 63:7 64:1,3,8 65:7 67:13 76:15 77:6,11, 20 81:7 82:10 85:11 86:12 92:1 97:23 98:1 101:23 102:6,11,19 105:4 110:15, 21 111:25 112:2 114:7,11, 12 substantiality [1] 14:11 substantially [2] 63:24 90: 23 success [3] 71:7 84:2 86:5 successful [2] 79:17 89:9 successfully [4] 12:25 79: 18 83:6 89:13 sudden [1] 36:20 suddenly [1] 108:11 sue [9] 7:19 33:23 34:1,2, 14 49:23 62:4 69:23 76:3 sues [4] 15:21 33:23,24 34: 21 suffer [2] 6:5 64:5 suffers [1] 95:15 suffices [1] 57:7 sufficient [7] 5:25 21:20 27:14 31:7 52:13 77:6 100: 8 sufficiently [1] 18:12 suggest [2] 17:23 113:23 suggested [3] 33:24 68:16 89:16 suing [4] 7:22 17:13 24:15, 23 suit [4] 51:6 53:4 68:7 69: 15 suits [7] 30:6 33:14,22 68: 9,15 70:3,10 summarize [1] 114:25 summary [4] 14:13 18:8 31:6,15 Summers [1] 77:18 Sunday [2] 69:12,13 support [3] 8:18 76:3 115: 24 supporting [3] 2:6 3:8 56: 23 suppose [7] 7:3 14:13 39: 18 90:2,10 93:13 97:6 SUPREME [3] 1:1,15 27: 13 surveillance [1] 109:9 sway [2] 59:19 61:7 sympathy [1] 19:10 system [1] 56:14	T table [4] 38:16 80:10,13,14 21,24 58:7 59:8 60:3,19 61:17 62:15 63:12,15 64: 23 65:4,13,21 66:9,13,17 67:2,24 68:6,24 69:24 70: 14 71:6,14,18,25 72:25 73: 18 74:12,22 talked [5] 31:8 52:12 62:19 87:7 100:3 talks [1] 114:16 tally [2] 6:14 75:13 targeted [1] 71:7 targeting [2] 59:16 66:4 tasked [1] 93:4 taxpayer [1] 33:7 taxpayers [1] 54:14 teach [1] 58:12 Ted [1] 38:7 tells [1] 54:9 tend [1] 35:8 tenet [1] 74:6 tenets [1] 57:18 terms [5] 8:22 47:21 51:12 68:19 99:13 test [7] 59:9 60:5 61:21 82: 11 94:24 105:18 111:25 tests [1] 118:14 themselves [3] 34:22 36:4 72:22 theoretical [5] 39:25 43:16 76:13 77:16 95:11 theoretically [1] 111:16 theories [1] 118:14 theory [29] 4:16 15:8 18:7 46:4 48:21 49:14 51:10,12, 17,22,22 52:18 60:2 72:11, 20 74:18 76:17,19 77:1,2 94:25 101:22 105:9 106:5, 6,18 110:10,20,23 there's [35] 10:7 14:2,4 15: 3,4 16:12 17:4 19:3 22:18 24:1 34:12 38:15,21 41:16 42:16 51:7,14,18 52:10 54: 9 55:13 58:5 61:19 65:6 68:11 72:23 73:9 74:22 80: 2,8 89:4 92:10,11 107:21 118:6 therefore [3] 59:18 80:23 97:7 they'll [2] 18:16 68:18 they've [1] 96:10 thicket [1] 62:24 thinking [3] 45:7 62:13 81: 22 thinks [2] 21:8 95:12 third [3] 51:21 52:18 86:10 THOMAS [13] 6:4,21,25 25: 11,12,21 26:1 58:2,7 67:18 77:4,23 109:23 though [10] 7:25 20:18 22:	17 53:4,14 55:11,14 58:4 69:18 70:22 thoughts [3] 22:9 37:22 84: 3 threadbare [1] 116:5 threat [5] 60:10,11,18 73: 25 74:11 threaten [1] 117:17 three [4] 4:24 87:19 118:13, 14 threshold [3] 60:13 73:24 83:23 throughout [1] 44:25 throw [1] 16:2 thrown [1] 69:8 thumb [1] 48:2 tight [2] 58:3,8 together [1] 44:1 tolls [1] 101:6 Tom [1] 81:20 tossed [1] 70:10 tossups [1] 116:21 total [4] 43:4,7 93:16,18 trace [1] 45:19 traceability [1] 36:17 track [1] 30:16 tradition [2] 22:5 76:2 trained [1] 91:24 translate [2] 47:14 48:5 translates [1] 10:16 TransUnion [2] 22:3 46:8 traveling [1] 109:6 treasure [1] 5:3 treated [2] 39:8 65:3 treats [1] 111:23 tried [2] 25:4 53:23 tries [1] 28:25 trivial [1] 26:8 true [3] 27:4 36:2 68:21 try [3] 27:9 50:14 104:9 trying [3] 16:6,17 88:20 tuned [1] 116:13 turn [4] 37:5 66:18 81:12 93:8 turnout [2] 30:19 59:25 turns [2] 102:14,18 twice [1] 99:14 two [40] 4:13,15,22 8:19 9: 18 19:23 21:6,19 22:2,9 23:20 24:25 36:11 43:25 44:2,6,22 45:15 52:8 57:5, 5 67:8 73:18 78:21 79:4, 11 82:2 84:5,5 89:21 92: 22 99:3,8 104:9,12,20 106: 24 107:8 108:4 117:20 two-week [1] 112:17 type [6] 73:23 81:12 87:13 88:11,13 91:9 types [2] 79:11 89:21
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U

U.S. [3] 55:19 61:13 90:11
ultimate [1] 6:17
ultimately [1] 38:1

Official - Subject to Final Review

uncomfortable ^[3] 5:15 18:13 20:8 under ^[21] 4:14 15:7 18:6 21:14 27:14 47:6 49:22 60: 1 67:21 77:13 83:7 89:7, 14 95:22 100:21 103:13,18, 24 106:5,17 114:21 undercounting ^[1] 88:6 underlying ^[1] 76:20 undermined ^[1] 49:18 understand ^[17] 11:11 13: 10 20:22,24 24:13 28:11 52:1,9 72:20 80:22 86:23 89:15 107:24 108:10 111: 9,20 112:21 understood ^[2] 107:10 111:18 undertaken ^[1] 101:17 unique ^[3] 5:19 21:13 65: 24 uniquely ^[1] 6:12 UNITED ^[6] 1:1,16 2:6 3:7 56:22 75:25 universe ^[2] 33:10,12 unknown ^[1] 66:21 unlawful ^[17] 4:18,19 18: 16 20:1 25:8 43:10 49:11 50:12 51:3,7,18 53:16 62: 8,11 73:1 109:9 116:1 unlawfully ^[1] 62:6 unless ^[2] 103:2,7 unofficial ^[1] 96:1 unseemly ^[4] 83:25 84:15 85:6,9 until ^[4] 36:8 38:11 78:8 101:5 untimely ^[1] 30:13 untold ^[1] 5:3 up ^[10] 4:13 35:10 36:4 45: 17 72:22 76:1 90:13 96:9 104:10 113:11 uphold ^[1] 113:4 urge ^[2] 9:20 36:23 uses ^[2] 82:10 95:15 using ^[2] 41:10 44:5 usual ^[1] 94:8 V validity ^[3] 57:2,19 65:24 versus ^[13] 4:5 37:15,16 63:22 79:8,10 81:13 87:5 89:19 103:10 104:24 114: 5,16 via ^[1] 93:10 viable ^[1] 102:13 victory ^[24] 4:21 6:14 7:13 8:7 9:16 10:13,15 11:11 12:11,17 15:7 17:9 21:9 37:19 59:6 75:24 87:15 95: 14 102:21,25 103:3,16 113: 24 114:21 videotapes ^[1] 91:3 view ^[4] 18:7 19:2,10 113: 25	vindicate ^[1] 62:5 violating ^[1] 109:17 violation ^[1] 53:6 Virginia ^[1] 2:2 visited ^[1] 53:11 visits ^[1] 52:22 voluntarily ^[1] 72:22 volunteer ^[1] 44:6 vote ^[16] 6:14 9:5 10:22,23 22:6 43:4,7 50:4 53:15 65: 1 66:19 75:13 93:15,18 103:19 106:22 voted ^[2] 16:5 50:4 voter ^[11] 23:16,22 31:18 33:7 36:5,13 39:15 41:20 50:3 53:15 54:13 voters ^[22] 8:4 9:5 16:4 33: 4 34:23 35:9,11,12 39:14 44:11 45:4,5 49:4,8,15,15, 23 53:11 54:14 62:21 64: 25 105:24 votes ^[17] 16:3 18:16 20:10 24:1 27:5 31:22 52:24 53: 16,21 70:17 78:5,22 86:17 96:1 103:20 107:12,17 voting ^[9] 9:3 28:15 31:13 35:17 50:2 53:24 65:2 69: 13 94:5 W wages ^[1] 47:19 wait ^[2] 38:10 101:24 waived ^[1] 9:23 waiver ^[1] 10:8 waives ^[1] 10:5 walk ^[3] 17:12 62:14 96:8 walking ^[2] 96:20,23 wanted ^[2] 98:11 109:8 wants ^[2] 12:23 116:22 Washington ^[2] 1:11 2:5 watchers ^[1] 95:24 watching ^[3] 44:8 101:4 118:10 water ^[1] 76:22 watered ^[1] 105:10 Watson ^[1] 98:13 way ^[30] 5:17 6:19 13:20,25 15:5 18:4 23:6 26:10 30:7 32:2 38:8 43:16 45:11 46: 24 48:1,23 49:19 50:15 51: 15 55:15 58:25 65:17 66: 20,21 82:3 83:24 92:13 93: 22 97:17 117:4 ways ^[5] 15:4 21:6 43:22 49:23 69:9 wealth ^[2] 95:17 100:1 Wednesday ^[1] 1:12 weeks ^[16] 4:13,15,22 43: 25 44:2,7,22 45:15 52:8 82:2 104:9,12,20 106:24 107:8 108:4 weird ^[1] 28:2 welcome ^[3] 6:3 58:1 77:3 whatever ^[10] 11:5 17:16	22:13 37:7 52:7 59:4 72:4 82:3,24 88:7 whatsoever ^[1] 67:22 Whereupon ^[1] 118:24 whether ^[25] 9:16 11:22 18: 9 20:18,20 24:21 33:8 34: 6,8 39:2 47:18 55:22 57: 23 59:11 62:20 64:16 70:2, 20 72:9 94:21 99:23 100:7 110:11,12,14 Whig ^[1] 32:23 White ^[2] 22:13 39:19 who's ^[4] 12:24 43:3 53:1 117:12 whole ^[5] 29:8 42:24 56:14 68:7 69:19 wholly ^[1] 60:12 whom ^[1] 30:6 will ^[26] 4:3 6:5,22 21:9 40: 3,5 55:4,12 56:1 57:24 61: 7 62:2 64:4,16 66:20,21 68:17 72:23 74:3 79:2 86: 20 88:24 93:17 97:17 114: 21,22 win ^[28] 6:17 10:22 11:15 13:11 17:5,8 18:3 31:12 39:3,9 43:4 46:16 72:23 78:2,4 79:24 80:17 84:17 87:14,21 103:10,11,12 106: 8 114:20,20,20 117:17 winner ^[4] 32:5 43:6 86:18 92:10 winners ^[1] 5:16 winning ^[13] 13:12 29:22 37:12 52:5 57:11 59:17,18 67:23 70:24 73:3,6 85:23 104:6 wins ^[7] 11:8,8 12:11 51:11 57:10 59:16 66:3 without ^[2] 76:10 104:17 Women ^[2] 44:11 105:24 won ^[6] 37:9 59:23 82:3,7 96:10 112:18 wonder ^[2] 48:25 49:13 wondering ^[1] 34:5 wonders ^[1] 88:10 word ^[5] 41:12 95:10,15 97: 1 108:17 words ^[3] 14:25 76:9 78:1 work ^[2] 9:8 99:21 Worker ^[1] 32:16 Workers ^[3] 31:21 37:11 85:20 works ^[1] 99:21 world ^[4] 33:13 36:10 43: 14 51:17 worried ^[6] 7:21 46:15 48: 9 54:13 97:2 112:8 worry ^[4] 26:18 33:5 113:6 116:15 worst ^[2] 5:13 13:21 write ^[1] 95:2 writing ^[1] 46:15 wrote ^[2] 95:7 111:7	Y yards ^[1] 91:5 year ^[3] 41:4 42:17 87:22 years ^[7] 19:4 23:1 25:13 48:1 78:21 79:19,23 Yep ^[1] 87:3 yourself ^[2] 35:1 118:8 Z zero ^[3] 37:11,12 104:10
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