

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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FIRST CHOICE WOMEN'S)
RESOURCE CENTERS, INC.,)
 Petitioner,)
 v.) No. 24-781
MATTHEW J. PLATKIN,)
ATTORNEY GENERAL OF NEW JERSEY,)
 Respondent.)
- - - - -

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12 Washington, D.C.
13 Tuesday, December 2, 2025
14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:05 a.m.

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1 APPEARANCES:

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3 behalf of the Petitioner.

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7 the Petitioner.

8 SUNDEEP IYER, Chief Counsel to the Attorney General,
9 Trenton, New Jersey; on behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ERIN M. HAWLEY, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	VIVEK SURI, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioner	29
9	ORAL ARGUMENT OF:	
10	SUNDEEP IYER, ESQ.	
11	On behalf of the Respondent	44
12	REBUTTAL ARGUMENT OF:	
13	ERIN M. HAWLEY, ESQ.	
14	On behalf of the Petitioner	93
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-781, First
5 Choice Women's Resource Centers versus Platkin.
6 Ms. Hawley.

7 ORAL ARGUMENT OF ERIN M. HAWLEY
8 ON BEHALF OF THE PETITIONER

9 MS. HAWLEY: Thank you, Mr. Chief
10 Justice, and may it please the Court:
11 This Court has long safeguarded the
12 right of association by protecting the
13 membership and donor lists of nonprofit
14 organizations like First Choice. Yet the
15 attorney general of New Jersey issued a
16 sweeping subpoena commanding on pain of
17 contempt that First Choice produce donor names,
18 addresses, and phone numbers so his office
19 could contact and question them. That violates
20 the right of association.

21 Yet the lower courts held that First
22 Choice must litigate its First Amendment claims
23 in state court. That violates this Court's
24 decision in Knick, contradicts the courts'
25 virtually unflagging obligation to decide cases

1 within their jurisdiction, and runs contrary to
2 Section 1983. Even the attorney general now
3 agrees as much.

4 His newest rationale for evading
5 review -- questioning First Choice's chilling
6 injury -- fails for two reasons. First, First
7 Choice's associational interests were harmed
8 the moment it received a coercive subpoena
9 demanding donor names on pain of contempt.
10 This is true irrespective of whether the
11 subpoena is non-self-executing for even an
12 unenforceable threat may chill First Amendment
13 freedoms.

14 Second, the attorney general does not
15 dispute that First Choice faces a credible
16 threat of enforcement, and there's no question
17 that First Choice's First Amendment interests
18 are arguably burdened by the subpoena. This
19 Court's cases require no more.

20 The attorney general's proposed
21 subpoena exception from ordinary Article III
22 rules would mean that the NAACP could have
23 received a hostile subpoena from an attorney
24 general and federal court review would not have
25 been available until a state court ordered

1 production. But then Younger abstention and
2 res judicata would almost certainly slam the
3 federal courthouse doors shut.

4 This Court should reverse and hold
5 that this subpoena violates the First Amendment
6 and satisfies Article III.

7 JUSTICE THOMAS: Your argument seems
8 to be based on the mere reception of the
9 subpoena, so what did that cause you to do?

10 MS. HAWLEY: Sure. So, under Article
11 III, we can have both a present and a future
12 imminent harm, Your Honor --

13 JUSTICE THOMAS: But what is -- what
14 did you have to do upon reception of the
15 subpoena?

16 MS. HAWLEY: So the subpoena commands
17 First Choice to do several things. It commands
18 it to produce 28 different categories of
19 documents, including every solicitation e-mail
20 and text message it sent to its donors. It
21 commands it produce donor names, addresses,
22 phone numbers, as well as places of employment.
23 It imposes a litigation hold, Your Honor. And
24 it also chilled First Choice and its donors'
25 First Amendment rights.

1 If you look at the complaint, the
2 complaint alleges both a present as well as a
3 future-looking chill. The complaint alleges
4 the coercive nature of the subpoena. This is
5 at Petition Appendix 127 through 129. It
6 details that the subpoena demands on pain of
7 contempt these donor names. Petition Appendix
8 124 through 126 places the subpoena in context.
9 This is the context of a hostile attorney
10 general who has issued a consumer alert, urged
11 New Jerseyans to beware of pregnancy centers,
12 and assembled a strike force against them.

13 JUSTICE THOMAS: Were there complaints
14 against -- were there complaints against you
15 that stimulated the subpoena?

16 MS. HAWLEY: No, Your Honor. The
17 attorney general has never identified a single
18 complaint against First Choice.

19 JUSTICE THOMAS: Did you view this as
20 a request? The briefs of the attorney general
21 seem to suggest that this is -- I've never
22 heard the term "subpoena request." But did you
23 view this as a request?

24 MS. HAWLEY: Absolutely not, Your
25 Honor. This is not in the record, but First

1 Choice immediately convened an emergency board
2 meeting to discuss the subpoena. The very
3 Latin term for subpoena means under penalty.

4 If you look at the face of the
5 subpoena, it twice commands First Choice to
6 produce on pain of contempt, and it twice
7 threatens that the failure to comply with the
8 subpoena, not a later state court order but
9 with the subpoena, shall render First Choice
10 liable for contempt and other penalties at law.

11 Some of those other penalties at law
12 are business dissolution. That is a death
13 knell for nonprofits like First Choice.

14 CHIEF JUSTICE ROBERTS: But --

15 JUSTICE JACKSON: Ms. Hawley --

16 CHIEF JUSTICE ROBERTS: -- but you are
17 taking a step beyond our existing precedent,
18 right? In -- in Bonta and NAACP, those
19 subpoenas -- failure to comply would lead right
20 away to legal penalties, as opposed to, here,
21 there's an additional step before you're going
22 to be liable, right?

23 MS. HAWLEY: So that is true, Your
24 Honor, but I don't think that matters either
25 under associational harm or under

1 pre-enforcement review. The question for
2 associational harm is whether a reasonable
3 nonprofit organization or a reasonable donor
4 would have been chilled. The attorney general
5 concedes that's the test at his brief, page 20.

6 As far as pre-enforcement review goes,
7 the attorney general does not contest that
8 there's a credible threat of enforcement here.
9 And as SBA List identified, there are several
10 injuries that flow simply from pre-enforcement
11 review. One of those is the burdens, the time
12 and resources spent on litigation. The second
13 is the possible imminent order of disclosure.
14 And the third here, which -- which may not be
15 at issue if this Court accepts the attorney
16 general's view, is the imminence of a penalty.

17 But regardless, those other injuries
18 do occur. And, in this case, we have the
19 additional chilling injury.

20 CHIEF JUSTICE ROBERTS: But you're
21 putting a lot of weight on the word
22 "imminence," right? I mean, they could proceed
23 with an enforcement action and -- or other
24 penalties, as in Bonta and NAACP, but there is
25 that additional step, right?

1 MS. HAWLEY: Not at all, Your Honor,
2 not before an enforcement proceeding. There's
3 no question the enforcement proceeding threat
4 is credible. The attorney general has, in
5 fact, entered enforcement proceedings. He has
6 entered a motion for sanctions over First
7 Choice's attempt to protect its donor names.

8 And, in fact, 12 briefs have been
9 filed at the state trial court demonstrating
10 the enormous burden that state enforcement
11 alone can cause on a nonprofit organization
12 like First Choice.

13 JUSTICE KAGAN: You -- you just --

14 JUSTICE BARRETT: What if -- go.

15 JUSTICE KAGAN: You just mentioned,
16 Ms. Hawley, sort of two theories, the
17 associational harm theory and the
18 pre-enforcement review theory. Could you
19 explain to me how you view the difference
20 between those two theories and the scope of
21 each and why it is that you have emphasized
22 one? Do you prefer that one, the associational
23 harm theory? Why? Why isn't the
24 pre-enforcement theory the way to go here?

25 MS. HAWLEY: So, to answer that last

1 question first, we're perfectly happy with a
2 decision from this Court under either theory.
3 Under our associational harm theory, we think
4 what First Choice needs to show is that a
5 reasonably objective donor or nonprofit, as
6 described as a person of ordinary firmness,
7 would have been chilled by the coercive
8 subpoena. We think that's clear here.

9 Under the second theory, the
10 pre-enforcement theory, what First Choice
11 would need to show is a credible threat of
12 enforcement. Again, enforcement's already
13 occurred. The attorney general does not and
14 cannot dispute that.

15 In addition, you need to show that
16 your constitutional or federal rights were
17 arguably burdened. Again, there's no question
18 this subpoena arguably burdens First Choice's
19 First Amendment rights.

20 As far as scope goes, Your Honor, we
21 don't think that either of them would open the
22 floodgates.

23 With respect to the pre-enforcement
24 theory, there are a couple of procedural
25 safeguards built in. To begin, you would have

1 to satisfy the other requirements of SBA List.
2 Basically, you would have to show a plausible
3 federal cause of action.

4 In addition, you would need to show
5 irreparable harm in order to get a preliminary
6 injunction to enjoin the state official.

7 In most cases outside of the First
8 Amendment context, we think that would be
9 relatively difficult. So we actually think the
10 scope of those two different theories will be
11 relatively similar, again, because of that
12 requirement of irreparable harm.

13 JUSTICE JACKSON: Can I just follow up
14 by asking I guess the lower courts really
15 focused on ripeness, which is a theory that
16 involves the timing of your lawsuit, and I
17 guess I'm wondering, even if we agree that
18 there is -- your constitutional rights are
19 arguably burdened, is it really occurring at
20 the moment of receipt of the subpoena?

21 I mean, I think there's -- part --
22 part of this dispute is about when those
23 burdens actually fall on an association. And
24 it feels a little odd to me that from the
25 moment the subpoena walks in, comes in,

1 especially if we credit your view that it's
2 unlawful and that they're not allowed to ask
3 you for these things, I wonder whether the
4 burden is really happening at that moment?

5 MS. HAWLEY: With respect, Your Honor,
6 I think an ordinary nonprofit receiving a
7 subpoena commanding compliance on pain of
8 contempt would find that to be chilling.

9 In addition --

10 JUSTICE JACKSON: I'm not talking the
11 chilling theory. I'm talking about the --
12 the -- the pre-enforcement theory.

13 MS. HAWLEY: So -- so either of them
14 suffice here, but -- but --

15 JUSTICE JACKSON: Mm-hmm.

16 MS. HAWLEY: -- to address your
17 question on pre-enforcement, the question is
18 whether, when the subpoena was delivered, there
19 is a credible threat of enforcement. That
20 credible threat is clear on the face of the
21 subpoena. It --

22 JUSTICE JACKSON: But what if you're
23 right -- what if you're right that the subpoena
24 is bogus? I guess I'm just -- I'm a little
25 confused as to how this works because, if

1 you're right that the subpoena is wrong, is --
2 is -- is unlawful, then I guess we would
3 suspect or expect that the state court would
4 agree with you and so there really isn't a
5 credible threat that it's going to be enforced.

6 MS. HAWLEY: So -- so two responses,
7 Your Honor. Under this Court's cases like
8 Steffel and Dombrowski, the ultimate success of
9 a constitutional challenge does not diminish
10 the credible threat of enforcement. This Court
11 has never required that a plaintiff show that
12 he has a really bad case in order to get into
13 federal court.

14 And second, Your Honor, Section 1983,
15 the reconstruction, Congress clearly provided
16 plaintiffs who have been harmed by alleged
17 state malfeasance a choice between federal and
18 state court.

19 First Choice is simply asking for its
20 day in federal court here. We think it
21 satisfies two theories of Article III standing.

22 And with respect to the sorts of
23 things that could happen in -- in -- later in
24 the case, the attorney general, for example,
25 talks about negotiation, but negotiation can

1 always occur in every case. The courts can
2 easily handle those sorts of things through
3 their docket management tools, but it doesn't
4 take away the fact that Article III standing
5 exists.

6 In fact, to take this case as an
7 example, the attorney general did not narrow
8 his subpoena until the Third Circuit granted
9 expedited review. To find that negotiation
10 somehow obviates Article III would give the
11 government the whip hand in every one of these
12 cases.

13 JUSTICE BARRETT: Ms. Hawley, I'm
14 sympathetic to the argument that the subpoena
15 on its face looked like it carried penalties
16 based on everything that you said, but I think
17 we have to accept for purposes of this case
18 that it's non-self-executing and so that it did
19 not, in fact, at the moment of receipt demand
20 that you reply on pain of contempt.

21 Would a letter have been sufficient
22 then for ripeness under your theory? What if
23 he had just sent a letter saying: I intend to
24 send you a subpoena that will demand all of
25 these documents? Or just a letter requesting

1 them that wasn't a subpoena? Please turn over
2 to me all of these documents.

3 MS. HAWLEY: So I think it depends.
4 A letter depends on the facts and circumstances
5 of the case. If it's a birthday card from the
6 attorney general that says: You know what, I
7 notice your fundraising has just been amazing
8 and -- and my fundraising could use a boost,
9 could you introduce me to some of your donors,
10 that's really different from a letter like at
11 issue in Bantam Books, which was issued under
12 apparent state authority and demanded donor
13 names. I think --

14 JUSTICE BARRETT: So a letter could be
15 enough?

16 MS. HAWLEY: Yes, Your Honor. Under
17 Bantam --

18 JUSTICE BARRETT: Nothing here on
19 your theory turns on the fact that it was a
20 subpoena?

21 MS. HAWLEY: The question -- I think
22 the subpoena makes it worse. Again, the Latin
23 for subpoena is "under penalty."

24 JUSTICE BARRETT: Because it shows
25 imminence, because it shows likelihood of -- of

1 the -- the likelihood that the threat will
2 actually materialize?

3 MS. HAWLEY: Yes. And because it
4 shows it's reasonable to be chilled.

5 JUSTICE BARRETT: And is it the burden
6 of litigation? Is it the expense and the --
7 the -- the being forced to defend one's self?
8 Because I think, on the pre-enforcement theory,
9 that is a concern, right, that the litigation
10 expense counts as the injury, even that
11 likelihood of article -- the likelihood that
12 you will incur litigation expense.

13 MS. HAWLEY: Yes, Your Honor. That's
14 what this Court held in SBA List, also alluded
15 to it in Ex Parte Younger.

16 JUSTICE SOTOMAYOR: But I don't
17 understand that theory. You're going to end up
18 in -- assuming litigation costs no matter what.
19 The issue is which forum, in state or federal,
20 because, in the federal forum, even if this
21 claim is right, it's not a given that this
22 subpoena violates your rights until a court
23 determines whether there was reasonable cause
24 for the attorney general's subpoena, whether it
25 was narrowly drawn, all the standards have to

1 be met by the other side, but that's going to
2 be litigated.

3 So I don't understand how the burden
4 of costs could ever be irreparable harm but
5 particularly in this situation, where the cost
6 is going to be incurred no matter what. So I
7 think you have to rely on the chilling effect
8 to your First Amendment rights, and if you
9 don't rely on that, then every single case
10 implicating a -- an alleged constitutional
11 violation like selective prosecution,
12 vagueness, I could go on and on, all of those
13 subpoenas will end up in federal court.

14 MS. HAWLEY: So --

15 JUSTICE SOTOMAYOR: And how does --
16 how do those people not make the same argument
17 you're making?

18 MS. HAWLEY: So a few responses, Your
19 Honor.

20 First, irreparable injury is separate
21 from the injury this Court found in SBA List,
22 which is the burdens of litigation. We don't
23 need to show irreparable injury --

24 JUSTICE SOTOMAYOR: But answer my
25 question. How is there a burden? You're going

1 to litigate here -- in state court or federal
2 court the same questions. It's only the -- an
3 issue of who's going to answer them.

4 MS. HAWLEY: So -- so I think that's
5 not quite correct, Your Honor, for the reason
6 being that if we're in state court, it's
7 because we've been forced there because the
8 attorney general, as he has here, has enforced
9 the subpoena.

10 JUSTICE SOTOMAYOR: But he -- it's
11 not as if you can -- you can go into state
12 court, and your motion in federal court
13 removing -- and your action will be has he
14 issued the subpoena appropriately or not. If
15 the federal court says it was appropriate,
16 you'll still have to answer it. But somebody
17 will have to litigate that question.

18 MS. HAWLEY: Yes, Your Honor. But
19 I think the burden this Court identified in
20 SBA List is the burden of being forced into
21 state court. If there's a credible threat
22 that --

23 JUSTICE SOTOMAYOR: I think the burden
24 there was more the burden of -- of the chill to
25 First Amendment rights. The burden has always,

1 in our cases, been the chilling effect, not the
2 burden of litigation.

3 MS. HAWLEY: So -- so we think, Your
4 Honor, under SBA List, the best reading of that
5 is that there are actually four possible
6 imminent injuries.

7 One is the burdens of litigation we've
8 been discussing.

9 One is the imminent disclosure order,
10 in this case, of donors.

11 The third is the imminence of a
12 adverse order on penalties. If you accept the
13 AG's theory, maybe that doesn't exist in this
14 case.

15 And the fourth is the chilling injury.

16 JUSTICE GORSUCH: Right. So you don't
17 really need to depend upon litigation costs.
18 You've got the other three buckets.

19 MS. HAWLEY: Correct, Your Honor.

20 JUSTICE GORSUCH: Even under the --
21 even under the enforcement as opposed to
22 chilling theory?

23 MS. HAWLEY: Yes, Your Honor.

24 JUSTICE GORSUCH: Okay. A question
25 about your discussion so far on the subpoena as

1 taken as given that it's non-self-executing.
2 Why?

3 MS. HAWLEY: I don't think you need
4 to, Your Honor. Under this Court's case law,
5 where a lower court's determination of state
6 law is as plainly incorrect as it is here, this
7 Court need not defer. And I can explain why
8 that state law determination is wrong, but a
9 prefatory note that it doesn't matter.

10 In this case, even if the attorney
11 general's subpoena is non-self-executing, First
12 Choice and its donors were reasonably chilled.

13 JUSTICE GORSUCH: No, I understand.

14 MS. HAWLEY: Bantam --

15 JUSTICE GORSUCH: We've got that point
16 out already.

17 MS. HAWLEY: Yes. Yes.

18 JUSTICE GORSUCH: But I -- I -- I just
19 wanted to give you an opportunity to address
20 the -- the state's argument that it's not
21 self-executing.

22 MS. HAWLEY: Thank you, Your Honor.

23 The state says the subpoena is
24 voluntary. That's not what the face of the
25 subpoena says. It says command or else. We'll

1 possibly go after your business license or
2 you'll wind up with contempt.

3 That's not what the state law says.

4 If you look at the last page of our opening
5 brief, it details Section 5686. It says that
6 if you fail to obey the subpoena, again, not a
7 later court order, if you fail to obey the
8 subpoena, you could be subject to contempt, you
9 could lose your business license. Those are
10 the death knell for nonprofits like First
11 Choice.

12 It's also not what the attorney
13 general said in either this case or in Smith &
14 Wesson. In this case, he told the state court
15 three times that the mere failure to comply
16 with the subpoena by producing documents
17 violated three separate state laws. It's at JA
18 50, 53, and 59.

19 And, finally, in the Smith & Wesson
20 litigation, the attorney general argued in the
21 Younger context that subpoenas have the force
22 of law, that they can be immediately opposed
23 contempt, and, in fact, he sought contempt in
24 that case for a mere failure to comply.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 JUSTICE ALITO: When was the first
5 time the Office of the Attorney General took
6 the position that subpoenas like this are not
7 self-executing?

8 MS. HAWLEY: To my knowledge, Your
9 Honor, in this case.

10 JUSTICE ALITO: What are we talking
11 about here? Are we talking about Article III
12 standing, which would be assessed at the time
13 when you filed your complaint? Are we talking
14 about events that occurred later, which I think
15 would be analyzed under the doctrine of
16 mootness and the -- your friends would have the
17 burden of showing that the case had become
18 moot? Are we talking about prudential
19 standing? Are we talking about Article III --
20 I'm sorry -- prudential ripeness, or are we
21 talking about Article III ripeness? If so, is
22 that any different from the standing inquiry?

23 MS. HAWLEY: Yes, Your Honor. So we
24 think the best way to look at this case is an
25 Article III injury in fact. In SBA List, this

1 Court equated Article III injury in fact with
2 constitutional ripeness. We don't think, since
3 Lexmark, that prudential ripeness is
4 necessarily something this Court is looking to
5 expand.

6 So we think the question is whether
7 First Choice has satisfied a present or future
8 injury. That would be assessed at the time of
9 the complaint. But you can look to the future
10 enforcement to show that the chill and the
11 credible threat of enforcement were credible
12 and objective at the time the complaint was
13 filed.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 Justice Kagan?

18 Justice Gorsuch, anything further?

19 Justice Kavanaugh?

20 Justice Jackson?

21 JUSTICE JACKSON: I actually have a
22 question. I guess I'm just trying to
23 understand what has happened to the imminence
24 requirement in your argument because I do see,
25 I appreciate, that you're saying that we could

1 have a situation in which the court
2 ultimately -- the state court ultimately
3 requires you to, you say, unconstitutionally
4 disclose this list.

5 But that's not certain to happen.

6 And, ordinarily, in standing, for future
7 injury, for risks of future injury, we -- we
8 require in all other kinds of contexts a really
9 clear showing that the thing you say is going
10 to happen, that you fear is going to happen is
11 imminent.

12 And so I just -- I'm just a little
13 nervous about this, and I'm just wondering,
14 have we created a separate doctrine, a
15 different doctrine for First Amendment?
16 Because we normally don't relax it, I think, in
17 this way.

18 MS. HAWLEY: So I think two responses,
19 Your Honor. First, First Choice has alleged a
20 present injury. If you look at the --

21 JUSTICE JACKSON: The chill?

22 MS. HAWLEY: Yes.

23 JUSTICE JACKSON: Yes, yes, setting --
24 I'm doing your other theory. All right. The
25 chill I get. Yes. The other theory.

1 MS. HAWLEY: So, with respect to the
2 pre-enforcement theory, I think this Court's
3 most recent precedent on that is SBA List.

4 JUSTICE JACKSON: Yes.

5 MS. HAWLEY: And what the Court said
6 is that when you have a credible threat of
7 enforcement, that means these other injuries
8 are sufficiently imminent. And even accepting
9 the attorney general's theory that maybe First
10 Choice is not immediately subject to
11 contempt -- we think that's wrong -- but even
12 if that's correct, you do have those other
13 three imminent injuries.

14 JUSTICE JACKSON: Which are?

15 MS. HAWLEY: They are --

16 JUSTICE JACKSON: Can you just repeat?

17 MS. HAWLEY: Sure. The burdens of
18 litigation, the fact of an imminent possibility
19 of a disclosure order for donors --

20 JUSTICE JACKSON: But that's not
21 imminent, right? I mean, that's many steps
22 away.

23 MS. HAWLEY: So, in SBA List, this
24 Court considered the possibility of an adverse
25 action to -- the credible threat in SBA List

1 takes the -- the place of the imminence if you
2 have --

3 JUSTICE JACKSON: I see. Okay.

4 MS. HAWLEY: Yes, if you have a
5 credible threat. And that makes sense, Your
6 Honor, because it -- it -- it --

7 JUSTICE JACKSON: And, I'm sorry, the
8 credibility of that threat doesn't turn on
9 the -- whether we think the court is actually
10 going to do that? You don't have to show that
11 the court is actually going to do it? It's
12 still a credible threat because?

13 MS. HAWLEY: Exactly. Under
14 Dombrowski, under Steffel, this Court has never
15 required criminal defendants and others to show
16 that they might actually be punished, which
17 makes sense, again, because, if a law is
18 super-unconstitutional, that doesn't mean
19 you -- you sort of talk yourself out of federal
20 court.

21 JUSTICE JACKSON: But isn't it
22 interesting that we don't have credible threat
23 in other areas? I mean, I'm thinking about,
24 for example, Perdomo and, you know, the -- the
25 situation -- I'm looking for it in my notes --

1 in which people are saying we're fearing that
2 we're going to have these adverse interactions
3 with ICE. We have --

4 MS. HAWLEY: Sure.

5 JUSTICE JACKSON: -- evidence of this
6 happening, and the Court seems to say not
7 enough. We don't employ some sort of a
8 credible threat analysis in that context.

9 MS. HAWLEY: Sure, Your Honor. And
10 that's actually why we think the First
11 Amendment associational harm here is
12 important --

13 JUSTICE JACKSON: Mm-hmm.

14 MS. HAWLEY: -- in addition to the
15 pre-enforcement because, as you identify, if
16 you have an investigation, the pre-enforcement
17 threat is not going to come into play in that
18 context.

19 JUSTICE JACKSON: I see.

20 MS. HAWLEY: So we think there are
21 cases like Bantam Books, like Speech First,
22 which Respondent identifies, in which
23 pre-enforcement will not be applicable, and
24 this Court should make clear that the First
25 Amendment protects those interests and standing

1 as well.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Suri.

6 ORAL ARGUMENT OF VIVEK SURI
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE PETITIONER

9 MR. SURI: Mr. Chief Justice, and may
10 it please the Court:

11 A plaintiff has Article III standing
12 to challenge a subpoena so long as the
13 plaintiff faces a credible threat that the
14 subpoena will be enforced against it. The
15 plaintiff doesn't need to make a further
16 showing of a chill on its associational
17 activities.

18 The chilling effect is relevant to the
19 merits of the First Amendment claim, and it's
20 also important to establishing irreparable
21 injury, but it isn't necessary for Article III
22 standing.

23 The judgment of the Third Circuit
24 should be reversed.

25 JUSTICE THOMAS: So what is the

1 basis -- which argument do you think is the --
2 the preferable approach here?

3 MR. SURI: We have proposed the
4 credible threat theory rather than the
5 objective chill theory for two main reasons,
6 the first of which is that this Court has had
7 many cases about credible threats of
8 enforcement and pre-enforcement challenges.
9 That is a well-developed doctrine. That's --

10 JUSTICE THOMAS: So let's just stop
11 there a second. What is the threat here?

12 MR. SURI: The threat here is that the
13 state will begin -- in fact, has already
14 begun -- a suit to enforce the subpoena if the
15 materials are not turned over, imposing
16 litigation costs on First Choice.

17 JUSTICE THOMAS: Let's -- let's assume
18 that this was before any suit had been filed in
19 state court to enforce the subpoena.

20 MR. SURI: Still standing as long as
21 the subpoena had been issued because, at that
22 point, First Choice faced a credible threat
23 that the suit would ultimately be --

24 JUSTICE THOMAS: What if, as Justice
25 Barrett asked, it was simply a letter request?

1 MR. SURI: In that case, almost
2 certainly no standing, the reason being that a
3 mere letter doesn't carry the same threat of
4 enforcement as a subpoena would.

5 Now we could envision some
6 hypothetical case closer to Bantam Books where
7 a letter in practice operates much like a
8 subpoena under some state's unusual scheme, but
9 setting that aside, there would not be
10 standing.

11 CHIEF JUSTICE ROBERTS: So let me make
12 sure I understand your answer to Justice
13 Thomas.

14 A threat of a subpoena is not enough;
15 it has to be an actual subpoena?

16 MR. SURI: That's correct, Mr. Chief
17 Justice.

18 I wonder -- sorry. Justice?

19 JUSTICE BARRETT: I was just going to
20 ask you on this, was this really
21 non-self-executing or self-executing, you --
22 you say in your brief we'll accept the lower
23 court's characterization of it as
24 non-self-executing.

25 MR. SURI: Correct.

1 JUSTICE BARRETT: It's my
2 understanding that the New Jersey court treated
3 it that way too because the New Jersey -- I
4 don't know that there was an express holding by
5 the New Jersey -- New Jersey court, and maybe
6 the attorney general can address that.

7 What is -- what is your view of the
8 best reading of this statute?

9 MR. SURI: We accept that New Jersey
10 subpoenas are not self-executing. The face of
11 the subpoena suggests that it is
12 self-executing, but we accept that regardless
13 of what the subpoena says on its face, the
14 courts have treated it as non-self-executing.

15 JUSTICE BARRETT: And the face of the
16 subpoena, however, the language that it used
17 does go to the credible threat theory, which
18 seems like that was part of your answer to
19 Justice Thomas in distinguishing the letter
20 from the subpoena.

21 MR. SURI: That's correct.

22 JUSTICE BARRETT: What problems do you
23 see with the chill theory?

24 MR. SURI: There are two main
25 problems. The first is that this Court has a

1 series of cases saying a subject of chill is
2 not enough for Article III standing. Laird
3 versus Tatum, Clapper, and Whole Woman's Health
4 against Jackson. So you'd have to draw a
5 distinction between an objectively reasonable
6 chill and a subjective chill.

7 The second is that the chill is highly
8 relevant to the merits and to irreparable
9 injury and there's a risk that courts might
10 conflate the Article III requirements with the
11 merits requirements.

12 You'd to have draw fine distinctions
13 about, for instance, whether a particular
14 degree of chill may be sufficient for Article
15 III but not necessarily sufficient on the
16 merits to prevail on the First Amendment claim.

17 If the Court is uncomfortable,
18 however, with the breadth of our credible
19 threat theory, then the backup we would urge
20 the Court to adopt is to say credible threat
21 plus a chill is enough. Leave for another day
22 whether the credible threat alone would be
23 sufficient.

24 CHIEF JUSTICE ROBERTS: Do you see --

25 JUSTICE SOTOMAYOR: That's an

1 interesting question because it -- what you're
2 basically saying is anyone with a
3 constitutional challenge of any kind, the ones
4 I mentioned, selective prosecution, vagueness,
5 whatever, has automatic standing to come to
6 federal court. That's your theory.

7 MR. SURI: A person has standing, but
8 there are other obstacles that would keep many
9 of those litigants --

10 JUSTICE SOTOMAYOR: But those
11 obstacles will always involve the merits to
12 some extent. They're going to involve that
13 plus chill no matter what, correct?

14 MR. SURI: No. The most important
15 obstacle is irreparable injury. And chill is
16 very important to establishing irreparable
17 injury, which is a higher bar than Article III
18 injury, and that's the main gatekeeper in our
19 view.

20 JUSTICE ALITO: In --

21 CHIEF JUSTICE ROBERTS: How many
22 states are the subpoenas self-executing and how
23 many of them aren't? Do you have any idea?

24 MR. SURI: I don't have exact numbers,
25 but my understanding is that the general

1 practice is that subpoenas are not
2 self-executing. That's true at the federal
3 level and in the states as well.

4 JUSTICE ALITO: In assessing the
5 threat at the time when the complaint was
6 filed, is it relevant whether it turns out
7 later, as a result of litigation in federal
8 court or state court, that the subpoena was not
9 self-executing, or is the degree of threat to
10 be assessed based on what one would know at
11 that time regarding whether it was
12 self-executing or non-self-executing?

13 MR. SURI: The normal rule is that
14 standing is assessed at the time that the suit
15 is brought and that doctrines like mootness
16 affect whether later developments change
17 standing.

18 And I understand there to be disputes
19 between the parties about whether, at the time
20 the suit was brought, it was clear that this
21 subpoena was, in fact, non-self-executing, but
22 we're willing to accept that for purposes of
23 this case because the outcome in our view
24 doesn't turn on that feature.

25 JUSTICE KAGAN: If -- if I understand

1 your position correctly from -- from your
2 brief, you think that the federal government is
3 actually in a different position from the
4 states with respect to the pre-enforcement
5 theory, that because of the APA, the federal
6 government would not be vulnerable to these
7 kinds of actions, is that correct?

8 MR. SURI: In general, yes. There are
9 some narrow statutes where Congress has
10 authorized pre-enforcement motions to quash,
11 and in those contexts, there would be Article
12 III standing.

13 JUSTICE KAGAN: I -- I guess that
14 leads to the obvious question, is whether you
15 would have picked the theory that you picked --
16 (Laughter.)

17 JUSTICE KAGAN: -- if you were
18 standing in the same shoes as the state is
19 standing in because Mr. Iyer will tell me if
20 I'm wrong, but I took from his brief that --
21 that the state was actually more concerned with
22 the pre-enforcement theory than with the chill
23 theory, that it seemed to it more disruptive of
24 its ordinary processes of enforcement.

25 MR. SURI: I appreciate that concern,

1 and we agree that pre-enforcement challenges
2 can in some circumstances be disruptive, but we
3 just don't think Article III is the correct
4 tool for addressing that concern.

5 Instead, the main tool should be the
6 irreparable injury requirement. There should
7 be no basis for granting a preliminary
8 injunction unless there's some irreparable harm
9 that will be suffered before the state court
10 ultimately orders enforcement.

11 In the vast majority of subpoena
12 cases, that won't be the case, but in First
13 Amendment chill cases, that often can be shown.

14 JUSTICE BARRETT: If there's no --

15 JUSTICE GORSUCH: But --

16 JUSTICE BARRETT: -- possibility of
17 getting the preliminary injunction because you
18 can never show irreparable harm, is it
19 redressable?

20 MR. SURI: It's redressable because
21 you have to accept the parties' allegations and
22 merits arguments for purposes of assessing
23 standing even if, ultimately, those arguments
24 turn out to be incorrect.

25 JUSTICE GORSUCH: Let me ask you this.

1 I wonder why, and follow up on Justice Kagan,
2 curious if the government didn't want to touch
3 the chill theory. Might there -- if -- if the
4 Court were to adopt the chill theory or -- or
5 reject it, would it -- would it have an affect
6 on federal litigation? Would -- is it Reisman
7 and Clair Furnace don't really address a chill
8 theory.

9 And I wonder whether, in federal
10 litigation, an abuse of subpoena seeking to
11 chill First Amendment rights could be
12 challenged or whether, under your view, you
13 have to wait until the end of the case?

14 MR. SURI: The chill theory would not
15 affect federal litigation because the chill
16 theory goes to Article III, and our objections
17 to the pre-enforcement suits in federal
18 litigation involve the existence of a cause of
19 action.

20 JUSTICE GORSUCH: A -- a -- a remedy
21 at law. And -- but, if there -- if there -- if
22 the only remedy at law is waiting 'til the end
23 of the case and the chill will have been
24 manifested before then by having, say, to
25 disclose your lists of donors, I would have

1 thought that equity could step in there. No?

2 MR. SURI: There are narrow
3 circumstances in which ultra vires review in
4 equity would be available even with respect to
5 federal subpoenas. But, as the Court said in
6 its Nuclear Regulatory Commission decision last
7 term, the standards for that are quite high and
8 would be a very narrow exception.

9 But, if the -- we don't have concerns
10 with adopting a chill theory so long as the
11 Court says that a credible threat plus a
12 chill --

13 JUSTICE GORSUCH: You mean you're not
14 suggesting that the federal government has more
15 ability to not just chill but to infringe upon
16 the First Amendment than states do?

17 MR. SURI: No.

18 JUSTICE GORSUCH: Okay.

19 MR. SURI: I'm suggesting only that
20 Congress has made different decisions about
21 what types of causes of action to provide.

22 JUSTICE GORSUCH: Well, I understand
23 that. But, if the cause of action is
24 inadequate because it comes at the end of the
25 case after the damage has been done, surely,

1 the government would -- can't take the view
2 that the First Amendment has no opportunity to
3 step in in those arguments to be presented?

4 MR. SURI: No. That's a good argument
5 to make to Congress for creating new causes of
6 action.

7 JUSTICE GORSUCH: To Congress. To
8 Congress.

9 MR. SURI: To Congress, yes.

10 JUSTICE GORSUCH: Yeah.

11 MR. SURI: This Court doesn't have the
12 authority to be --

13 JUSTICE GORSUCH: So -- so -- so
14 somebody who faces an abusive subpoena by the
15 United States Government has to go ask for
16 Congress to change the law?

17 MR. SURI: No. As I've mentioned,
18 there is a narrow exception under ultra vires
19 review, but, in general, the ability to
20 challenge it in federal court comes at the end
21 of --

22 JUSTICE GORSUCH: Why would it have to
23 be ultra vires? Reisman and -- I'm sorry,
24 Chief. Reisman -- Reisman and Claire Furnace
25 talk about the adequacy of a remedy at law as

1 being the point. And if there isn't a remedy
2 at law, it says equity can step in.

3 MR. SURI: Ultra vires review is
4 merely another term for the same equitable
5 action that we --

6 JUSTICE GORSUCH: Okay. You're saying
7 it's the same thing?

8 MR. SURI: It's the same thing, yes.

9 JUSTICE GORSUCH: All right.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 JUSTICE THOMAS: No. I'm good, Chief.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 Justice Kagan?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: And we made clear
19 that the ultra vires review is really close to
20 nonexistent.

21 MR. SURI: Exactly right. Yes.

22 (Laughter.)

23 JUSTICE KAVANAUGH: Okay.

24 MR. SURI: It's -- it is -- it is very
25 narrow, but it is theoretically available in

1 some extreme circumstances, yes.

2 JUSTICE KAVANAUGH: Do you have an
3 example?

4 (Laughter.)

5 MR. SURI: Leedom and Kyne is the one
6 that comes to mind. That was a long time ago.

7 JUSTICE KAVANAUGH: Yeah. That was
8 a one -- a one-off.

9 JUSTICE GORSUCH: How about where the
10 First Amendment is being violated?

11 JUSTICE KAVANAUGH: That's -- I gather
12 that's not good enough.

13 MR. SURI: No, because, in most cases,
14 the opportunity in -- to get a federal court to
15 adjudicate the lawfulness of the federal
16 subpoena is provided at the end of the subpoena
17 enforcement process, and, therefore, there
18 isn't the same question as arises in this case
19 about losing the federal forum entirely.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: Can I just ask you,
24 in response to Justice Barrett, when she asked
25 about the chill theory, you said there were two

1 problems, one of which is the fact that there's
2 a merits connection and -- and that you saw as
3 a problem.

4 I guess I'm still struggling to
5 understand why the pre-enforcement theory and
6 the aspect of injury that relates to the
7 possible -- possibility that you're going to be
8 ordered to disclose, why isn't that also bound
9 up with the merits? I mean, it will only
10 happen if you are wrong on the merits of your
11 challenge.

12 So I -- I see, for example, the
13 litigation cost theory of pre-enforcement that
14 you're going to spend this money and it's not
15 bound up with the merits. You've got to do
16 that anyway. And so I understand that as a
17 potential injury, notwithstanding Justice
18 Sotomayor's point about you having to incur it
19 anyway. But the idea that you're going to be
20 injured because there's the possibility that
21 the Court will rule against you seems to me to
22 be bound up in the merits.

23 MR. SURI: No, Justice Jackson,
24 when --

25 JUSTICE JACKSON: No? Okay. Why not?

1 MR. SURI: Pre-enforcement challenges
2 are a staple of federal litigation, and in
3 those challenges, what a court does is simply
4 ask is there a threat, a reasonable objective
5 threat that the state will begin proceedings or
6 that the prosecutor will begin proceedings.

7 To determine standing, you don't need
8 to make a further inquiry into how likely it is
9 that --

10 JUSTICE JACKSON: And that's because
11 you're injured because they brought the
12 proceedings? Is that the -- that's the injury
13 you're saying?

14 MR. SURI: That's the injury.

15 JUSTICE JACKSON: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Iyer?

19 ORAL ARGUMENT OF SUNDEEP IYER

20 ON BEHALF OF THE RESPONDENT

21 MR. IYER: Mr. Chief Justice, and may
22 it please the Court:

23 Petitioner's factual allegations do
24 not show that the issuance of this subpoena
25 objectively chilled Petitioner's First

1 Amendment rights.

2 To some of the colloquies this morning
3 about state law, New Jersey state law
4 establishes that subpoenas do not require
5 anyone to produce documents, and a party faces
6 no penalties for non-production. Any legal
7 duty to produce documents and, in this case,
8 any disclosure of donor identities is instead
9 wholly contingent on a future state court order
10 requiring production.

11 This case is a perfect illustration.
12 The state court has repeatedly declined to
13 order production over two years of litigation.
14 That helps explain why Petitioner never alleged
15 below that anyone actually has been or is
16 objectively likely to be chilled by this
17 subpoena. Instead, at most, the complaint
18 alleges that the subpoena itself "may cause"
19 donors to stop contributing. But that
20 contingent language has never been enough for
21 Article III.

22 The federal government's alternative
23 credible threat of enforcement theory of
24 standing is even worse. State and local
25 governments issue tens of thousands of

1 subpoenas every year. But the federal
2 government's theory would risk turning many of
3 these ordinary subpoena disputes into federal
4 cases even without a First Amendment claim.
5 That would be a remarkable break from history
6 and tradition.

7 No court has accepted that theory, and
8 this Court should not be the first,
9 particularly in a case where the question
10 presented was itself limited to chill.

11 Of course, plaintiffs who receive an
12 administrative subpoena may have Article III
13 standing in some circumstances, where, for
14 example, the recipient faces some concrete harm
15 or legal penalties from the moment of the
16 subpoena's issuance or where the recipient
17 alleges that the subpoena is connected to other
18 government statements or actions that
19 themselves create objective chill. Petitioner
20 hasn't alleged anything of the sort here.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: What is the
23 difference between this subpoena and a request?

24 MR. IYER: Your Honor, this subpoena
25 is a predicate under state law for the state

1 executive branch to be able to go to a court to
2 seek a court order requiring production. We
3 couldn't do that if we had just sent a letter
4 request. But, in other critical respects,
5 there's really not a difference in terms of the
6 legal obligations that are actually imposed
7 upon a recipient of a subpoena.

8 Justice Thomas, I think to your
9 questions at the outset, you had made a remark
10 about how this subpoena doesn't look like other
11 kinds of subpoenas that you're familiar with,
12 and I -- I think there is some confusion in the
13 nomenclature here.

14 Typically, when we think about
15 subpoenas, we're thinking about grand jury
16 subpoenas or subpoenas that are issued by a
17 court during civil litigation. I think an
18 administrative subpoena is very different, and
19 courts, as a matter of state law, have held
20 across the country that these subpoenas
21 themselves don't impose any obligation to
22 produce documents from the moment of -- of the
23 issuance of the subpoena.

24 JUSTICE THOMAS: So what's the
25 difference between this and a request?

1 MR. IYER: So I -- I think there is
2 not a difference in terms of the change in
3 legal obligations for Petitioner. Petitioner
4 stands --

5 JUSTICE THOMAS: So, if I were to
6 request these documents from an organization as
7 an administrative agency, would I write this
8 sentence: Failure to comply with this
9 request -- and I'm substituting "subpoena"
10 for -- "request" for "subpoena" -- failure to
11 comply with this request may render you liable
12 for contempt of court?

13 MR. IYER: Yeah, I --

14 JUSTICE THOMAS: How would I write
15 that so --

16 MR. IYER: -- I do want to directly
17 address that because I think that's the nub of
18 a number of the questions this morning and a
19 number of the colloquies this morning.

20 So the subpoena does say exactly what
21 you said, and it says that an individual who
22 receives the subpoena is commanded to produce.
23 But just a couple pages down in the subpoena --
24 this is at Petition Appendix 93a -- the
25 subpoena itself says that one entirely

1 appropriate way for a party to respond is to
2 object to some or even all of the requests
3 contained in the subpoena.

4 And as a matter of background state
5 constitutional due process principles, New
6 Jersey Supreme Court has long held that the
7 executive branch can't be the one that's
8 deciding on those objections.

9 JUSTICE BARRETT: But, counsel --

10 MR. IYER: Those are exactly --

11 JUSTICE BARRETT: -- you didn't take
12 that position below. Everything you're
13 saying -- if the New Jersey Supreme Court has
14 long held that, I thought you took the position
15 below that the obligation attached the moment
16 the subpoena was served?

17 MR. IYER: That's not correct, Your
18 Honor. Throughout this litigation, we have
19 consistently taken the position that this
20 subpoena is non-self-executing. What Your
21 Honor may be referring to is the position that
22 we took before the Third Circuit in the Smith &
23 Wesson case several years ago, several years
24 before the start of this litigation.

25 And I'll be completely candid with the

1 Court. We took the opposite position in that
2 Smith & Wesson case. We ultimately lost.
3 Judge Hardiman's decision for the Third Circuit
4 rejected that theory, and what Judge
5 Hardiman --

6 JUSTICE GORSUCH: It did -- it did,
7 but it cited one Superior Court decision from
8 New Jersey as authority, which -- which is
9 something, I suppose, but it's not the New
10 Jersey Supreme Court. You don't cite to the
11 New Jersey Supreme Court in your brief before
12 us. You cite to the Third Circuit decision.

13 And just looking at the statute, it
14 says the AG's subpoenas have the force of law,
15 and if a person fails to obey the subpoena, the
16 AG may apply to the Superior Court and obtain
17 an order adjudging such person in contempt of
18 court.

19 Now I don't know how to read that
20 other than it's pretty self-executing to me,
21 counsel. Now I -- maybe that's anomalous.
22 Maybe that's wrong. Maybe the New Jersey
23 Supreme Court's read it differently. But
24 that's not the materials I have before me, so
25 help me out.

1 MR. IYER: Absolutely. So we think
2 there are a number of reasons why these
3 subpoenas need to be understood as
4 non-self-executing. Having said that --

5 JUSTICE GORSUCH: Well, there are lots
6 of reasons, but how about some authority?

7 MR. IYER: Yeah, absolutely. So --

8 JUSTICE GORSUCH: What you got besides
9 that trial court decision?

10 MR. IYER: Yeah. So the New Jersey
11 Supreme Court in Silverman v. Berkson, which is
12 a case that's cited in the amicus briefs at 661
13 A.2d 1274, is a 1995 New Jersey Supreme Court
14 case. I think the Third Circuit had that
15 before it as well. The Third Circuit, Judge
16 Hardiman, canvassed state practice in coming to
17 that decision.

18 Now I do want to be absolutely clear
19 with the Court, if you disagree with us as a
20 matter of state law on whether or not this
21 subpoena is self-executing --

22 JUSTICE GORSUCH: No, I'm just trying
23 to get to the bottom of it. That's it.

24 MR. IYER: Absolutely, but if the --

25 JUSTICE GORSUCH: Do you think

1 Silverman answers the question?

2 MR. IYER: I do think Silverman speaks
3 very strongly to that question. I will say --

4 JUSTICE GORSUCH: Speaks strongly to
5 the question. That's a little bit different,
6 counsel.

7 (Laughter.)

8 MR. IYER: I do think there are
9 background constitutional principles that make
10 very clear that the executive branch --

11 JUSTICE GORSUCH: Background
12 constitutional. Okay. All right. Got it.

13 JUSTICE KAVANAUGH: But you were about
14 to say, if we disagree with you, what?

15 MR. IYER: Yeah. If you disagree with
16 us and think this subpoena is self-executing,
17 there's no dispute that Petitioner would have
18 standing from the moment of the issuance of the
19 subpoena. There would be consequences that
20 flow if the subpoena is self-executing from the
21 moment of the issuance of the subpoena.

22 JUSTICE ALITO: What was the -- what
23 was the date of the first occasion when your
24 office took the position that a subpoena like
25 this is not self-executing?

1 MR. IYER: Your Honor, it was in --

2 JUSTICE ALITO: Yeah, I'm sorry, is
3 self-executing. I'm sorry, is not
4 self-executing.

5 (Laughter.)

6 JUSTICE ALITO: When did you first say
7 on the record someplace these -- this sort of
8 subpoena is -- is not self-executing?

9 MR. IYER: We took that position from
10 the start of this litigation, Your Honor.

11 JUSTICE ALITO: Where -- where would I
12 look to see that?

13 MR. IYER: So I think you would look
14 to the petition -- to the JA, for example, to
15 our state court enforcement action, where, JA
16 59, we're not seeking penalties for their
17 failure to comply with the subpoena itself.
18 All we're seeking from the -- from the state
19 court in a production order is a obligation to
20 produce documents.

21 I do -- I think, to the nub of your
22 question, Justice Alito, this is the first time
23 that we've had to directly come across a First
24 Amendment challenge since Smith & Wesson, which
25 is why we haven't really raised these issues

1 prior to this litigation. We don't as a matter
2 of course -- I do want to be clear about
3 this -- we don't as a matter of course seek
4 penalties for the failure to comply with a
5 subpoena itself.

6 JUSTICE KAGAN: Put -- putting --
7 putting this litigation aside, wouldn't you
8 prefer for your subpoenas to be self-executing?

9 MR. IYER: Sure.

10 (Laughter.)

11 MR. IYER: The Third Circuit held
12 otherwise in Smith & Wesson.

13 JUSTICE KAGAN: So do you view your
14 position in this case, the reason that you took
15 this position, did you view it as like you were
16 required to take this position by the Third
17 Circuit? Is that -- is that the issue here?

18 MR. IYER: We do ultimately think that
19 Judge Hardiman got it right in Smith & Wesson.
20 And our job first and foremost is to interpret
21 the statutes that our legislature has given us.

22 If the legislature decided that it
23 wanted to give the executive branch
24 self-executing subpoena authority, we'd be
25 happy to use that authority, but that's just

1 not the statute that we have before us.

2 JUSTICE KAGAN: Just putting on your
3 lawyer's cap, you decided that Judge Hardiman
4 was right?

5 MR. IYER: Yeah, ultimately --

6 JUSTICE KAGAN: Even though Judge
7 Hardiman didn't command your position here?

8 MR. IYER: That's right. And -- and
9 Judge -- Judge Hardiman's opinion for the court
10 ultimately canvassed state practice. It dealt
11 with all of the arguments that we had made
12 before the court.

13 And I -- I will say that if, again,
14 the question that this Court has is about the
15 meaning of state law, I think there are
16 entirely appropriate ways to resolve those
17 questions, for example, by remanding the case
18 to the Third Circuit with instructions to
19 certify the question to the New Jersey Supreme
20 Court, as is consistent with typical practice
21 in cases like --

22 JUSTICE JACKSON: And what -- and the
23 question is with respect to self-executing just
24 so I understand what you mean, what would a
25 self-executing subpoena look like versus what

1 we have here?

2 MR. IYER: Yeah. So the difference
3 between a self-executing subpoena and this
4 subpoena, so a self-executing subpoena would
5 impose some penalties or consequences from the
6 moment of the issuance of the subpoena itself.
7 So a --

8 JUSTICE JACKSON: If the person didn't
9 respond?

10 MR. IYER: Correct. Correct.

11 JUSTICE JACKSON: So immediately -- so
12 you could go to court, the AG would go to court
13 and not ask for litigation over whether or not
14 they had to respond but just ask for a penalty
15 to be imposed?

16 MR. IYER: That's correct.

17 JUSTICE JACKSON: That's a
18 self-executing subpoena?

19 MR. IYER: That would be a
20 self-executing subpoena.

21 JUSTICE JACKSON: So what do we have
22 here, not that?

23 MR. IYER: Not that because the AG has
24 to make a request to the state court. And any
25 production of documents, any legal obligation

1 to produce documents, is entirely contingent on
2 a future state court.

3 JUSTICE BARRETT: Well, I've got to
4 say, though, look -- putting my lawyer's hat
5 on, if I were a New Jersey trial court, I would
6 still be making the argument that New Jersey
7 courts are not bound by the Third Circuit's
8 decision that this is self-executing.

9 But I want to put that aside for a
10 second and ask you, you said in your opening
11 that if we adopted this pre-enforcement theory,
12 we would be throwing the door open wide and
13 that there would be all manner of challenges
14 in federal court to subpoenas issued in New
15 Jersey.

16 Can you give me some examples of this
17 Pandora's box?

18 MR. IYER: Yeah. It's a difficult
19 question to answer, I think, Justice Barrett,
20 in part because this would represent a pretty
21 dramatic sea change in historical practice.
22 Petitioner and the United States haven't
23 identified a single case that adopts this
24 credible threat of enforcement theory for
25 subpoenas in particular.

1 So this would be a pretty
2 extraordinary change. And I think the risk
3 would be that federal courts would potentially
4 be inundated by these subpoena cases. So --

5 JUSTICE BARRETT: In what kinds of
6 cases?

7 MR. IYER: Yeah.

8 JUSTICE BARRETT: And are we only
9 talking about First Amendment cases? Are we
10 talking about other constitutional challenges?

11 MR. IYER: I don't see a way to limit
12 the United States' proposed rule just to First
13 Amendment challenges. I think it would
14 encompass Fourth Amendment challenges, to
15 Justice Sotomayor's examples earlier, due
16 process challenges, extraterritoriality
17 challenges.

18 Just to put this in perspective, the
19 single state agency that is before this Court
20 today from a single state has issued more than
21 500 subpoenas this year alone to all kinds of
22 businesses, to home contractors, to car
23 dealerships, who we have reason to believe
24 could be violating the law and so we want more
25 information.

1 Google, in its public disclosures, the
2 single company, said in 2024 it alone received
3 50,000 subpoenas across the entire United
4 States. You're talking about a huge volume.
5 You're talking about many different kinds of
6 potential federal constitutional claims.

7 And I think all of that is why the
8 United States is asking for a bespoke exception
9 for its subpoenas in particular, and --

10 CHIEF JUSTICE ROBERTS: How -- I'm
11 sorry. Finish your answer.

12 MR. IYER: Yeah. The United States
13 is asking for a bespoke exception for its
14 subpoenas in particular.

15 And I'll also say as a final note on
16 this point that Petitioner themselves on page
17 22 of their reply brief says don't reach the
18 questions about the credible threat of
19 enforcement outside the First Amendment. You
20 can resolve this case on chill. We agree
21 ultimately chill is the right framework for
22 resolving this case.

23 And I would think, if this Court wants
24 to take up the credible threat of enforcement
25 theory, it would want briefing, for example, on

1 some of the history and tradition arguments
2 that we had raised in our red brief and that
3 the reply just doesn't address.

4 And so I think that this Court can
5 appropriately leave those questions for another
6 day and decide this case on the basis of chill.

7 CHIEF JUSTICE ROBERTS: Counsel, you
8 referred to the fact that you addressed these
9 subpoenas to car dealerships and things like
10 that.

11 Your friends on the other side don't
12 represent a car dealership. Do you think there
13 is a credible chilling effect from the state
14 seeking full names, phone numbers, addresses,
15 present or last known place of employment, of
16 every one of their donors who gave through any
17 means other than the one specific website?

18 In other words, do you think they have
19 a credible chill concern?

20 MR. IYER: I don't think that, and I
21 think that's best illustrated by the
22 allegations that are in their complaint, as
23 well as in the supporting declarations in
24 support of their motion for a preliminary
25 injunction.

1 So, if you look at their complaint
2 allegations, all of the harms they identified
3 are tethered to a future downstream state court
4 order requiring disclosure, but they're not
5 tethered to the subpoena itself.

6 As I noted in my opening, I think the
7 closest they get in their complaint is at
8 Petition Appendix 137, this is paragraph 125,
9 where they say the subpoena "may cause" people
10 who associate with First Choice to reasonably
11 fear that they themselves will face retaliation
12 or public exposure. That "may cause" language
13 has never been sufficient for Article III.

14 The rest of the allegations in their
15 complaint, take a look, for example, at
16 paragraph 73 or paragraph 76 on Petition
17 Appendix 130, those allegations are focused on
18 the harms from the disclosure of documents that
19 identify First Choice's donors, but all of
20 those harms, again, are contingent on a future
21 downstream state court --

22 CHIEF JUSTICE ROBERTS: So you don't
23 think it might have an effect on future
24 potential donors to the organization to know
25 that their name, phone number, address,

1 et cetera, could be disclosed as a result of
2 the subpoena?

3 MR. IYER: It certainly has not in
4 this case. I take Petitioner in their --

5 CHIEF JUSTICE ROBERTS: How do you
6 know that?

7 MR. IYER: So I take Petitioner in
8 their reply brief in this case to all but
9 concede that there's not been any evidence of
10 anyone actually being chilled by this subpoena
11 over the two-plus years of litigation, and I
12 think --

13 CHIEF JUSTICE ROBERTS: Well, how do
14 you get that evidence? Somebody comes in and
15 say, "I'm chilled, I don't want to reveal my
16 name, address, phone number, et cetera, and
17 here is my affidavit." That's not going to
18 work, is it?

19 MR. IYER: I absolutely think that
20 that is something they could have pled here,
21 but they did not plead it. And I think, if you
22 look at the declarations that they submitted
23 in support of their motion for a preliminary
24 injunction, I think it's the same problem.

25 So, if you look at the donor

1 declaration, they submitted a declaration on
2 behalf of anonymous donors. This is at
3 Petition Appendix 174 to 178. There's no
4 allegation of any prospective chill for any of
5 those -- those donors.

6 I think the closest they get in this
7 entire case based on this factual record to
8 alleging chill is at Petition Appendix 177.
9 This is the donor declaration, paragraph 0,
10 which says: "Each of us would have been less
11 likely to donate to First Choice if we had
12 known information about the donation might be
13 disclosed."

14 But that's a backwards-looking
15 statement of harm. It's not about prospective
16 chill --

17 JUSTICE GORSUCH: Really? I mean,
18 that -- I mean, we're going to now pick over
19 the tense of a verb that they chose? I mean,
20 they're saying: "If we had known that this
21 was going to happen, we wouldn't have given.
22 Per force, if it's going to be disclosed, we
23 won't give."

24 I mean, doesn't that just follow night
25 from day?

1 MR. IYER: We don't think so for a
2 couple of reasons. First --

3 JUSTICE GORSUCH: Okay.

4 MR. IYER: -- this Court's decision
5 in Lyons makes perfectly clear that a
6 backward-facing allegation of harm isn't
7 sufficient to --

8 JUSTICE GORSUCH: No, I -- I
9 understand that when you're dealing with
10 prospective harms, but that allegation seems to
11 me -- I mean, really, we're going to -- that
12 that's what this case turns on is -- is the
13 tense of that verb?

14 MR. IYER: I think that's the closest
15 they get to standing. I do want to explain why
16 we think it is particularly the case here that
17 their backward-looking allegation really can't
18 establish forward-looking --

19 JUSTICE ALITO: But what if they had
20 said -- what if they had used the future tense?
21 If this information is disclosed, we will not
22 donate?

23 MR. IYER: I don't think that would
24 be --

25 JUSTICE ALITO: That wouldn't be

1 enough?

2 MR. IYER: No, because that allegation
3 that you noted is tethered to whether or not
4 there will be disclosure. But I think the
5 harms that they're identifying have to be
6 tethered to the subpoena itself. I think this
7 goes back to some of the colloquies earlier
8 this morning about whether you can have
9 standing based on the issuance of the subpoena
10 from the moment of the receipt of the subpoena
11 itself.

12 If Petitioner had alleged that there
13 were chill harms and those chill harms need to
14 be objectively reasonable, but if they had
15 alleged chill harms from the moment of the
16 subpoena's issuance, I think it would be a
17 different --

18 JUSTICE ALITO: So they have to --
19 they have to allege that in the complaint?
20 They have to allege specifically in the
21 complaint that donors will be chilled?

22 MR. IYER: Yes, I think so. And they
23 have to be chilled by the issuance of the
24 subpoena itself.

25 JUSTICE GORSUCH: So what's wrong with

1 then, if the tense is what matters, what's
2 wrong with paragraph P?

3 MR. IYER: Yeah. So I think paragraph
4 P suffers from the same problem. It says, "If
5 our personal information is disclosed" --

6 JUSTICE GORSUCH: Yeah, that's future.

7 MR. IYER: -- "to the attorney
8 general," that's --

9 JUSTICE GORSUCH: Right. That's --

10 MR. IYER: It's future, but it's about
11 a future state court order, and you --

12 JUSTICE GORSUCH: Okay. All right.
13 So, really, it doesn't boil down to the past
14 tense. It boils down to your argument about
15 self-executing versus non-self-executing --

16 MR. IYER: So I -- I think that if
17 you --

18 JUSTICE GORSUCH: -- and your -- your
19 assertion at the end of the day that because
20 it's non-self-executing, that there's no threat
21 of chill?

22 MR. IYER: Yeah. I -- I -- I think --

23 JUSTICE GORSUCH: So, really --

24 MR. IYER: -- just to be really clear
25 about --

1 JUSTICE GORSUCH: -- we can get past
2 these past tense issues then, right?

3 MR. IYER: Just -- yeah. Just to be
4 really clear about this, if this subpoena were
5 considered self-executing as a matter of state
6 law --

7 JUSTICE GORSUCH: No, I've got that.

8 MR. IYER: -- you don't even need to
9 get to chill.

10 JUSTICE GORSUCH: I know. We're
11 dealing now with -- I think your argument
12 ultimately has to be that non-self-executing
13 subpoenas can never be enough. I think that's
14 your position because I think you're conceding
15 that, okay, they've got -- they've got the
16 right tense in P. Fair?

17 MR. IYER: So they've got the right
18 tense in P but that they've got the wrong thing
19 in their cites on that.

20 JUSTICE KAGAN: Well, suppose they had
21 the right thing. Suppose that they said, you
22 know, if there were a subpoena issued, that
23 even those -- you know, if there were a
24 subpoena even though non-self-executing that
25 were issued, because of the possibility that it

1 would be executed on by a court, I would not
2 contribute.

3 MR. IYER: I think that would be
4 sufficient to allege chill, but that's not
5 necessarily enough by itself to get to that
6 chill being objectively reasonable. So our
7 position in this case is that they need to do
8 two things. They need to allege that there has
9 been chill. I think they fail at the outset on
10 that metric. But they also then need to allege
11 facts indicating that that chill based on the
12 issuance of the subpoena --

13 JUSTICE GORSUCH: And that's why --

14 JUSTICE KAGAN: And does that depend
15 on how often courts deny these subpoenas? I
16 mean, suppose that you think courts basically
17 order these subpoenas complied with 98 percent
18 of the time. I don't know if that's true. But
19 suppose it were.

20 MR. IYER: I don't think still that
21 would be enough. That's basically the set of
22 facts that this Court --

23 JUSTICE BARRETT: Really?

24 MR. IYER: -- has before it.

25 JUSTICE GORSUCH: So -- so just to --

1 just to put a --

2 JUSTICE KAGAN: Wait. Could I --
3 could I get --

4 JUSTICE GORSUCH: Sure.

5 JUSTICE KAGAN: -- the answer to my
6 question?

7 JUSTICE GORSUCH: Yeah.

8 MR. IYER: Yeah. That's basically the
9 set of facts that this Court had before it in
10 Clapper. Now Clapper is most commonly
11 understood as a case about the standing
12 analysis that applies when there's no evidence
13 that the government is specifically targeting
14 an entity, but at page 413 of the Clapper
15 decision, this Court said, even if the
16 respondents in that case could establish that
17 there was particular targeting of the -- of the
18 communications of the respondents in that case,
19 that's still not enough for standing because it
20 is contingent on a -- on a court order. In
21 that case, it was the Foreign Intelligence
22 Surveillance Court's order.

23 I think, in Clapper, Justice Breyer
24 pointed out in the dissent that there were
25 16 -- 1,676 applications that were made; over

1 98 percent of them were granted without
2 modification. And this Court still said that
3 we don't rest our standing theories on
4 guesswork about the actions of independent
5 decisionmakers, particularly where those
6 decisionmakers are courts. And I --

7 JUSTICE JACKSON: So is that why
8 Mr. Suri says it's bound up in the merits, the
9 chill argument? Is that -- is that what your
10 understanding is of his concern about chill as
11 an argument?

12 MR. IYER: I take that to be a
13 different concern.

14 JUSTICE JACKSON: Okay.

15 MR. IYER: I take that concern just to
16 be that, as this Court's decision in AFP
17 illustrates, one factor that a court considers
18 in the First Amendment analysis is the risk of
19 a chilling effect, and that's relevant to the
20 merits.

21 JUSTICE JACKSON: Mm-hmm.

22 MR. IYER: But I don't think that
23 means that you can't also consider chill for
24 purposes of standing. It's a different kind of
25 analysis.

1 JUSTICE JACKSON: So you say consider
2 it, but, because of this Clapper point, it's
3 not shown here enough?

4 MR. IYER: Yeah. I -- I think that's
5 right. Now I do think that there may be a
6 limited class of cases where a party could
7 allege that -- facts sufficient to support
8 standing based on the issuance of a subpoena
9 alone. And I think there are three categories
10 of these kinds of cases.

11 The first is where there's some kind
12 of concrete harm from the issuance of the
13 stand -- of the subpoena itself. And I'll come
14 back to each of these examples if the Court
15 wants.

16 Second is where the subpoena forms one
17 part of the basis for a credible threat of
18 enforcement of the underlying statute that
19 actually regulates the conduct of the plaintiff
20 in the case.

21 And then the third is, with respect to
22 objective chill, it's been our consistent
23 position throughout this litigation that the
24 mere issuance of a subpoena without more can't
25 establish objective chill, but we --

1 JUSTICE GORSUCH: I think that's got
2 to be your bottom-line argument in response to
3 Justice Kagan's questions, is that just the
4 issuance of the subpoena cannot, no matter what
5 the allegations are, be a basis for an
6 objective chill.

7 MR. IYER: So I think there is a
8 caveat there, which --

9 JUSTICE GORSUCH: Okay. What's --
10 what's the caveat?

11 MR. IYER: -- brings together cases
12 like Laird and Bantam Books, which is that if
13 there are other government actions or other
14 government statements that are linked to the
15 subpoena that themselves would create an
16 objective chill by establishing a credible
17 threat of future harm --

18 JUSTICE GORSUCH: But that's something
19 else. You're saying that you have to have
20 something additive. But just on its own,
21 you're -- you're asking us to adopt the
22 position it can never be enough?

23 MR. IYER: Just on its own without any
24 additional facts --

25 JUSTICE GORSUCH: Right.

1 MR. IYER: -- statements --

2 JUSTICE GORSUCH: Yeah.

3 MR. IYER: -- actions, yes.

4 JUSTICE BARRETT: But, on this case,
5 weren't there? I mean, you had this Project
6 Strike on the pregnancy centers. You know, the
7 attorney general had essentially, you know,
8 what your friends on the other side would say,
9 declared war on pregnancy centers. So, if it
10 is true that the non-self-executing subpoena is
11 enough if it's in the context of other
12 government statements, why wouldn't that be
13 satisfied here?

14 MR. IYER: Yeah, my friends on the
15 other side don't let the actual factual
16 allegations get in the way of telling a story
17 about hostility here, but I think that story is
18 just not borne out by the record evidence
19 that's been offered here. So, ultimately, I
20 think, at the end of the day, what they're
21 identifying are policy agreements --
22 disagreements that they have with the attorney
23 general. That's never been enough to establish
24 hostility. It's never been enough to establish
25 standing.

1 I think, with respect to the specific
2 allegations, Justice Barrett, that you're
3 noting, they point to a consumer alert that we
4 had issued about crisis pregnancy centers, and
5 they also point to a reproductive rights strike
6 force. I'll take each of those points in turn.

7 I think, first, with respect to the
8 consumer alert, which is on JA 357 to 362, all
9 that consumer alert is doing is telling people
10 what the mission of organizations like crisis
11 pregnancy centers are.

12 I don't take Petitioner to be
13 disputing the point that we make in that
14 consumer alert, which is that crisis pregnancy
15 centers are entities that seek to deter women
16 from accessing abortion care. They do take
17 issue with our statement in that alert that
18 there may sometimes be misrepresentations or
19 false statements that are made in the provision
20 of medical care. But I don't think it's
21 evidence of hostility to have a targeted
22 consumer alert that identifies a potential risk
23 of misrepresentations.

24 And then a subpoena that's
25 specifically targeted to address whether those

1 misrepresentations occurred, if it were
2 otherwise, then every time the state issues a
3 consumer alert about car dealerships or home
4 contractors, that would somehow establish
5 hostility.

6 JUSTICE BARRETT: Let me stop you
7 right there.

8 MR. IYER: Yeah.

9 JUSTICE BARRETT: If -- we don't need
10 to get into the record here, but if it were the
11 case that there were kind of this surrounding
12 context, would that be enough on your theory?

13 MR. IYER: It depends on what that
14 context is.

15 JUSTICE BARRETT: What that context
16 was.

17 MR. IYER: So --

18 JUSTICE BARRETT: But that might be a
19 context, in response to Justice Gorsuch's
20 question, where, if there were more, if there
21 was a non-self-executing subpoena plus some
22 other background, we don't need to get into
23 whether this is enough, but you concede in the
24 abstract that might be enough?

25 MR. IYER: Yes, we do. And -- and

1 maybe I could just illustrate with one or two
2 examples of what might be sufficient to
3 establish standing. So, if there were
4 statements made by a public official who's
5 issuing the subpoena that they want to publicly
6 expose donors to a particular organization or,
7 for that matter, to all nonprofit
8 organizations, I think that's the kind of
9 credible threat of -- of future harm that could
10 be sufficient to get you in the door for a
11 challenge to the subpoena.

12 I think same thing if there are
13 statements or actions specifically targeting
14 the donors for enforcement, saying we want to
15 bring to justice not just this organization but
16 all of its supporters, I think that could be
17 sufficient. We just don't have anything like
18 that in the factual record here.

19 Turning back if I can --

20 JUSTICE ALITO: Well, before you turn
21 back, suppose that the complaint here had been
22 filed right after your initiation of
23 enforcement proceedings in state court. Would
24 there be Article III standing then?

25 MR. IYER: We don't think so for

1 exactly the reason I had noted in response to
2 Justice Kagan's question earlier. In that
3 circumstance, the issuance of a state court
4 order requiring production would still be too
5 contingent.

6 JUSTICE ALITO: So they have to
7 litigate the -- the matter in state court, and
8 until a state court orders them to comply and
9 in doing so rejects their First Amendment
10 challenge to the subpoena, they cannot go to
11 federal court?

12 MR. IYER: As I --

13 JUSTICE ALITO: That's your position?

14 MR. IYER: As I noted earlier, we do
15 think that there are a couple of categories of
16 cases where they might be able to go to court
17 based on the issuance of the subpoena alone. I
18 had noted a first category where --

19 JUSTICE ALITO: Well, let's talk about
20 this case. In this case --

21 MR. IYER: Sure.

22 JUSTICE ALITO: -- your position is
23 that they need to litigate this in state court,
24 and until the state court rejects their First
25 Amendment claim and orders compliance, they

1 cannot go to federal court? That's your --

2 JUSTICE JACKSON: But, at that point,
3 aren't they precluded? I mean, you've --
4 you've sort of made it impossible for them to
5 make their claim in federal court, right?

6 MR. IYER: So let me maybe address
7 that preclusion point head on. We think there
8 are a couple of reasons why the fears of the
9 preclusion trap that this Court identified in
10 Knick just don't apply in this context.

11 For one thing, this Court has always
12 made clear that you don't bend the rules of
13 Article III standing based on potential fears
14 of preclusion. And in cases like Whole Woman's
15 Health, for instance, this Court noted that
16 there may not always be available a federal
17 forum for a federal constitutional claim
18 challenging --

19 JUSTICE JACKSON: So you're not saying
20 they wouldn't be precluded. You're just saying
21 there are times when it's too bad?

22 MR. IYER: So I think there could be a
23 narrow set of circumstances. I'll grant you
24 here we think they would be precluded under --

25 JUSTICE JACKSON: They would be you

1 think?

2 MR. IYER: -- under New Jersey
3 principles of preclusion. Of course, under the
4 Full Faith and Credit Clause, you apply state
5 preclusion principles. And there might be
6 other states that have different kinds of rules
7 related to preclusion. But I think in part,
8 because there are some circumstances, as I --
9 as I noted before -- and, again, I don't think
10 this case fits into this bucket -- but, because
11 there are some circumstances where a party
12 would have access to a federal forum, I don't
13 think it is invariably true that a party would
14 necessarily be precluded just by the issuance
15 of a subpoena.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 If your client -- or, I'm sorry, your
19 friend's client had complied with the subpoena
20 and the state of New Jersey had full names,
21 phone numbers, addresses, place of employment
22 and all that of donors, what was the state
23 going to do with that information?

24 MR. IYER: We've been very clear about
25 this from the outset. Our entire purpose in

1 asking for the category of donor information
2 that we asked about was to evaluate whether any
3 donors themselves might have been deceived by
4 the representations on the donation pages
5 maintained by First Choice.

6 I -- I'm happy to disclaim from the
7 podium here, we have no interest in seeking
8 enforcement against any of these donors. We
9 have no interest in publicly disclosing any
10 information about these donors. It is purely
11 for the purpose -- we are asking for that
12 information, purely for the purpose of
13 evaluating whether donors might have been
14 harmed.

15 CHIEF JUSTICE ROBERTS: Well, our
16 precedents give protection to donor privacy in
17 situations of charitable solicitation. And --
18 would those apply here or not?

19 MR. IYER: Yeah, we don't dispute that
20 those precedents would supply the relevant
21 framework. I think that's a merits question,
22 not a standing question. I think this Court's
23 decision in Americans For Prosperity would
24 supply the relevant framework, although I would
25 note -- and this, again, goes to the merits

1 analysis, not to the standing analysis, so I
2 don't think the Court needs to consider it
3 here, but one of the modes of seeking
4 information about donors that this Court
5 pointed to as more narrowly tailored than the
6 blunderbuss regulation that was an issue in AFP
7 was targeted subpoena towards a particular
8 entity where the state has concerns about
9 potential deceit or misconduct of some sort.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. Justice Thomas?

12 JUSTICE THOMAS: Did you have
13 complaints that form the basis of your concern
14 about the fund-raising activities here?

15 MR. IYER: We certainly had complaints
16 about crisis pregnancy centers that Petitioner
17 --

18 JUSTICE THOMAS: No, about this crisis
19 pregnancy center.

20 MR. IYER: So I think we've been clear
21 from the outset that we haven't had complaints
22 about this specific pregnancy center.

23 JUSTICE THOMAS: So you had no basis
24 to think they were deceiving any of their
25 contributors?

1 MR. IYER: I -- I -- I -- I don't
2 think -- I don't think that's correct, Your
3 Honor. I think we had carefully canvassed all
4 of the public information that is provided on
5 the website of First Choice in making a
6 determination that we wanted to initiate an
7 investigation.

8 JUSTICE THOMAS: But you had no
9 factual basis?

10 MR. IYER: I -- I don't think that's
11 true, Your Honor. I think, for example, you
12 could take a look at a comparison between the
13 donation page for First Choice that we have
14 carved out from the very beginning --

15 JUSTICE THOMAS: So you had no
16 Complainants?

17 MR. IYER: We had no complaints but
18 state governments, federal government initiate
19 investigations all the time in the absence of
20 complaints, where they have a reason to suspect
21 that there could be potential issues of legal
22 compliance.

23 And, look, it could be the case based
24 on our investigation when we look at documents,
25 when we look at information, that ultimately

1 we'll determine that First Choice isn't liable
2 for any violation at all --

3 JUSTICE THOMAS: Well, that just seems
4 to be a burdensome way to find out whether
5 someone has a confusing website, but you said
6 earlier that you did not agree with their
7 characterization of why they were being put to
8 this.

9 And it would seem that the obvious way
10 to refute that was to say we had 100
11 complaints. But you say you have no complaints
12 but, rather, you looked at the website and
13 their materials and you think it could have
14 been misleading.

15 So why is your characterization any
16 better than theirs?

17 MR. IYER: So, Your Honor, I point you
18 to the Turner declaration, which is at pages
19 400 to 401 of the Joint Appendix, which lays
20 out the predicate for the state's investigation
21 of First Choice. And we had concerns in four
22 buckets.

23 We had concerns about potentially
24 misleading donors. We had concerns about the
25 unlicensed practice of medicine. We had

1 concerns about patient privacy practices. And
2 we had concerns about potentially misleading or
3 untrue medical statements.

4 So I think we had a more than ample
5 basis to initiate this investigation.

6 JUSTICE THOMAS: But --

7 MR. IYER: And again --

8 JUSTICE THOMAS: -- you had no
9 Complainants.

10 MR. IYER: We had no complaints but I
11 think, Your Honor, that goes at most to the
12 merits. That doesn't go to the standing
13 analysis.

14 CHIEF JUSTICE ROBERTS: Justice Alito?
15 Justice Kagan?

16 JUSTICE KAGAN: That argument,
17 Mr. Iyer, that you mentioned from Justice
18 Breyer in Clapper, I remember agreeing with
19 that argument.

20 (Laughter.)

21 JUSTICE KAGAN: And -- and -- and the
22 reason is it's a very commonsensical argument.
23 And it's basically like what's an ordinary
24 person supposed to think? And what's an
25 ordinary person supposed to do based on what an

1 ordinary person is supposed to think?

2 And I think here too you would make
3 the same argument, is that an ordinary person,
4 one of the funders for this organization or for
5 any similar organization presented with this
6 subpoena and then told but don't worry, it has
7 to be stamped by a court, is not going to take
8 that as very reassuring, in the same way that
9 Justice Breyer said the people in that case
10 were not going to be particularly reassured by
11 the fact that there was a step yet to be taken.

12 So why isn't that right?

13 MR. IYER: So Justice Kagan, I was
14 trying to respond directly to your hypothetical
15 that posited the 98 percent grant rate. We
16 don't think that's actually what happened in
17 state court. And you could look at the facts
18 of this very case to see that.

19 The state has sought an enforcement
20 order from the state court for more than two
21 years. The state court has repeatedly declined
22 to order production. Instead it's ordered the
23 parties at petition appendix 63 to 66 to
24 negotiate and to narrow the scope of the
25 subpoena.

1 JUSTICE KAGAN: I appreciate that that
2 it's -- IT'S not automatic. And maybe neither
3 you nor I know the exact numbers, but still I'm
4 an ordinary person and I think: Okay, this --
5 these subpoenas, they're pretty regularly
6 issued, and maybe this one will be denied, but,
7 you know, maybe it won't.

8 And -- and that's -- I'm fearful of
9 that. I don't want my name being given. So
10 why isn't that enough?

11 MR. IYER: Your Honor, I think this
12 Court has always said --

13 JUSTICE KAGAN: I -- I mean, I guess
14 that's the say it's even -- you know, that the
15 Clapper case was a little bit more so, but why
16 does it have to be a little bit more so?

17 MR. IYER: Yeah. Your Honor, I think
18 the facts here are pretty far afield of that.
19 Smith & Wesson itself at page 894 of that
20 opinion, Judge Hardiman noted there was far
21 more for the state court to do than merely
22 implement a predetermined outcome.

23 You can see this in how other courts
24 have handled subpoena processes in -- in other
25 states, for example, Twitter at page 1196 of

1 the Ninth Circuit opinion said that enforcement
2 is not a rubber stamp of -- of the process.

3 So I think the facts here are --
4 are -- are just different in kind. And my
5 friends on the other side haven't alleged
6 anything about success rates, for example, for
7 subpoena enforcement. And as a practical
8 matter, I think the facts of this very case
9 illustrate that there's not a predetermined
10 outcome to this process.

11 And I think from the perspective of
12 Article III standing, this Court has always
13 said that you look at whether or not there's a
14 contingent future action that the harm depends
15 on. And here there is a contingent future
16 action it depends on.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: The ACLU's amicus
21 brief expresses concern about what they call
22 suppression by subpoena and censorship by
23 intimidation.

24 And they say, you know, just go with
25 the common sense framework that the Court's

1 cases have, which have said that "a speaker is
2 not obligated to wait for formal enforcement
3 before challenging the constitutionality of
4 state action" and "a subpoena seeking sensitive
5 donor information," to pick up on Justice
6 Kagan's common sense point, "can chill a
7 disfavored speaker's protective associations
8 long before it's ever enforced."

9 I mean, you've gone to the specifics
10 of the complaint, but the -- the broader common
11 sense of the situation reflected in the ACLU's
12 brief, reflected in some of the questions would
13 seem to say, you know, this is just kind of
14 obvious that there's some kind of objective
15 chill from a subpoena on speech.

16 So I just want to give you a chance to
17 respond to that amicus brief.

18 MR. IYER: Absolutely. Absolutely,
19 Justice Kavanaugh.

20 We think there is certainly a
21 difference between our position and the ACLU's
22 position in that brief but that that difference
23 is not as great as it might appear on its face.

24 In particular, as we noted this
25 morning, we think that while the issuance of

1 the subpoena standing alone by itself isn't
2 enough to get someone in the federal courthouse
3 doors, you could have situations where there
4 are other government statements or other
5 government actions that themselves create an
6 objective chill.

7 That might, together with the
8 subpoena, be sufficient to establish standing.
9 And I take it that that's really the thrust of
10 the concern that the ACLU has, is where there's
11 some clear factual record, where the
12 government, for example, has made statements or
13 actions saying we're going to go after donors,
14 we're going to publicly disclose their
15 information, we want to target them, I -- I --
16 I think we would agree in those circumstances
17 that there's standing. The problem is that the
18 factual allegations just don't support that in
19 this case.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: A question about the
24 Pandora's box again. So you were pointing out
25 how many thousands of subpoenas get issued by

1 state agencies all across the country.

2 Presumably some of those are self-executing.

3 You were saying -- and -- and
4 you've -- you've admitted that there would be
5 standing to bring pre-enforcement challenges if
6 they were self-executing.

7 Well, why haven't we seen a lot of
8 pre-enforcement litigation if some of those
9 subpoenas are self-executing?

10 MR. IYER: Your Honor, this Court has
11 seen that exact litigation in cases like Bates
12 and Shelton, both of which involved demands for
13 disclosure, where there was a penalty that
14 immediately attached --

15 JUSTICE BARRETT: But I guess my -- I
16 guess -- I have no idea empirically --

17 MR. IYER: Mm-hmm.

18 JUSTICE BARRETT: -- how many states
19 routinely issue non-self-executing as opposed
20 to self-executing subpoenas. I guess what I'm
21 trying to get a handle on is your argument
22 that, whoa, this would be a --

23 MR. IYER: Yeah.

24 JUSTICE BARRETT: -- Pandora's box
25 because there are thousands and thousands of

1 these subpoenas, and imagine how much
2 litigation we would see.

3 Where I'm going with this question,
4 what I'm trying to nail down is, well, if half
5 of those or three-fourths of those are already
6 self-executing subpoenas, what's the big deal
7 because presumably all those people have
8 standing, so why are you so concerned?

9 MR. IYER: The factual premise I think
10 is not accurate there. Overwhelmingly, states
11 use non-self-executing subpoenas.

12 JUSTICE BARRETT: Okay. Thank you.
13 That was the question.

14 And then the others, I just want to be
15 clear about the facts. In response to Justice
16 Thomas, when you were describing the premise
17 for seeking this donor information, et cetera,
18 you were mentioning that it was a misleading
19 website. So is what the state wanted to do
20 with the donor names and addresses is to
21 contact them to figure out if they thought
22 they'd been donating to, like, an abortion
23 clinic as opposed to a pregnancy care center?

24 MR. IYER: I -- I wouldn't frame it in
25 exactly those terms, but I think we're looking

1 at whether or not the donors have potentially
2 been deceived. And I think if you look at the
3 --

4 JUSTICE BARRETT: But that would be
5 the subject of the deception, right? I -- I
6 gather that you think the website might have
7 made them think that this was an entity that
8 provided abortion care as opposed to a pro-life
9 entity. That's -- so that was the concern?

10 MR. IYER: Yeah, that's right, Your
11 Honor.

12 JUSTICE BARRETT: All right. Thanks.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: So just to pin this
16 down finally, you named a couple of
17 circumstances in which you thought a party
18 might have the ability to challenge a
19 non-self-executing subpoena from the moment of
20 issuance. You say none of those exist here.

21 And so is it your view that, absent
22 those, it's not ripe at the beginning, that the
23 process goes forward in state court, and that,
24 what, it's at the point of enforcement by the
25 state court that the party would have standing

1 but then we have the preclusion problem? Is
2 that your view?

3 MR. IYER: Yes, Your Honor.

4 JUSTICE JACKSON: Okay. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Rebuttal, Ms. Hawley?

8 REBUTTAL ARGUMENT OF ERIN M. HAWLEY

9 ON BEHALF OF THE PETITIONER

10 MS. HAWLEY: Thank you, Mr. Chief
11 Justice.

12 So one of the questions is about
13 self-executing and the comparison to this
14 statute. I would urge Your Honors to look at
15 footnote 1 of the response brief, page 6. That
16 catalogues a list of statutes that are self- --
17 non-self-executing. Excuse me. That's
18 presumably what Judge Hardiman was thinking
19 about in the Third Circuit decision. They read
20 very differently from the subpoena -- or,
21 excuse me, the state law. They do not say
22 failure to obey means you can get contempt or
23 loss of a business license.

24 In addition, Your Honor, Justice
25 Barrett, you asked about the state court

1 proceeding and the representative --
2 representations of the attorney general. I
3 would point you to JA 50, 53, and 59. At each
4 of those pages, the attorney general
5 represented that the mere failure to hand over
6 donor names and the other documents demanded by
7 the subpoena constitute a violation of three
8 different state laws. That's in this case to
9 the state court.

10 Additionally, Your Honor, in response
11 to Justice Gorsuch's questions, I believe my
12 friend from the other side conceded that this
13 basically means that no non-self-executing
14 subpoena gets into federal court. That's the
15 very same litigation requirement imposed by the
16 lower courts. It violates this Court's
17 decision in Knick. It means that every
18 challenge would not only be disbarred -- or
19 disallowed at the opening stages, but it would
20 also be precluded later on.

21 The attorney general in this case --
22 this is at JA 143 -- argued preclusion the
23 second time we were before the district court.
24 They successfully prevented Smith & Wesson from
25 ever having the merits of their claim

1 determined in federal court by arguing
2 preclusion. Again, that's inconsistent with
3 Section 1983. It violates this Court's
4 decision in Knick. And it's contrary to this
5 Court's virtually unflagging obligation to
6 exercise jurisdiction where it had been given.

7 With respect to the non-self-executing
8 nature of the subpoena, we want to make clear
9 that even a non-self-executing subpoena can
10 impose an objective chill. The test is whether
11 a person of ordinary firmness, that sort of
12 common-sense approach you were talking about,
13 Justice Kagan, would terrify normal donors, mom
14 and pop donors. If you look at the allegations
15 in this case, some donors gave as little as
16 \$10. Those folks are going to be worried about
17 a state attorney general, the highest law
18 enforcement officer in the country, demanding
19 their names, phone numbers, addresses, places
20 of employment, so that he can contact them
21 about a donor website.

22 And to speak about that donor
23 website -- it is at our opening brief, page
24 10 -- it is not in the least misleading. It
25 pictures smiling faces of babies and their

1 families. That there's no question that it
2 belongs to something like Planned Parenthood.

3 In addition, if the attorney general
4 is really worried about donor deception, it
5 doesn't need to show -- it doesn't need to
6 contact those donors. Instead, the objective
7 standard applies under the Consumer Fraud Act.
8 All the attorney general needs to do is prove a
9 reasonable person would be -- be deceived. He
10 cannot possibly do that today.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 The case is submitted.

14 (Whereupon, at 11:27 a.m., the case
15 was submitted.)

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1 1 [1] 93:15 1,676 [1] 69:25 100 [1] 83:10 1196 [1] 86:25 12 [1] 10:8 125 [1] 61:8 1274 [1] 51:13 130 [1] 61:17 137 [1] 61:8 143 [1] 94:22 16 [1] 69:25 174 [1] 63:3 177 [1] 63:8 178 [1] 63:3 1983 [1] 14:14 1995 [1] 51:13 2 20 [1] 9:5 2024 [1] 59:2 22 [1] 59:17 3 357 [1] 74:8 362 [1] 74:8 4 400 [1] 83:19 401 [1] 83:19 413 [1] 69:14 5 50 [2] 22:18 94:3 50,000 [1] 59:3 500 [1] 58:21 53 [2] 22:18 94:3 5686 [1] 22:5 59 [3] 22:18 53:16 94:3 6 6 [1] 93:15 63 [1] 85:23 66 [1] 85:23 661 [1] 51:12 7 73 [1] 61:16	76 [1] 61:16 8 894 [1] 86:19 9 93a [1] 48:24 98 [3] 68:17 70:1 85:15 A a.2d [1] 51:13 ability [3] 39:15 40:19 92:18 able [2] 47:1 77:16 abortion [3] 74:16 91:22 92:8 absence [1] 82:19 absent [1] 92:21 absolutely [7] 51:1,7,18,24 62:19 88:18,18 abstract [1] 75:24 abuse [1] 38:10 abusive [1] 40:14 accept [7] 15:17 20:12 31:22 32:9,12 35:22 37:21 accepted [1] 46:7 accepting [1] 26:8 accepts [1] 9:15 access [1] 79:12 accessing [1] 74:16 accurate [1] 91:10 aclu [1] 89:10 aclu's [3] 87:20 88:11,21 across [4] 47:20 53:23 59:3 90:1 action [13] 9:23 12:3 19:13 26:25 38:19 39:21,23 40:6 41:5 53:15 87:14,16 88:4 actions [8] 36:7 46:18 70:4 72:13 73:3 76:13 89:5,13 activities [2] 29:17 81:14 actual [2] 31:15 73:15 actually [16] 12:9,23 17:2 20:5 24:21 27:9,11,16 28:10 36:3,21 45:15 47:6 62:10 71:19 85:16 addition [5] 11:15 12:4 13:9 28:14 93:24	additional [4] 8:21 9:19,25 72:24 additionally [1] 94:10 additive [1] 72:20 address [10] 13:16 21:19 32:6 38:7 48:17 60:3 61:25 62:16 74:25 78:6 addressed [1] 60:8 addresses [3] 60:14 79:21 91:20 addressing [1] 37:4 adequacy [1] 40:25 adjudging [1] 50:17 adjudicate [1] 42:15 administrative [3] 46:12 47:18 48:7 admitted [1] 90:4 adopt [3] 33:20 38:4 72:21 adopted [1] 57:11 adopting [1] 39:10 adopts [1] 57:23 adverse [3] 20:12 26:24 28:2 affect [3] 35:16 38:5,15 affidavit [1] 62:17 afield [1] 86:18 afp [2] 70:16 81:6 ag [3] 50:16 56:12,23 agencies [1] 90:1 agency [2] 48:7 58:19 ago [2] 42:6 49:23 agree [6] 12:17 14:4 37:1 59:20 83:6 89:16 agreeing [1] 84:18 agreements [1] 73:21 ag's [2] 20:13 50:14 alert [7] 74:3,8,9,14,17,22 75:3 alito [20] 23:3,4,10 24:14 34:20 35:4 52:22 53:2,6,11,22 64:19,25 65:18 76:20 77:6,13,19,22 84:14 allegation [5] 63:4 64:6,10,17 65:2 allegations [10] 37:21 44:23 60:22 61:2,14,17 72:5 73:16 74:2 89:18	allege [6] 65:19,20 68:4,8,10 71:7 alleged [8] 14:16 18:10 25:19 45:14 46:20 65:12,15 87:5 alleges [2] 45:18 46:17 alleging [1] 63:8 allowed [1] 13:2 alluded [1] 17:14 almost [1] 31:1 alone [7] 10:11 33:22 58:21 59:2 71:9 77:17 89:1 already [4] 11:12 21:16 30:13 91:5 alternative [1] 45:22 although [1] 80:24 amazing [1] 16:7 amendment [24] 11:19 12:8 18:8 19:25 25:15 28:11,25 29:19 33:16 37:13 38:11 39:16 40:2 42:10 45:1 46:4 53:24 58:9,13,14 59:19 70:18 77:9,25 americans [1] 80:23 amicus [4] 29:7 51:12 87:20 88:17 ample [1] 84:4 analysis [7] 28:8 69:12 70:18,25 81:1,1 84:13 analyzed [1] 23:15 anomalous [1] 50:21 anonymous [1] 63:2 another [3] 33:21 41:4 60:5 answer [9] 10:25 18:24 19:3,16 31:12 32:18 57:19 59:11 69:5 answers [1] 52:1 anyway [2] 43:16,19 apa [1] 36:5 apparent [1] 16:12 appear [1] 88:23 appendix [7] 48:24 61:8,17 63:3,8 83:19 85:23 applicable [1] 28:23 applications [1] 69:25 applies [1] 69:12
--	--	--	--

Official - Subject to Final Review

apply [4] 50:16 78:10 79:4 80:18 appreciate [3] 24:25 36:25 86:1 approach [1] 30:2 appropriate [3] 19:15 49:1 55:16 appropriately [2] 19:14 60:5 areas [1] 27:23 aren't [2] 34:23 78:3 arguably [3] 11:17,18 12:19 argued [2] 22:20 94:22 argument [20] 15:14 18:16 21:20 24:24 29:6 30:1 40:4 44:19 57:6 66:14 67:11 70:9,11 72:2 84:16,19,22 85:3 90:21 93:8 arguments [5] 37:22,23 40:3 55:11 60:1 arises [1] 42:18 article [24] 14:21 15:4,10 17:11 23:11,19,21,25 24:1 29:11,21 33:2,10,14 34:17 36:11 37:3 38:16 45:21 46:12 61:13 76:24 78:13 87:12 aside [3] 31:9 54:7 57:9 aspect [1] 43:6 assertion [1] 66:19 assessed [4] 23:12 24:8 35:10,14 assessing [2] 35:4 37:22 associate [1] 61:10 association [1] 12:23 associational [7] 8:25 9:2 10:17,22 11:3 28:11 29:16 associations [1] 88:7 assume [1] 30:17 assuming [1] 17:18 attached [2] 49:15 90:14 attempt [1] 10:7 attorney [22] 9:4,7,15 10:4 11:13 14:24 15:7 16:6 17:24 19:8 21:10 22:12,20 23:	5 26:9 32:6 66:7 73:7,22 94:2,4,21 authority [6] 16:12 40:12 50:8 51:6 54:24,25 authorized [1] 36:10 automatic [2] 34:5 86:2 available [3] 39:4 41:25 78:16 away [3] 8:20 15:4 26:22 B back [4] 65:7 71:14 76:19,21 background [4] 49:4 52:9,11 75:22 backup [1] 33:19 backward-facing [1] 64:6 backward-looking [1] 64:17 backwards-looking [1] 63:14 bad [2] 14:12 78:21 bantam [6] 16:11,17 21:14 28:21 31:6 72:12 bar [1] 34:17 barrett [37] 10:14 15:13 16:14,18,24 17:5 30:25 31:19 32:1,15,22 37:14,16 42:21,24 49:9,11 57:3,19 58:5,8 68:23 73:4 74:2 75:6,9,15,18 89:22,23 90:15,18,24 91:12 92:4,12 93:25 based [10] 15:16 35:10 63:7 65:9 68:11 71:8 77:17 78:13 82:23 84:25 basically [7] 12:2 34:2 68:16,21 69:8 84:23 94:13 basis [9] 30:1 37:7 60:6 71:17 72:5 81:13,23 82:9 84:5 bates [1] 90:11 become [1] 23:17 begin [4] 11:25 30:13 44:5,6 beginning [2] 82:14 92:22 begun [1] 30:14 behalf [3] 44:20 63:2 93:9	believe [2] 58:23 94:11 below [3] 45:15 49:12,15 bend [1] 78:12 berkson [1] 51:11 besides [1] 51:8 bespoke [2] 59:8,13 best [4] 20:4 23:24 32:8 60:21 better [1] 83:16 between [9] 10:20 14:17 33:5 35:19 46:23 47:25 56:3 82:12 88:21 beyond [1] 8:17 big [1] 91:6 birthday [1] 16:5 bit [3] 52:5 86:15,16 blunderbuss [1] 81:6 board [1] 8:1 bogus [1] 13:24 boil [1] 66:13 boils [1] 66:14 bonta [2] 8:18 9:24 books [4] 16:11 28:21 31:6 72:12 boost [1] 16:8 borne [1] 73:18 both [1] 90:12 bottom [1] 51:23 bottom-line [1] 72:2 bound [5] 43:8,15,22 57:7 70:8 box [3] 57:17 89:24 90:24 branch [4] 47:1 49:7 52:10 54:23 breadth [1] 33:18 break [1] 46:5 breyer [3] 69:23 84:18 85:9 brief [14] 9:5 22:5 31:22 36:2,20 50:11 59:17 60:2 62:8 87:21 88:12,17,22 93:15 briefing [1] 59:25 briefs [2] 10:8 51:12 bring [2] 76:15 90:5 brings [1] 72:11 broad [1] 88:10 brought [3] 35:15,20 44:	11 bucket [1] 79:10 buckets [2] 20:18 83:22 built [1] 11:25 burden [12] 10:10 13:4 17:5 18:3,25 19:19,20,23,24,25 20:2 23:17 burdened [2] 11:17 12:19 burdens [6] 9:11 11:18 12:23 18:22 20:7 26:17 burdensome [1] 83:4 business [4] 8:12 22:1,9 93:23 businesses [1] 58:22 C call [1] 87:21 candid [1] 49:25 cannot [4] 11:14 72:4 77:10 78:1 canvassed [3] 51:16 55:10 82:3 cap [1] 55:3 car [4] 58:22 60:9,12 75:3 card [1] 16:5 care [4] 74:16,20 91:23 92:8 carefully [1] 82:3 carried [1] 15:15 carry [1] 31:3 carved [1] 82:14 case [63] 9:18 14:12,24 15:1,6,17 16:5 18:9 20:10,14 21:4,10 22:13,14,24 23:9,17,24 31:1,6 35:23 37:12 38:13,23 39:25 42:18 45:7,11 46:9 49:23 50:2 51:12,14 54:14 55:17 57:23 59:20,22 60:6 62:4,8 63:7 64:12,16 68:7 69:11,16,18,21 71:20 73:4 75:11 77:20,20 79:10 82:23 85:9,18 86:15 87:8 89:19 94:8,21 cases [22] 12:7 14:7 15:12 20:1 28:21 30:7 33:1 37:12,13 42:13 46:4 55:21 58:4,6,9 71:6,10 72:11 77:16 78:
--	--	---	--

Official - Subject to Final Review

14 88:1 90:11 catalogues [1] 93:16 categories [2] 71:9 77:15 category [2] 77:18 80:1 cause [8] 10:11 12:3 17:23 38:18 39:23 45:18 61:9,12 causes [2] 39:21 40:5 caveat [2] 72:8,10 censorship [1] 87:22 center [3] 81:19,22 91:23 centers [6] 73:6,9 74:4,11, 15 81:16 certain [1] 25:5 certainly [4] 31:2 62:3 81:15 88:20 certify [1] 55:19 cetera [3] 62:1,16 91:17 challenge [10] 14:9 29:12 34:3 40:20 43:11 53:24 76:11 77:10 92:18 94:18 challenged [1] 38:12 challenges [11] 30:8 37:1 44:1,3 57:13 58:10,13,14, 16,17 90:5 challenging [2] 78:18 88:3 chance [1] 88:16 change [5] 35:16 40:16 48:2 57:21 58:2 characterization [3] 31:23 83:7,15 charitable [1] 80:17 chief [32] 8:14,16 9:20 22:25 24:15 29:3,9 31:11,16 33:24 34:21 40:24 41:10, 13,14 42:20 44:16,21 59:10 60:7 61:22 62:5,13 79:16 80:15 81:10 84:14 87:17 89:21 92:13 93:5,10 chill [56] 19:24 24:10 25:21, 25 29:16 30:5 32:23 33:1,6, 6,7,14,21 34:13,15 36:22 37:13 38:3,4,7,11,14,15,23 39:10,12,15 42:25 46:10, 19 59:20,21 60:6,19 63:4,8, 16 65:13,13,15 66:21 67:9 68:4,6,9,11 70:9,10,23 71:	22,25 72:6,16 88:6,15 89:6 chilled [10] 9:4 11:7 17:4 21:12 44:25 45:16 62:10, 15 65:21,23 chilling [10] 9:19 13:8,11 18:7 20:1,15,22 29:18 60:13 70:19 choice [23] 8:1,5,9,13 10:12 11:4,10 14:17,19 21:12 22:11 24:7 25:19 26:10 30:16,22 61:10 63:11 80:5 82:5,13 83:1,21 choice's [3] 10:7 11:18 61:19 chose [1] 63:19 circuit [12] 15:8 29:23 49:22 50:3,12 51:14,15 54:11, 17 55:18 87:1 93:19 circuit's [1] 57:7 circumstance [1] 77:3 circumstances [10] 16:4 37:2 39:3 42:1 46:13 78:23 79:8,11 89:16 92:17 cite [2] 50:10,12 cited [2] 50:7 51:12 cites [1] 67:19 civil [1] 47:17 claim [8] 17:21 29:19 33:16 46:4 77:25 78:5,17 94:25 claims [1] 59:6 clair [1] 38:7 claire [1] 40:24 clapper [8] 33:3 69:10,10, 14,23 71:2 84:18 86:15 class [1] 71:6 clause [1] 79:4 clear [17] 11:8 13:20 25:9 28:24 35:20 41:18 51:18 52:10 54:2 64:5 66:24 67:4 78:12 79:24 81:20 89:11 91:15 clearly [1] 14:15 client [2] 79:18,19 clinic [1] 91:23 close [1] 41:19 closer [1] 31:6	closest [3] 61:7 63:6 64:14 coercive [1] 11:7 colloquies [3] 45:2 48:19 65:7 come [4] 28:17 34:5 53:23 71:13 comes [5] 12:25 39:24 40:20 42:6 62:14 coming [1] 51:16 command [2] 21:25 55:7 commanded [1] 48:22 commanding [1] 13:7 commands [1] 8:5 commission [1] 39:6 common [3] 87:25 88:6,10 commonly [1] 69:10 commonsensical [1] 84:22 communications [1] 69:18 company [1] 59:2 comparison [2] 82:12 93:13 complainants [2] 82:16 84:9 complaint [13] 23:13 24:9, 12 35:5 45:17 60:22 61:1,7, 15 65:19,21 76:21 88:10 complaints [8] 81:13,15, 21 82:17,20 83:11,11 84:10 completely [1] 49:25 compliance [3] 13:7 77:25 82:22 complied [2] 68:17 79:19 comply [9] 8:7,19 22:15, 24 48:8,11 53:17 54:4 77:8 concede [2] 62:9 75:23 conceded [1] 94:12 concedes [1] 9:5 conceding [1] 67:14 concern [11] 17:9 36:25 37:4 60:19 70:10,13,15 81:13 87:21 89:10 92:9 concerned [2] 36:21 91:8 concerns [7] 39:9 81:8 83:	21,23,24 84:1,2 concrete [2] 46:14 71:12 conduct [1] 71:19 conflate [1] 33:10 confused [1] 13:25 confusing [1] 83:5 confusion [1] 47:12 congress [8] 14:15 36:9 39:20 40:5,7,8,9,16 connected [1] 46:17 connection [1] 43:2 consequences [2] 52:19 56:5 consider [3] 70:23 71:1 81:2 considered [2] 26:24 67:5 considers [1] 70:17 consistent [2] 55:20 71:22 consistently [1] 49:19 constitute [1] 94:7 constitutional [12] 11:16 12:18 14:9 18:10 24:2 34:3 49:5 52:9,12 58:10 59:6 78:17 constitutionality [1] 88:3 consumer [6] 74:3,8,9,14, 22 75:3 contact [1] 91:21 contained [1] 49:3 contempt [12] 8:6,10 13:8 15:20 22:2,8,23,23 26:11 48:12 50:17 93:22 contest [1] 9:7 context [10] 12:8 22:21 28:8,18 73:11 75:12,14,15,19 78:10 contexts [2] 25:8 36:11 contingent [8] 45:9,20 57:1 61:20 69:20 77:5 87:14, 15 contractors [2] 58:22 75:4 contribute [1] 68:2 contributing [1] 45:19
--	---	--	---

Official - Subject to Final Review

contributors ^[1] 81:25 convened ^[1] 8:1 correct ^[14] 19:5 20:19 26:12 31:16,25 32:21 34:13 36:7 37:3 49:17 56:10,10,16 82:2 correctly ^[1] 36:1 cost ^[2] 18:5 43:13 costs ^[4] 17:18 18:4 20:17 30:16 couldn't ^[1] 47:3 counsel ^[11] 23:1 29:4 41:11 44:17 49:9 50:21 52:6 60:7 79:17 81:11 93:6 country ^[2] 47:20 90:1 counts ^[1] 17:10 couple ^[6] 11:24 48:23 64:2 77:15 78:8 92:16 course ^[4] 46:11 54:2,3 79:3 courthouse ^[1] 89:2 courts ^[13] 12:14 15:1 32:14 33:9 47:19 57:7 58:3 68:15,16 70:6 86:23 87:25 94:16 court's ^[12] 14:7 21:4,5 26:2 31:23 46:21 50:23 64:4 69:22 70:16 80:22 94:16 create ^[3] 46:19 72:15 89:5 created ^[1] 25:14 creating ^[1] 40:5 credibility ^[1] 27:8 credible ^[34] 9:8 10:4 11:11 13:19,20 14:5,10 19:21 24:11,11 26:6,25 27:5,12,22 28:8 29:13 30:4,7,22 32:17 33:18,20,22 39:11 45:23 57:24 59:18,24 60:13,19 71:17 72:16 76:9 credit ^[2] 13:1 79:4 criminal ^[1] 27:15 crisis ^[5] 74:4,10,14 81:16,18 critical ^[1] 47:4 curiae ^[1] 29:7 curious ^[1] 38:2	D damage ^[1] 39:25 date ^[1] 52:23 day ^[6] 14:20 33:21 60:6 63:25 66:19 73:20 deal ^[1] 91:6 dealership ^[1] 60:12 dealerships ^[3] 58:23 60:9 75:3 dealing ^[2] 64:9 67:11 dealt ^[1] 55:10 death ^[2] 8:12 22:10 deceit ^[1] 81:9 deceived ^[2] 80:3 92:2 deceiving ^[1] 81:24 deception ^[1] 92:5 decide ^[1] 60:6 decided ^[2] 54:22 55:3 deciding ^[1] 49:8 decision ^[14] 11:2 39:6 50:3,7,12 51:9,17 57:8 64:4 69:15 70:16 80:23 93:19 94:17 decisionmakers ^[2] 70:5,6 decisions ^[1] 39:20 declaration ^[4] 63:1,1,9 83:18 declarations ^[2] 60:23 62:22 declared ^[1] 73:9 declined ^[2] 45:12 85:21 defend ^[1] 17:7 defendants ^[1] 27:15 defer ^[1] 21:7 degree ^[2] 33:14 35:9 delivered ^[1] 13:18 demand ^[2] 15:19,24 demand ^[2] 16:12 94:6 demands ^[1] 90:12 demonstrating ^[1] 10:9 denied ^[1] 86:6 deny ^[1] 68:15 depend ^[2] 20:17 68:14 depends ^[5] 16:3,4 75:13 87:14,16	described ^[1] 11:6 describing ^[1] 91:16 details ^[1] 22:5 deter ^[1] 74:15 determination ^[3] 21:5,8 82:6 determine ^[2] 44:7 83:1 determines ^[1] 17:23 developments ^[1] 35:16 difference ^[8] 10:19 46:23 47:5,25 48:2 56:2 88:21,22 different ^[15] 12:10 16:10 23:22 25:15 36:3 39:20 47:18 52:5 59:5 65:17 70:13,24 79:6 87:4 94:8 differently ^[2] 50:23 93:20 difficult ^[2] 12:9 57:18 diminish ^[1] 14:9 directly ^[3] 48:16 53:23 85:14 disagree ^[3] 51:19 52:14,15 disagreements ^[1] 73:22 disallowed ^[1] 94:19 disbarred ^[1] 94:18 disclaim ^[1] 80:6 disclose ^[4] 25:4 38:25 43:8 89:14 disclosed ^[5] 62:1 63:13,22 64:21 66:5 disclosing ^[1] 80:9 disclosure ^[8] 9:13 20:9 26:19 45:8 61:4,18 65:4 90:13 disclosures ^[1] 59:1 discuss ^[1] 8:2 discussing ^[1] 20:8 discussion ^[1] 20:25 disfavored ^[1] 88:7 dispute ^[4] 11:14 12:22 52:17 80:19 disputes ^[2] 35:18 46:3 disputing ^[1] 74:13 disruptive ^[2] 36:23 37:2 dissent ^[1] 69:24 dissolution ^[1] 8:12 distinction ^[1] 33:5	distinctions ^[1] 33:12 distinguishing ^[1] 32:19 district ^[1] 94:23 docket ^[1] 15:3 doctrine ^[4] 23:15 25:14,15 30:9 doctrines ^[1] 35:15 documents ^[13] 15:25 16:2 22:16 45:5,7 47:22 48:6 53:20 56:25 57:1 61:18 82:24 94:6 doing ^[3] 25:24 74:9 77:9 dombrowski ^[2] 14:8 27:14 donate ^[2] 63:11 64:22 donating ^[1] 91:22 donation ^[3] 63:12 80:4 82:13 done ^[1] 39:25 donor ^[13] 9:3 10:7 11:5 16:12 45:8 62:25 63:9 80:1,16 88:5 91:17,20 94:6 donors ^[23] 16:9 20:10 21:12 26:19 38:25 45:19 60:16 61:19,24 63:2,5 65:21 76:6,14 79:22 80:3,8,10,13 81:4 83:24 89:13 92:1 door ^[2] 57:12 76:10 doors ^[1] 89:3 down ^[5] 48:23 66:13,14 91:4 92:16 downstream ^[2] 61:3,21 dramatic ^[1] 57:21 draw ^[2] 33:4,12 drawn ^[1] 17:25 due ^[2] 49:5 58:15 during ^[1] 47:17 duty ^[1] 45:7 E each ^[5] 10:21 63:10 71:14 74:6 94:3 earlier ^[5] 58:15 65:7 77:2,14 83:6 easily ^[1] 15:2 effect ^[6] 18:7 20:1 29:18 60:13 61:23 70:19
--	--	---	---

Official - Subject to Final Review

either ^[5] 8:24 11:2,21 13:13 22:13 emergency ^[1] 8:1 emphasized ^[1] 10:21 empirically ^[1] 90:16 employ ^[1] 28:7 employment ^[2] 60:15 79:21 encompass ^[1] 58:14 end ^[9] 17:17 18:13 38:13, 22 39:24 40:20 42:16 66:19 73:20 enforce ^[2] 30:14,19 enforced ^[4] 14:5 19:8 29:14 88:8 enforcement ^[32] 9:8,23 10:2,3,5,10 11:12 13:19 14:10 20:21 24:10,11 26:7 30:8 31:4 36:24 37:10 42:17 45:23 53:15 57:24 59:19, 24 71:18 76:14,23 80:8 85:19 87:1,7 88:2 92:24 enforcement's ^[1] 11:12 enjoin ^[1] 12:6 enormous ^[1] 10:10 enough ^[22] 16:15 28:7 31:14 33:2,21 42:12 45:20 65:1 67:13 68:5,21 69:19 71:3 72:22 73:11,23,24 75:12, 23,24 86:10 89:2 entered ^[2] 10:5,6 entire ^[3] 59:3 63:7 79:25 entirely ^[4] 42:19 48:25 55:16 57:1 entities ^[1] 74:15 entity ^[4] 69:14 81:8 92:7,9 envision ^[1] 31:5 equated ^[1] 24:1 equitable ^[1] 41:4 equity ^[3] 39:1,4 41:2 erin ^[1] 93:8 especially ^[1] 13:1 essentially ^[1] 73:7 establish ^[8] 64:18 69:16 71:25 73:23,24 75:4 76:3 89:8 establishes ^[1] 45:4	establishing ^[3] 29:20 34:16 72:16 et ^[3] 62:1,16 91:17 evaluate ^[1] 80:2 evaluating ^[1] 80:13 even ^[19] 12:17 17:10,20 20:20,21 21:10 26:8,11 37:23 39:4 45:24 46:4 49:2 55:6 67:8,23,24 69:15 86:14 events ^[1] 23:14 everything ^[2] 15:16 49:12 evidence ^[6] 28:5 62:9,14 69:12 73:18 74:21 ex ^[1] 17:15 exact ^[3] 34:24 86:3 90:11 exactly ^[6] 27:13 41:21 48:20 49:10 77:1 91:25 example ^[14] 14:24 15:7 27:24 42:3 43:12 46:14 53:14 55:17 59:25 61:15 82:11 86:25 87:6 89:12 examples ^[4] 57:16 58:15 71:14 76:2 exception ^[4] 39:8 40:18 59:8,13 excuse ^[2] 93:17,21 executed ^[1] 68:1 executive ^[4] 47:1 49:7 52:10 54:23 exist ^[2] 20:13 92:20 existence ^[1] 38:18 existing ^[1] 8:17 exists ^[1] 15:5 expand ^[1] 24:5 expect ^[1] 14:3 expedited ^[1] 15:9 expense ^[3] 17:6,10,12 explain ^[4] 10:19 21:7 45:14 64:15 expose ^[1] 76:6 exposure ^[1] 61:12 express ^[1] 32:4 expresses ^[1] 87:21 extent ^[1] 34:12 extraordinary ^[1] 58:2 extraterritoriality ^[1] 58:16	16 extreme ^[1] 42:1 F face ^[9] 8:4 13:20 15:15 21:24 32:10,13,15 61:11 88:23 faced ^[1] 30:22 faces ^[4] 29:13 40:14 45:5 46:14 fact ^[15] 10:5,8 15:4,6,19 16:19 22:23 23:25 24:1 26:18 30:13 35:21 43:1 60:8 85:11 factor ^[1] 70:17 facts ^[11] 16:4 68:11,22 69:9 71:7 72:24 85:17 86:18 87:3,8 91:15 factual ^[8] 44:23 63:7 73:15 76:18 82:9 89:11,18 91:9 fail ^[3] 22:6,7 68:9 fails ^[1] 50:15 failure ^[10] 8:7,19 22:15,24 48:8,10 53:17 54:4 93:22 94:5 fair ^[1] 67:16 faith ^[1] 79:4 fall ^[1] 12:23 false ^[1] 74:19 familiar ^[1] 47:11 far ^[5] 9:6 11:20 20:25 86:18,20 fear ^[2] 25:10 61:11 fearful ^[1] 86:8 fearing ^[1] 28:1 fears ^[2] 78:8,13 feature ^[1] 35:24 federal ^[43] 11:16 12:3 14:13,17,20 17:19,20 18:13 19:1,12,15 27:19 34:6 35:2, 7 36:2,5 38:6,9,15,17 39:5, 14 40:20 42:14,15,19 44:2 45:22 46:1,3 57:14 58:3 59:6 77:11 78:1,5,16,17 79:12 82:18 89:2 94:14 feels ^[1] 12:24	few ^[1] 18:18 figure ^[1] 91:21 filed ^[6] 10:9 23:13 24:13 30:18 35:6 76:22 final ^[1] 59:15 finally ^[2] 22:19 92:16 find ^[3] 13:8 15:9 83:4 fine ^[1] 33:12 finish ^[1] 59:11 firmness ^[1] 11:6 first ^[63] 8:5,9,13 10:6,12 11:1,4,10,18,19 12:7 14:19 18:8,20 19:25 21:11 22:10 23:4 24:7 25:15,19,19 26:9 28:10,21,24 29:19 30:6,16, 22 32:25 33:16 37:12 38:11 39:16 40:2 42:10 44:25 46:4,8 52:23 53:6,22,23 54:20 58:9,12 59:19 61:10,19 63:11 64:2 70:18 71:11 74:7 77:9,18,24 80:5 82:5,13 83:1,21 fits ^[1] 79:10 floodgates ^[1] 11:22 flow ^[2] 9:10 52:20 focused ^[2] 12:15 61:17 follow ^[3] 12:13 38:1 63:24 footnote ^[1] 93:15 force ^[4] 22:21 50:14 63:22 74:6 forced ^[3] 17:7 19:7,20 foreign ^[1] 69:21 foremost ^[1] 54:20 form ^[1] 81:13 formal ^[1] 88:2 forms ^[1] 71:16 forum ^[5] 17:19,20 42:19 78:17 79:12 forward ^[1] 92:23 forward-looking ^[1] 64:18 found ^[1] 18:21 four ^[2] 20:5 83:21 fourth ^[2] 20:15 58:14 frame ^[1] 91:24 framework ^[4] 59:21 80:21,24 87:25
--	---	---	--

Official - Subject to Final Review

friend ^[1] 94:12 friends ^[5] 23:16 60:11 73:8,14 87:5 friend's ^[1] 79:19 full ^[3] 60:14 79:4,20 funders ^[1] 85:4 fundraising ^[2] 16:7,8 fund-raising ^[1] 81:14 furnace ^[2] 38:7 40:24 further ^[4] 23:2 24:18 29:15 44:8 future ^[17] 24:7,9 25:6,7 45:9 57:2 61:3,20,23 64:20 66:6,10,11 72:17 76:9 87:14,15 G gatekeeper ^[1] 34:18 gather ^[2] 42:11 92:6 gave ^[1] 60:16 general ^[21] 9:4,7 10:4 11:13 14:24 15:7 16:6 19:8 22:13,20 23:5 32:6 34:25 36:8 40:19 66:8 73:7,23 94:2,4,21 general's ^[4] 9:16 17:24 21:11 26:9 gets ^[1] 94:14 getting ^[1] 37:17 give ^[7] 15:10 21:19 54:23 57:16 63:23 80:16 88:16 given ^[5] 17:21 21:1 54:21 63:21 86:9 google ^[1] 59:1 gorsuch ^[49] 20:16,20,24 21:13,15,18 24:18 37:15,25 38:20 39:13,18,22 40:7,10,13,22 41:6,9 42:9 50:6 51:5,8,22,25 52:4,11 63:17 64:3,8 65:25 66:6,9,12,18,23 67:1,7,10 68:13,25 69:4,7 72:1,9,18,25 73:2 87:18 gorsuch's ^[2] 75:19 94:11 got ^[13] 20:18 21:15 43:15 51:8 52:12 54:19 57:3 67:7,15,15,17,18 72:1 government ^[16] 15:11	36:2,6 38:2 39:14 40:1,15 46:18 69:13 72:13,14 73:12 82:18 89:4,5,12 governments ^[2] 45:25 82:18 government's ^[2] 45:22 46:2 grand ^[1] 47:15 grant ^[2] 78:23 85:15 granted ^[2] 15:8 70:1 granting ^[1] 37:7 great ^[1] 88:23 guess ^[11] 12:14,17 13:24 14:2 24:22 36:13 43:4 86:13 90:15,16,20 guesswork ^[1] 70:4 H half ^[1] 91:4 hand ^[2] 15:11 94:5 handle ^[2] 15:2 90:21 handled ^[1] 86:24 happen ^[6] 14:23 25:5,10,10 43:10 63:21 happened ^[2] 24:23 85:16 happening ^[2] 13:4 28:6 happy ^[3] 11:1 54:25 80:6 hardiman ^[7] 50:5 51:16 54:19 55:3,7 86:20 93:18 hardiman's ^[2] 50:3 55:9 harm ^[18] 8:25 9:2 10:17,23 11:3 12:5,12 18:4 28:11 37:8,18 46:14 63:15 64:6 71:12 72:17 76:9 87:14 harmed ^[2] 14:16 80:14 harms ^[8] 61:2,18,20 64:10 65:5,13,13,15 hat ^[1] 57:4 hawley ^[44] 8:15,23 10:1,16,25 13:5,13,16 14:6 15:13 16:3,16,21 17:3,13 18:14,18 19:4,18 20:3,19,23 21:3,14,17,22 23:8,23 25:18,22 26:1,5,15,17,23 27:4,13 28:4,9,14,20 93:7,8,10 head ^[1] 78:7 health ^[2] 33:3 78:15	held ^[5] 17:14 47:19 49:6,14 54:11 help ^[1] 50:25 helps ^[1] 45:14 high ^[1] 39:7 higher ^[1] 34:17 highly ^[1] 33:7 historical ^[1] 57:21 history ^[2] 46:5 60:1 holding ^[1] 32:4 home ^[2] 58:22 75:3 honor ^[37] 8:24 10:1 11:20 13:5 14:7,14 16:16 17:13 18:19 19:5,18 20:4,19,23 21:4,22 23:9,23 25:19 27:6 28:9 46:24 49:18,21 53:1,10 82:3,11 83:17 84:11 86:11,17 90:10 92:11 93:3,24 94:10 honors ^[1] 93:14 hostility ^[4] 73:17,24 74:21 75:5 however ^[2] 32:16 33:18 huge ^[1] 59:4 hypothetical ^[2] 31:6 85:14 I ice ^[1] 28:3 idea ^[3] 34:23 43:19 90:16 identified ^[5] 9:9 19:19 57:23 61:2 78:9 identifies ^[2] 28:22 74:22 identify ^[2] 28:15 61:19 identifying ^[2] 65:5 73:21 identities ^[1] 45:8 iii ^[23] 14:21 15:4,10 23:11,19,21,25 24:1 29:11,21 33:2,10,15 34:17 36:12 37:3 38:16 45:21 46:12 61:13 76:24 78:13 87:12 illustrate ^[2] 76:1 87:9 illustrated ^[1] 60:21 illustrates ^[1] 70:17 illustration ^[1] 45:11 imagine ^[1] 91:1 immediately ^[5] 8:1 22:22	26:10 56:11 90:14 imminence ^[6] 9:16,22 16:25 20:11 24:23 27:1 imminent ^[8] 9:13 20:6,9 25:11 26:8,13,18,21 implement ^[1] 86:22 implicating ^[1] 18:10 important ^[4] 28:12 29:20 34:14,16 impose ^[2] 47:21 56:5 imposed ^[3] 47:6 56:15 94:15 imposing ^[1] 30:15 impossible ^[1] 78:4 inadequate ^[1] 39:24 incorrect ^[2] 21:6 37:24 incur ^[2] 17:12 43:18 incurred ^[1] 18:6 independent ^[1] 70:4 indicating ^[1] 68:11 individual ^[1] 48:21 information ^[14] 58:25 63:12 64:21 66:5 79:23 80:1,10,12 81:4 82:4,25 88:5 89:15 91:17 infringe ^[1] 39:15 initiate ^[3] 82:6,18 84:5 initiation ^[1] 76:22 injunction ^[5] 12:6 37:8,17 60:25 62:24 injured ^[2] 43:20 44:11 injuries ^[5] 9:10,17 20:6 26:7,13 injury ^[22] 9:19 17:10 18:20,21,23 20:15 23:25 24:1,8 25:7,7,20 29:21 33:9 34:15,17,18 37:6 43:6,17 44:12,14 inquiry ^[2] 23:22 44:8 instance ^[2] 33:13 78:15 instead ^[4] 37:5 45:8,17 85:22 instructions ^[1] 55:18 intelligence ^[1] 69:21 intend ^[1] 15:23 interactions ^[1] 28:2 interest ^[2] 80:7,9
---	---	---	--

Official - Subject to Final Review

interesting [2] 27:22 34:1 interests [1] 28:25 interpret [1] 54:20 intimidation [1] 87:23 introduce [1] 16:9 inundated [1] 58:4 invariably [1] 79:13 investigation [5] 28:16 82:7,24 83:20 84:5 investigations [1] 82:19 involve [3] 34:11,12 38:18 involved [1] 90:12 involves [1] 12:16 irreparable [12] 12:5,12 18:4,20,23 29:20 33:8 34: 15,16 37:6,8,18 isn't [12] 10:23 14:4 27:21 29:21 41:1 42:18 43:8 64:6 83:1 85:12 86:10 89:1 issuance [19] 44:24 46:16 47:23 52:18,21 56:6 65:9, 16,23 68:12 71:8,12,24 72: 4 77:3,17 79:14 88:25 92: 20 issue [9] 9:15 16:11 17:19 19:3 45:25 54:17 74:17 81: 6 90:19 issued [11] 16:11 19:14 30: 21 47:16 57:14 58:20 67: 22,25 74:4 86:6 89:25 issues [4] 53:25 67:2 75:2 82:21 issuing [1] 76:5 itself [14] 45:18 46:10 48: 25 53:17 54:5 56:6 61:5 65: 6,11,24 68:5 71:13 86:19 89:1 iyer [100] 36:19 44:18,19,21 46:24 48:1,13,16 49:10,17 51:1,7,10,24 52:2,8,15 53: 1,9,13 54:9,11,18 55:5,8 56:2,10,16,19,23 57:18 58: 7,11 59:12 60:20 62:3,7,19 64:1,4,14,23 65:2,22 66:3, 7,10,16,22,24 67:3,8,17 68: 3,20,24 69:8 70:12,15,22 71:4 72:7,11,23 73:1,3,14	75:8,13,17,25 76:25 77:12, 14,21 78:6,22 79:2,24 80: 19 81:15,20 82:1,10,17 83: 17 84:7,10,17 85:13 86:11, 17 88:18 90:10,17,23 91:9, 24 92:10 93:3 J ja [6] 22:17 53:14,15 74:8 94:3,22 jackson [42] 8:15 12:13 13: 10,15,22 24:20,21 25:21,23 26:4,14,16,20 27:3,7,21 28: 5,13,19 29:2 33:4 42:22,23 43:23,25 44:10,15 55:22 56:8,11,17,21 70:7,14,21 71:1 78:2,19,25 92:14,15 93:4 jersey [20] 32:2,3,5,5,9 45: 3 49:6,13 50:8,10,11,22 51: 10,13 55:19 57:5,6,15 79:2, 20 job [1] 54:20 joint [1] 83:19 judge [10] 50:3,4 51:15 54: 19 55:3,6,9,9 86:20 93:18 judgment [1] 29:23 jury [1] 47:15 K kagan [22] 10:13,15 24:17 35:25 36:13,17 38:1 41:16 54:6,13 55:2,6 67:20 68:14 69:2,5 84:15,16,21 85:13 86:1,13 kagan's [3] 72:3 77:2 88:6 kavanaugh [12] 24:19 41: 17,18,23 42:2,7,11 52:13 87:19,20 88:19 89:20 keep [1] 34:8 kind [8] 34:3 70:24 71:11 75:11 76:8 87:4 88:13,14 kinds [8] 25:8 36:7 47:11 58:5,21 59:5 71:10 79:6 knell [2] 8:13 22:10 knick [2] 78:10 94:17 knowledge [1] 23:8 known [3] 60:15 63:12,20	kyne [1] 42:5 L laird [2] 33:2 72:12 language [3] 32:16 45:20 61:12 last [4] 10:25 22:4 39:6 60: 15 later [7] 8:8 14:23 22:7 23: 14 35:7,16 94:20 latin [2] 8:3 16:22 laughter [7] 36:16 41:22 42:4 52:7 53:5 54:10 84:20 law [23] 8:10,11 21:4,6,8 22: 3,22 27:17 38:21,22 40:16, 25 41:2 45:3,3 46:25 47:19 50:14 51:20 55:15 58:24 67:6 93:21 lawfulness [1] 42:15 laws [2] 22:17 94:8 lawsuit [1] 12:16 lawyer's [2] 55:3 57:4 lays [1] 83:19 lead [1] 8:19 leads [1] 36:14 leave [2] 33:21 60:5 leedom [1] 42:5 legal [7] 8:20 45:6 46:15 47:6 48:3 56:25 82:21 legislature [2] 54:21,22 less [1] 63:10 letter [11] 15:21,23,25 16:4, 10,14 30:25 31:3,7 32:19 47:3 level [1] 35:3 lexmark [1] 24:3 liable [4] 8:10,22 48:11 83: 1 license [3] 22:1,9 93:23 likelihood [4] 16:25 17:1, 11,11 likely [3] 44:8 45:16 63:11 limit [1] 58:11 limited [2] 46:10 71:6 linked [1] 72:14 list [12] 9:9 12:1 17:14 18: 21 19:20 20:4 23:25 25:4	26:3,23,25 93:16 lists [1] 38:25 litigants [1] 34:9 litigate [4] 19:1,17 77:7,23 litigated [1] 18:2 litigation [33] 9:12 17:6,9, 12,18 18:22 20:2,7,17 22: 20 26:18 30:16 35:7 38:6, 10,15,18 43:13 44:2 45:13 47:17 49:18,24 53:10 54:1, 7 56:13 62:11 71:23 90:8, 11 91:2 94:15 little [6] 12:24 13:24 25:12 52:5 86:15,16 local [1] 45:24 long [7] 29:12 30:20 39:10 42:6 49:6,14 88:8 look [22] 8:4 22:4 23:24 24: 9 25:20 47:10 53:12,13 55: 25 57:4 61:1,15 62:22,25 82:12,23,24,25 85:17 87: 13 92:2 93:14 looked [2] 15:15 83:12 looking [4] 24:4 27:25 50: 13 91:25 lose [1] 22:9 losing [1] 42:19 loss [1] 93:23 lost [1] 50:2 lot [2] 9:21 90:7 lots [1] 51:5 lower [4] 12:14 21:5 31:22 94:16 lyons [1] 64:5 M made [11] 39:20 41:18 47: 9 55:11 69:25 74:19 76:4 78:4,12 89:12 92:7 main [4] 30:5 32:24 34:18 37:5 maintained [1] 80:5 majority [1] 37:11 malfeasance [1] 14:17 management [1] 15:3 manifested [1] 38:24 manner [1] 57:13
---	---	---	--

Official - Subject to Final Review

many ^[9] 26:21 30:7 34:8, 21,23 46:2 59:5 89:25 90:18 materialize ^[1] 17:2 materials ^[3] 30:15 50:24 83:13 matter ^[14] 17:18 18:6 21:9 34:13 47:19 49:4 51:20 54:1,3 67:5 72:4 76:7 77:7 87:8 matters ^[2] 8:24 66:1 mean ^[18] 9:22 12:21 26:21 27:18,23 39:13 43:9 55:24 63:17,18,19,24 64:11 68:16 73:5 78:3 86:13 88:9 meaning ^[1] 55:15 means ^[7] 8:3 26:7 60:17 70:23 93:22 94:13,17 medical ^[2] 74:20 84:3 medicine ^[1] 83:25 meeting ^[1] 8:2 mentioned ^[4] 10:15 34:4 40:17 84:17 mentioning ^[1] 91:18 mere ^[5] 22:15,24 31:3 71:24 94:5 merely ^[2] 41:4 86:21 merits ^[17] 29:19 33:8,11,16 34:11 37:22 43:2,9,10,15,22 70:8,20 80:21,25 84:12 94:25 met ^[1] 18:1 metric ^[1] 68:10 might ^[16] 27:16 33:9 38:3 61:23 63:12 75:18,24 76:2 77:16 79:5 80:3,13 88:23 89:7 92:6,18 mind ^[1] 42:6 misconduct ^[1] 81:9 misleading ^[4] 83:14,24 84:2 91:18 misrepresentations ^[3] 74:18,23 75:1 mission ^[1] 74:10 mm-hmm ^[4] 13:15 28:13 70:21 90:17 modes ^[1] 81:3	modification ^[1] 70:2 moment ^[13] 12:20,25 13:4 15:19 46:15 47:22 49:15 52:18,21 56:6 65:10,15 92:19 money ^[1] 43:14 moot ^[1] 23:18 mootness ^[2] 23:16 35:15 morning ^[5] 45:2 48:18,19 65:8 88:25 most ^[7] 12:7 26:3 34:14 42:13 45:17 69:10 84:11 motion ^[4] 10:6 19:12 60:24 62:23 motions ^[1] 36:10 ms ^[43] 8:15,23 10:1,16,25 13:5,13,16 14:6 15:13 16:3,16,21 17:3,13 18:14,18 19:4,18 20:3,19,23 21:3,14,17,22 23:8,23 25:18,22 26:1,5,15,17,23 27:4,13 28:4,9,14,20 93:7,10 much ^[2] 31:7 91:1 N naacp ^[2] 8:18 9:24 nail ^[1] 91:4 name ^[3] 61:25 62:16 86:9 named ^[1] 92:16 names ^[6] 10:7 16:13 60:14 79:20 91:20 94:6 narrow ^[8] 15:7 36:9 39:2,8 40:18 41:25 78:23 85:24 narrowly ^[2] 17:25 81:5 necessarily ^[4] 24:4 33:15 68:5 79:14 necessary ^[1] 29:21 need ^[18] 11:11,15 12:4 18:23 20:17 21:3,7 29:15 44:7 51:3 65:13 67:8 68:7,8,10 75:9,22 77:23 needs ^[2] 11:4 81:2 negotiate ^[1] 85:24 negotiation ^[3] 14:25,25 15:9 neither ^[1] 86:2 nervous ^[1] 25:13	never ^[10] 14:11 27:14 37:18 45:14,20 61:13 67:13 72:22 73:23,24 new ^[21] 32:2,3,5,5,9 40:5 45:3 49:5,13 50:8,9,11,22 51:10,13 55:19 57:5,6,14 79:2,20 night ^[1] 63:24 ninth ^[1] 87:1 nomenclature ^[1] 47:13 none ^[1] 92:20 nonexistent ^[1] 41:20 non-production ^[1] 45:6 nonprofit ^[5] 9:3 10:11 11:5 13:6 76:7 nonprofits ^[2] 8:13 22:10 non-self-executing ^[21] 15:18 21:1,11 31:21,24 32:14 35:12,21 49:20 51:4 66:15,20 67:12,24 73:10 75:21 90:19 91:11 92:19 93:17 94:13 nor ^[1] 86:3 normal ^[1] 35:13 normally ^[1] 25:16 note ^[3] 21:9 59:15 80:25 noted ^[9] 61:6 65:3 77:1,14,18 78:15 79:9 86:20 88:24 notes ^[1] 27:25 nothing ^[1] 16:18 notice ^[1] 16:7 noting ^[1] 74:3 notwithstanding ^[1] 43:17 nub ^[2] 48:17 53:21 nuclear ^[1] 39:6 number ^[5] 48:18,19 51:2 61:25 62:16 numbers ^[4] 34:24 60:14 79:21 86:3 O obey ^[4] 22:6,7 50:15 93:22 object ^[1] 49:2 objections ^[2] 38:16 49:8	objective ^[11] 11:5 24:12 30:5 44:4 46:19 71:22,25 72:6,16 88:14 89:6 objectively ^[5] 33:5 44:25 45:16 65:14 68:6 obligated ^[1] 88:2 obligation ^[4] 47:21 49:15 53:19 56:25 obligations ^[2] 47:6 48:3 obstacle ^[1] 34:15 obstacles ^[2] 34:8,11 obtain ^[1] 50:16 obviates ^[1] 15:10 obvious ^[3] 36:14 83:9 88:14 occasion ^[1] 52:23 occur ^[2] 9:18 15:1 occurred ^[3] 11:13 23:14 75:1 occurring ^[1] 12:19 odd ^[1] 12:24 offered ^[1] 73:19 office ^[2] 23:5 52:24 official ^[2] 12:6 76:4 often ^[2] 37:13 68:15 okay ^[16] 20:24 27:3 39:18 41:6,23 43:25 44:15 52:12 64:3 66:12 67:15 70:14 72:9 86:4 91:12 93:4 one ^[23] 9:11 10:22,22 15:11 20:7,9 35:10 42:5,8 43:1 48:25 49:7 50:7 60:16,17 70:17 71:16 76:1 78:11 81:3 85:4 86:6 93:12 one-off ^[1] 42:8 ones ^[1] 34:3 one's ^[1] 17:7 only ^[6] 19:2 38:22 39:19 43:9 58:8 94:18 open ^[2] 11:21 57:12 opening ^[4] 22:4 57:10 61:6 94:19 operates ^[1] 31:7 opinion ^[3] 55:9 86:20 87:1 opportunity ^[3] 21:19 40:2 42:14
---	--	---	---

Official - Subject to Final Review

opposed [6] 8:20 20:21 22:22 90:19 91:23 92:8 opposite [1] 50:1 oral [2] 29:6 44:19 order [21] 8:8 9:13 12:5 14:12 20:9,12 22:7 26:19 45:9,13 47:2 50:17 53:19 61:4 66:11 68:17 69:20,22 77:4 85:20,22 ordered [2] 43:8 85:22 orders [3] 37:10 77:8,25 ordinarily [1] 25:6 ordinary [9] 11:6 13:6 36:24 46:3 84:23,25 85:1,3 86:4 organization [8] 9:3 10:11 48:6 61:24 76:6,15 85:4,5 organizations [2] 74:10 76:8 other [36] 8:10,11 9:17,23 12:1 18:1 20:18 25:8,24,25 26:7,12 27:23 34:8 46:17 47:4,10 50:20 58:10 60:11,17,18 72:13,13 73:8,11,15 75:22 79:6 86:23,24 87:5 89:4,4 94:6,12 others [2] 27:15 91:14 otherwise [2] 54:12 75:2 out [12] 21:16 27:19 35:6 37:24 50:25 69:24 73:18 82:14 83:4,20 89:24 91:21 outcome [3] 35:23 86:22 87:10 outset [4] 47:9 68:9 79:25 81:21 outside [2] 12:7 59:19 over [9] 10:6 16:1 30:15 45:13 56:13 62:11 63:18 69:25 94:5 overwhelmingly [1] 91:10 own [2] 72:20,23 P page [8] 9:5 22:4 59:16 69:14 82:13 86:19,25 93:15	pages [4] 48:23 80:4 83:18 94:4 pain [3] 8:6 13:7 15:20 pandora's [3] 57:17 89:24 90:24 paragraph [6] 61:8,16,16 63:9 66:2,3 part [6] 12:21,22 32:18 57:20 71:17 79:7 parte [1] 17:15 particular [8] 33:13 57:25 59:9,14 69:17 76:6 81:7 88:24 particularly [5] 18:5 46:9 64:16 70:5 85:10 parties [2] 35:19 85:23 parties' [1] 37:21 party [7] 45:5 49:1 71:6 79:11,13 92:17,25 past [3] 66:13 67:1,2 patient [1] 84:1 penalties [11] 8:10,11,20 9:24 15:15 20:12 45:6 46:15 53:16 54:4 56:5 penalty [5] 8:3 9:16 16:23 56:14 90:13 people [6] 18:16 28:1 61:9 74:9 85:9 91:7 per [1] 63:22 percent [3] 68:17 70:1 85:15 perdomo [1] 27:24 perfect [1] 45:11 perfectly [2] 11:1 64:5 person [10] 11:6 34:7 50:15,17 56:8 84:24,25 85:1,3 86:4 personal [1] 66:5 perspective [2] 58:18 87:11 petition [7] 48:24 53:14 61:8,16 63:3,8 85:23 petitioner [14] 29:8 45:14 46:19 48:3,3 52:17 57:22 59:16 62:4,7 65:12 74:12 81:16 93:9 petitioner's [2] 44:23,25	phone [4] 60:14 61:25 62:16 79:21 pick [2] 63:18 88:5 picked [2] 36:15,15 pin [1] 92:15 place [3] 27:1 60:15 79:21 plainly [1] 21:6 plaintiff [5] 14:11 29:11,13,15 71:19 plaintiffs [2] 14:16 46:11 plausible [1] 12:2 play [1] 28:17 plead [1] 62:21 please [3] 16:1 29:10 44:22 pled [1] 62:20 plus [4] 33:21 34:13 39:11 75:21 podium [1] 80:7 point [15] 21:15 30:22 41:1 43:18 59:16 71:2 74:3,5,13 78:2,7 83:17 88:6 92:24 94:3 pointed [2] 69:24 81:5 pointing [1] 89:24 points [1] 74:6 policy [1] 73:21 posited [1] 85:15 position [22] 23:6 36:1,3 49:12,14,19,21 50:1 52:24 53:9 54:14,15,16 55:7 67:14 68:7 71:23 72:22 77:13,22 88:21,22 possibility [6] 26:18,24 37:16 43:7,20 67:25 possible [3] 9:13 20:5 43:7 possibly [1] 22:1 potential [7] 43:17 59:6 61:24 74:22 78:13 81:9 82:21 potentially [4] 58:3 83:23 84:2 92:1 practical [1] 87:7 practice [7] 31:7 35:1 51:16 55:10,20 57:21 83:25 practices [1] 84:1	precedent [2] 8:17 26:3 precedents [2] 80:16,20 precluded [5] 78:3,20,24 79:14 94:20 preclusion [8] 78:7,9,14 79:3,5,7 93:1 94:22 predetermined [2] 86:22 87:9 predicate [2] 46:25 83:20 pre-enforcement [26] 9:1,6,10 10:18,24 11:10,23 13:12,17 17:8 26:2 28:15,16,23 30:8 36:4,10,22 37:1 38:17 43:5,13 44:1 57:11 90:5,8 prefatory [1] 21:9 prefer [2] 10:22 54:8 preferable [1] 30:2 pregnancy [9] 73:6,9 74:4,11,14 81:16,19,22 91:23 preliminary [5] 12:5 37:7,17 60:24 62:23 premise [2] 91:9,16 present [3] 24:7 25:20 60:15 presented [3] 40:3 46:10 85:5 presumably [3] 90:2 91:7 93:18 pretty [5] 50:20 57:20 58:1 86:5,18 prevail [1] 33:16 prevented [1] 94:24 principles [4] 49:5 52:9 79:3,5 prior [1] 54:1 privacy [2] 80:16 84:1 problem [5] 43:3 62:24 66:4 89:17 93:1 problems [3] 32:22,25 43:1 procedural [1] 11:24 proceed [1] 9:22 proceeding [3] 10:2,3 94:1 proceedings [5] 10:5 44:5,6,12 76:23
---	--	--	--

Official - Subject to Final Review

process ^[6] 42:17 49:5 58:16 87:2,10 92:23 processes ^[2] 36:24 86:24 produce ^[7] 8:6 45:5,7 47:22 48:22 53:20 57:1 producing ^[1] 22:16 production ^[7] 45:10,13 47:2 53:19 56:25 77:4 85:22 project ^[1] 73:5 pro-life ^[1] 92:8 proposed ^[2] 30:3 58:12 prosecution ^[2] 18:11 34:4 prosecutor ^[1] 44:6 prospective ^[3] 63:4,15 64:10 prosperity ^[1] 80:23 protect ^[1] 10:7 protection ^[1] 80:16 protective ^[1] 88:7 protects ^[1] 28:25 provide ^[1] 39:21 provided ^[4] 14:15 42:16 82:4 92:8 provision ^[1] 74:19 prudential ^[3] 23:18,20 24:3 public ^[4] 59:1 61:12 76:4 82:4 publicly ^[3] 76:5 80:9 89:14 punished ^[1] 27:16 purely ^[2] 80:10,12 purpose ^[3] 79:25 80:11,12 purposes ^[4] 15:17 35:22 37:22 70:24 put ^[5] 54:6 57:9 58:18 69:1 83:7 putting ^[5] 9:21 54:6,7 55:2 57:4 Q quash ^[1] 36:10 question ^[32] 9:1 10:3 11:	1,17 13:17,17 16:21 18:25 19:17 20:24 24:6,22 34:1 36:14 42:18 46:9 52:1,3,5 53:22 55:14,19,23 57:19 69:6 75:20 77:2 80:21,22 89:23 91:3,13 questions ^[11] 19:2 46:21 47:9 48:18 55:17 59:18 60:5 72:3 88:12 93:12 94:11 quite ^[2] 19:5 39:7 R raised ^[2] 53:25 60:2 rate ^[1] 85:15 rates ^[1] 87:6 rather ^[2] 30:4 83:12 reach ^[1] 59:17 read ^[3] 50:19,23 93:19 reading ^[2] 20:4 32:8 really ^[22] 12:14,19 13:4 14:4,12 16:10 20:17 25:8 31:20 38:7 41:19 47:5 53:25 63:17 64:11,17 66:13,23,24 67:4 68:23 89:9 reason ^[7] 19:5 31:2 54:14 58:23 77:1 82:20 84:22 reasonable ^[8] 9:2,3 17:4,23 33:5 44:4 65:14 68:6 reasonably ^[3] 11:5 21:12 61:10 reasons ^[5] 30:5 51:2,6 64:2 78:8 reassured ^[1] 85:10 reassuring ^[1] 85:8 rebuttal ^[2] 93:7,8 receipt ^[3] 12:20 15:19 65:10 receive ^[1] 46:11 received ^[1] 59:2 receives ^[1] 48:22 receiving ^[1] 13:6 recent ^[1] 26:3 recipient ^[3] 46:14,16 47:7 reconstruction ^[1] 14:15 record ^[6] 53:7 63:7 73:18 75:10 76:18 89:11	red ^[1] 60:2 redressable ^[2] 37:19,20 referred ^[1] 60:8 referring ^[1] 49:21 reflected ^[2] 88:11,12 refute ^[1] 83:10 regarding ^[1] 35:11 regardless ^[2] 9:17 32:12 regularly ^[1] 86:5 regulates ^[1] 71:19 regulation ^[1] 81:6 regulatory ^[1] 39:6 reisman ^[4] 38:6 40:23,24,24 reject ^[1] 38:5 rejected ^[1] 50:4 rejects ^[2] 77:9,24 related ^[1] 79:7 relates ^[1] 43:6 relatively ^[2] 12:9,11 relax ^[1] 25:16 relevant ^[6] 29:18 33:8 35:6 70:19 80:20,24 rely ^[2] 18:7,9 remanding ^[1] 55:17 remark ^[1] 47:9 remarkable ^[1] 46:5 remedy ^[4] 38:20,22 40:25 41:1 remember ^[1] 84:18 removing ^[1] 19:13 render ^[2] 8:9 48:11 repeat ^[1] 26:16 repeatedly ^[2] 45:12 85:21 reply ^[4] 15:20 59:17 60:3 62:8 represent ^[2] 57:20 60:12 representations ^[2] 80:4 94:2 representative ^[1] 94:1 represented ^[1] 94:5 reproductive ^[1] 74:5 request ^[9] 30:25 46:23 47:4,25 48:6,9,10,11 56:24 requesting ^[1] 15:25 requests ^[1] 49:2	require ^[2] 25:8 45:4 required ^[3] 14:11 27:15 54:16 requirement ^[4] 12:12 24:24 37:6 94:15 requirements ^[3] 12:1 33:10,11 requires ^[1] 25:3 requiring ^[4] 45:10 47:2 61:4 77:4 resolve ^[2] 55:16 59:20 resolving ^[1] 59:22 resources ^[1] 9:12 respect ^[10] 11:23 13:5 14:22 26:1 36:4 39:4 55:23 71:21 74:1,7 respects ^[1] 47:4 respond ^[5] 49:1 56:9,14 85:14 88:17 respondent ^[2] 28:22 44:20 respondents ^[2] 69:16,18 response ^[7] 42:24 72:2 75:19 77:1 91:15 93:15 94:10 responses ^[3] 14:6 18:18 25:18 rest ^[2] 61:14 70:3 result ^[2] 35:7 62:1 retaliation ^[1] 61:11 reveal ^[1] 62:15 reversed ^[1] 29:24 review ^[9] 9:1,6,11 10:18 15:9 39:3 40:19 41:3,19 rights ^[9] 11:16,19 12:18 17:22 18:8 19:25 38:11 45:1 74:5 ripe ^[1] 92:22 ripeness ^[6] 12:15 15:22 23:20,21 24:2,3 risk ^[5] 33:9 46:2 58:2 70:18 74:22 risks ^[1] 25:7 roberts ^[26] 8:14,16 9:20 22:25 24:15 29:3 31:11 33:24 34:21 41:10,14 42:20 44:16 59:10 60:7 61:22 62:
---	---	---	---

5,13 79:16 80:15 81:10 84:14 87:17 89:21 92:13 93:5 routinely [1] 90:19 rubber [1] 87:2 rule [3] 35:13 43:21 58:12 rules [2] 78:12 79:6 S safeguards [1] 11:25 same [14] 18:16 19:2 31:3 36:18 41:4,7,8 42:18 62:24 66:4 76:12 85:3,8 94:15 sanctions [1] 10:6 satisfied [2] 24:7 73:13 satisfies [1] 14:21 satisfy [1] 12:1 saw [1] 43:2 saying [15] 15:23 24:25 28:1 33:1 34:2 41:6 44:13 49:13 63:20 72:19 76:14 78:19,20 89:13 90:3 says [17] 16:6 19:15 21:23,25,25 22:3,5 32:13 39:11 41:2 48:21,25 50:14 59:17 63:10 66:4 70:8 sba [10] 9:9 12:1 17:14 18:21 19:20 20:4 23:25 26:3,23,25 scheme [1] 31:8 scope [4] 10:20 11:20 12:10 85:24 sea [1] 57:21 second [8] 9:12 11:9 14:14 30:11 33:7 57:10 71:16 94:23 section [2] 14:14 22:5 see [11] 24:24 27:3 28:19 32:23 33:24 43:12 53:12 58:11 85:18 86:23 91:2 seek [3] 47:2 54:3 74:15 seeking [8] 38:10 53:16,18 60:14 80:7 81:3 88:4 91:17 seem [2] 83:9 88:13 seemed [1] 36:23 seems [5] 28:6 32:18 43:21 64:10 83:3	seen [2] 90:7,11 selective [2] 18:11 34:4 self [2] 17:7 93:16 self-executing [34] 21:21 23:7 31:21 32:10,12 34:22 35:2,9,12 50:20 51:21 52:16,20,25 53:3,4,8 54:8,24 55:23,25 56:3,4,18,20 57:8 66:15 67:5 90:2,6,9,20 91:6 93:13 send [1] 15:24 sense [5] 27:5,17 87:25 88:6,11 sensitive [1] 88:4 sent [2] 15:23 47:3 sentence [1] 48:8 separate [3] 18:20 22:17 25:14 series [1] 33:1 served [1] 49:16 set [3] 68:21 69:9 78:23 setting [2] 25:23 31:9 several [3] 9:9 49:23,23 shall [1] 8:9 shelton [1] 90:12 shoes [1] 36:18 show [12] 11:4,11,15 12:2,4 14:11 18:23 24:10 27:10,15 37:18 44:24 showing [3] 23:17 25:9 29:16 shown [2] 37:13 71:3 shows [3] 16:24,25 17:4 side [6] 18:1 60:11 73:8,15 87:5 94:12 silverman [3] 51:11 52:1,2 similar [2] 12:11 85:5 simply [4] 9:10 14:19 30:25 44:3 since [2] 24:2 53:24 single [5] 18:9 57:23 58:19,20 59:2 situation [4] 18:5 25:1 27:25 88:11 situations [2] 80:17 89:3 smith [9] 22:13,19 49:22	50:2 53:24 54:12,19 86:19 94:24 solicitation [1] 80:17 somebody [3] 19:16 40:14 62:14 somehow [2] 15:10 75:4 someone [2] 83:5 89:2 someplace [1] 53:7 sometimes [1] 74:18 sorry [8] 23:20 27:7 31:18 40:23 53:2,3 59:11 79:18 sort [7] 10:16 27:19 28:7 46:20 53:7 78:4 81:9 sorts [2] 14:22 15:2 sotomayor [9] 17:16 18:15,24 19:10,23 24:16 33:25 34:10 41:15 sotomayor's [2] 43:18 58:15 sought [2] 22:23 85:19 speaker [1] 88:1 speaker's [1] 88:7 speaks [2] 52:2,4 specific [3] 60:17 74:1 81:22 specifically [4] 65:20 69:13 74:25 76:13 specifics [1] 88:9 speech [2] 28:21 88:15 spend [1] 43:14 spent [1] 9:12 stages [1] 94:19 stamp [1] 87:2 stamped [1] 85:7 stand [1] 71:13 standards [2] 17:25 39:7 standing [46] 14:21 15:4 23:12,19,22 25:6 28:25 29:11,22 30:20 31:2,10 33:2 34:5,7 35:14,17 36:12,18,19 37:23 44:7 45:24 46:13 52:18 64:15 65:9 69:11,19 70:3,24 71:8 73:25 76:3,24 78:13 80:22 81:1 84:12 87:12 89:1,8,17 90:5 91:8 92:25 stands [1] 48:4	staple [1] 44:2 start [2] 49:24 53:10 state [77] 8:8 10:9,10 12:6 14:3,17,18 16:12 17:19 19:1,6,11,21 21:5,8,23 22:3,14,17 25:2 30:13,19 35:8 36:18,21 37:9 44:5 45:3,3,9,12,24 46:25,25 47:19 49:4 51:16,20 53:15,18 55:10,15 56:24 57:2 58:19,20 60:13 61:3,21 66:11 67:5 75:2 76:23 77:3,7,8,23,24 79:4,20,22 81:8 82:18 85:17,19,20,21 86:21 88:4 90:1 91:19 92:23,25 93:21,25 94:8,9 statement [2] 63:15 74:17 statements [10] 46:18 72:14 73:1,12 74:19 76:4,13 84:3 89:4,12 states [14] 29:7 34:22 35:3 36:4 39:16 40:15 57:22 59:4,8,12 79:6 86:25 90:18 91:10 states' [1] 58:12 state's [3] 21:20 31:8 83:20 statute [5] 32:8 50:13 55:1 71:18 93:14 statutes [3] 36:9 54:21 93:16 steffell [2] 14:8 27:14 step [7] 8:17,21 9:25 39:1 40:3 41:2 85:11 steps [1] 26:21 still [10] 19:16 27:12 30:20 43:4 57:6 68:20 69:19 70:2 77:4 86:3 stop [3] 30:10 45:19 75:6 story [2] 73:16,17 strike [2] 73:6 74:5 strongly [2] 52:3,4 struggling [1] 43:4 subject [4] 22:8 26:10 33:1 92:5 subjective [1] 33:6 submitted [2] 62:22 63:1
--	---	--	--

subpoenas ^[35] 8:19 18:13 22:21 23:6 32:10 34:22 35:1 39:5 45:4 46:1 47:11, 15,16,16,20 50:14 51:3 54:8 57:14,25 58:21 59:3,9,14 60:9 67:13 68:15,17 86:5 89:25 90:9,20 91:1,6,11 subpoena's ^[2] 46:16 65:16 substituting ^[1] 48:9 success ^[2] 14:8 87:6 successfully ^[1] 94:24 suffered ^[1] 37:9 suffers ^[1] 66:4 suffice ^[1] 13:14 sufficient ^[12] 15:21 33:14, 15,23 61:13 64:7 68:4 71:7 76:2,10,17 89:8 sufficiently ^[1] 26:8 suggesting ^[2] 39:14,19 suggests ^[1] 32:11 suit ^[5] 30:14,18,23 35:14, 20 suits ^[1] 38:17 sundeeep ^[1] 44:19 superior ^[2] 50:7,16 super-unconstitutiona l ^[1] 27:18 supply ^[2] 80:20,24 support ^[4] 60:24 62:23 71:7 89:18 supporters ^[1] 76:16 supporting ^[2] 29:8 60:23 suppose ^[6] 50:9 67:20,21 68:16,19 76:21 supposed ^[3] 84:24,25 85:1 suppression ^[1] 87:22 supreme ^[8] 49:6,13 50:10, 11,23 51:11,13 55:19 surely ^[1] 39:25 suri ^[37] 29:5,6,9 30:3,12, 20 31:1,16,25 32:9,21,24 34:7,14,24 35:13 36:8,25 37:20 38:14 39:2,17,19 40:4,9,11,17 41:3,8,21,24 42:5,13 43:23 44:1,14 70:8	surrounding ^[1] 75:11 surveillance ^[1] 69:22 suspect ^[2] 14:3 82:20 sympathetic ^[1] 15:14 T tailored ^[1] 81:5 talks ^[1] 14:25 target ^[1] 89:15 targeted ^[3] 74:21,25 81:7 targeting ^[3] 69:13,17 76:13 tatum ^[1] 33:3 tens ^[1] 45:25 tense ^[8] 63:19 64:13,20 66:1,14 67:2,16,18 term ^[3] 8:3 39:7 41:4 terms ^[3] 47:5 48:2 91:25 test ^[1] 9:5 tethered ^[4] 61:3,5 65:3,6 thanks ^[1] 92:12 theirs ^[1] 83:16 themselves ^[7] 46:19 47:21 59:16 61:11 72:15 80:3 89:5 theoretically ^[1] 41:25 theories ^[5] 10:16,20 12:10 14:21 70:3 theory ^[49] 10:17,18,23,24 11:2,3,9,10,24 12:15 13:11, 12 15:22 16:19 17:8,17 20:13,22 25:24,25 26:2,9 30:4, 5 32:17,23 33:19 34:6 36:5, 15,22,23 38:3,4,8,14,16 39:10 42:25 43:5,13 45:23 46:2,7 50:4 57:11,24 59:25 75:12 therefore ^[1] 42:17 there's ^[23] 8:21 9:8 10:2 11:17 12:21 19:21 33:9 37:8,14 43:1,20 47:5 52:17 62:9 63:3 66:20 69:12 71:11 87:9,13 88:14 89:10,17 they've ^[4] 67:15,15,17,18 thinking ^[3] 27:23 47:15 93:18 third ^[15] 9:14 15:8 20:11	29:23 49:22 50:3,12 51:14, 15 54:11,16 55:18 57:7 71:21 93:19 thomas ^[24] 23:2 29:25 30:10,17,24 31:13 32:19 41:12,13 46:22 47:8,24 48:5, 14 81:11,12,18,23 82:8,15 83:3 84:6,8 91:16 though ^[3] 55:6 57:4 67:24 thousands ^[4] 45:25 89:25 90:25,25 threat ^[42] 9:8 10:3 11:11 13:19,20 14:5,10 17:1 19:21 24:11 26:6,25 27:5,8,12, 22 28:8,17 29:13 30:4,11, 12,22 31:3,14 32:17 33:19, 20,22 35:5,9 39:11 44:4,5 45:23 57:24 59:18,24 66:20 71:17 72:17 76:9 threatens ^[1] 8:7 threats ^[1] 30:7 three ^[6] 20:18 22:15,17 26:13 71:9 94:7 three-fourths ^[1] 91:5 throughout ^[2] 49:18 71:23 throwing ^[1] 57:12 thrust ^[1] 89:9 til ^[1] 38:22 timing ^[1] 12:16 today ^[1] 58:20 together ^[2] 72:11 89:7 took ^[8] 23:5 36:20 49:14, 22 50:1 52:24 53:9 54:14 tool ^[2] 37:4,5 tools ^[1] 15:3 touch ^[1] 38:2 towards ^[1] 81:7 tradition ^[2] 46:6 60:1 trap ^[1] 78:9 treated ^[2] 32:2,14 trial ^[3] 10:9 51:9 57:5 true ^[6] 8:23 35:2 68:18 73:10 79:13 82:11 trying ^[5] 24:22 51:22 85:14 90:21 91:4 turn ^[6] 16:1 27:8 35:24 37:	24 74:6 76:20 turned ^[1] 30:15 turner ^[1] 83:18 turning ^[2] 46:2 76:19 turns ^[3] 16:19 35:6 64:12 twice ^[2] 8:5,6 twitter ^[1] 86:25 two ^[13] 10:16,20 12:10 14:6,21 25:18 30:5 32:24 42:25 45:13 68:8 76:1 85:20 two-plus ^[1] 62:11 types ^[1] 39:21 typical ^[1] 55:20 typically ^[1] 47:14 U ultimate ^[1] 14:8 ultimately ^[13] 25:2,2 30:23 37:10,23 50:2 54:18 55:5,10 59:21 67:12 73:19 82:25 ultra ^[5] 39:3 40:18,23 41:3, 19 uncomfortable ^[1] 33:17 unconstitutionally ^[1] 25:3 under ^[25] 8:3,25,25 11:2,3, 9 14:7 15:22 16:11,16,23 20:4,20,21 21:4 23:15 27:13,14 31:8 38:12 40:18 46:25 78:24 79:2,3 underlying ^[1] 71:18 understand ^[12] 17:17 18:3 21:13 24:23 31:12 35:18, 25 39:22 43:5,16 55:24 64:9 understanding ^[3] 32:2 34:25 70:10 understood ^[2] 51:3 69:11 united ^[7] 29:7 40:15 57:22 58:12 59:3,8,12 unlawful ^[2] 13:2 14:2 unless ^[1] 37:8 unlicensed ^[1] 83:25 until ^[5] 15:8 17:22 38:13 77:8,24
---	---	--	--

untrue ^[1] 84:3	whatever ^[1] 34:5
unusual ^[1] 31:8	whether ^[27] 9:2 13:3,18
up ^[11] 12:13 17:17 18:13	17:23,24 24:6 27:9 33:13,
22:2 38:1 43:9,15,22 59:24	22 35:6,11,16,19 36:14 38:
70:8 88:5	9,12 51:20 56:13 65:3,8 74:
urge ^[2] 33:19 93:14	25 75:23 80:2,13 83:4 87:
V	13 92:1
vagueness ^[2] 18:12 34:4	whip ^[1] 15:11
vast ^[1] 37:11	whoa ^[1] 90:22
verb ^[2] 63:19 64:13	whole ^[2] 33:3 78:14
versus ^[3] 33:3 55:25 66:	wholly ^[1] 45:9
15	who's ^[2] 19:3 76:4
view ^[12] 9:16 10:19 13:1	wide ^[1] 57:12
32:7 34:19 35:23 38:12 40:	will ^[25] 12:10 15:24 17:1,
1 54:13,15 92:21 93:2	12 18:13 19:13,17 28:23
violated ^[2] 22:17 42:10	29:14 30:13 34:11 36:19
violates ^[2] 17:22 94:16	37:9 38:23 43:9,21 44:5,6
violating ^[1] 58:24	52:3 55:13 61:11 64:21 65:
violation ^[3] 18:11 83:2 94:	4,21 86:6
7	willing ^[1] 35:22
vires ^[5] 39:3 40:18,23 41:	wind ^[1] 22:2
3,19	without ^[4] 46:4 70:1 71:
vivek ^[1] 29:6	24 72:23
volume ^[1] 59:4	woman's ^[2] 33:3 78:14
voluntary ^[1] 21:24	women ^[1] 74:15
vulnerable ^[1] 36:6	wonder ^[4] 13:3 31:18 38:
W	1,9
wait ^[3] 38:13 69:2 88:2	wondering ^[2] 12:17 25:
waiting ^[1] 38:22	13
walks ^[1] 12:25	word ^[1] 9:21
wanted ^[4] 21:19 54:23 82:	words ^[1] 60:18
6 91:19	work ^[1] 62:18
wants ^[2] 59:23 71:15	works ^[1] 13:25
war ^[1] 73:9	worry ^[1] 85:6
way ^[10] 10:24 23:24 25:17	worse ^[2] 16:22 45:24
32:3 49:1 58:11 73:16 83:4,	write ^[2] 48:7,14
9 85:8	Y
ways ^[1] 55:16	year ^[2] 46:1 58:21
website ^[6] 60:17 82:5 83:	years ^[5] 45:13 49:23,23
5,12 91:19 92:6	62:11 85:21
weight ^[1] 9:21	younger ^[2] 17:15 22:21
welcome ^[1] 46:21	yourself ^[1] 27:19
well-developed ^[1] 30:9	
wesson ^[9] 22:14,19 49:23	
50:2 53:24 54:12,19 86:19	
94:24	