

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARKWAYNE MULLIN, SECRETARY,)

4 DEPARTMENT OF HOMELAND SECURITY,)

5 ET AL.,)

6 Petitioners,)

7 v.) No. 25-1083

8 DAHLIA DOE, ET AL.,)

9 Respondents.)

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11 DONALD J. TRUMP, PRESIDENT)

12 OF THE UNITED STATES, ET AL.,)

13 Petitioners,)

14 V.) No. 25-1084

15 FRITZ EMMANUEL LESLY MIOT, ET AL.,)

16 Respondents.)

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19 Washington, D.C.

20 Wednesday, April 29, 2026

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22 The above-entitled matter came on for
23 oral argument before the Supreme Court of the
24 United States at 10:35 a.m.

25

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GEN. D. JOHN SAUER, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	AHILAN T. ARULANANTHAM, ESQ.	
7	On behalf of the Respondents in	
8	Case No. 25-1083	54
9	ORAL ARGUMENT OF:	
10	GEOFFREY M. PIPOLY, ESQ.	
11	On behalf of the Respondents in	
12	Case No. 25-1084	98
13	REBUTTAL ARGUMENT OF:	
14	GEN. D. JOHN SAUER, ESQ.	
15	On behalf of the Petitioners	119
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
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P R O C E E D I N G S

(10:35 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 25-1083, Mullin versus Doe, and the consolidated case. General Sauer.

ORAL ARGUMENT OF GEN. D. JOHN SAUER
ON BEHALF OF THE PETITIONERS

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

Respondents here seek judicial review of the Secretary's decisions to terminate temporary protected status for Syria and Haiti. Yet Section 1254a(b)(5)(A) provides that there is no judicial review of any determination of the Secretary with respect to the designation or termination or extension of a designation of a foreign state for temporary protected status.

That provision means what it says. "Determination" is hardly a rarely used word that broadly includes the Secretary's decisions, conclusions, or opinions. Both "any" and "with respect to" have an expansive meaning and a broadening effect. The provision thus bars judicial review of both the

1 Secretary's ultimate decision whether to
2 designate, extend, or terminate and of each
3 antecedent step along the way to that
4 determination.

5 Respondents' attempts to carve out
6 exceptions to the review bar would eviscerate
7 it because virtually any substantive challenge
8 could be recast as a procedural claim, as their
9 own claims demonstrate.

10 Moreover, their claims plainly cannot
11 be raised without referring to or relying on
12 the termination decisions, and they challenge
13 the very kind of foreign-policy-laden judgments
14 that are traditionally entrusted to the
15 political branches.

16 Even if their claims are not barred,
17 they are meritless. The statute does not
18 micromanage the degree of consultation with
19 other agencies. Paragraph (b)(3) requires the
20 Secretary to consider the national interest in
21 reviewing designations made under (b)(1)(C)
22 because it requires her to determine whether
23 the foreign state continues to meet the
24 conditions for designation under paragraph (1).

25 Far from demonstrating pretext, the

1 fact that the Secretary exercised her
2 discretion consistently is a virtue, not a
3 vice. And the Miot Respondents' constitutional
4 claim is meritless under any standard of
5 review.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: What was the practice
8 before the -- this statute was adopted?

9 GENERAL SAUER: That was the EVD
10 practice --

11 JUSTICE THOMAS: Yeah.

12 GENERAL SAUER: -- that's discussed in
13 the Smith -- the en banc Smith decision from
14 the D.C. Circuit. And that was, I think,
15 properly characterized by Judge Silberman in
16 his opinion as essentially a forbearance policy
17 that fell within the heartland of Heckler
18 against Cheney.

19 So one of the points we make is that
20 the historical background of this statute is a
21 statute where there was limited, if any,
22 judicial review of executive discretion in that
23 case. And it's telling that President Bush, in
24 his signing statement, objected to Congress
25 moving into this area and entrenching on what

1 he viewed as the executive's traditionally
2 unreviewable discretion. So it's unsurprising
3 in that context that Congress passed a judicial
4 review bar that at least partially accommodated
5 the executive's constitutional objection to the
6 sort of imposition of these kinds of
7 regulations in that particular area.

8 JUSTICE THOMAS: If the President or
9 the executive branch has constitutional
10 authority to do this in a discretionary way,
11 can Congress limit that?

12 GENERAL SAUER: We don't dispute that
13 here. President Bush obviously objected on
14 that ground. But we don't dispute that
15 Congress can move in here. And what -- and
16 what they've done, as we envision it, they have
17 moved into an area that was really kind of a
18 forbearance or an enforcement policy regime,
19 and they've elevated it to a particular status
20 and said here are the criteria for regulating
21 that status. And we don't dispute that
22 Congress has the authority to do that.

23 JUSTICE THOMAS: Are there -- are
24 there any examples of that discretionary
25 authority being challenged?

1 GENERAL SAUER: You mean in this
2 particular case or more generally?

3 JUSTICE THOMAS: More generally.

4 GENERAL SAUER: Well, there is the
5 DED -- I'm not sure if this is responsive to
6 the question, but there is the DED policy
7 that's kind of a -- as I understand it, a -- a
8 successor of the EVD. I won't call it a -- I
9 guess program, you could call it, from -- from
10 the 1908s.

11 So there are situations where the
12 executive exercises enforcement discretion
13 here. When it comes to TPS, Congress has
14 entered the area, has created it as a
15 particular immigration status, and we don't --
16 we don't dispute that Congress can do that
17 here.

18 JUSTICE JACKSON: Counsel, do you --

19 CHIEF JUSTICE ROBERTS: General, you
20 rely on Trump versus Hawaii in -- in your
21 argument, but that involved the President and
22 entry restrictions. Here, we're concerned with
23 the Secretary and -- and aliens that are
24 already present -- present. Your argument is a
25 significant expansion of Trump versus Hawaii,

1 isn't it?

2 GENERAL SAUER: Well, I point to what
3 the Court said in the particular paragraph
4 where it discusses why rational basis review
5 would apply here as opposed to a more stringent
6 review under Arlington Heights. The Court
7 pointed to features like this is neutral on its
8 face, which we have here; it's within the core
9 of the executive responsibility, which we also
10 have here; it's freighted with foreign
11 relations concerns and national security
12 concerns. Those kinds of criteria are all
13 present here.

14 Obviously, as the Court correctly --
15 as you point -- correctly point out, the
16 President was involved and it was an exclusion
17 as opposed to people who are already here under
18 a -- under a kind of status.

19 However, the Court did go on to say
20 that -- that Trump versus Hawaii applies across
21 different contexts and constitutional claims.
22 And the cases that it cited, like Kleindienst
23 against Mandel and -- and the other -- Mathews
24 against Diaz and other cases that are cited
25 there are also cases that weren't -- didn't

1 have those particular features of it.

2 So, for those reasons, we think Trump
3 against Hawaii provides the proper, the
4 rational basis standard for their
5 constitutional claim. However, if the Court
6 goes the other way, we also claim that, as I
7 said before, that's meritless under any
8 standard of review.

9 JUSTICE JACKSON: Can I take you back
10 to the EVD discussion that you had with Justice
11 Thomas? Although President Bush may have
12 objected to the restrictions and the intent to
13 cabin the Secretary's discretion, wasn't it
14 Congress's view that the EVD program was
15 seriously flawed -- in fact, I'm quoting now
16 from the legislative history -- "seriously
17 flawed and in urgent need of reform"?

18 GENERAL SAUER: That certainly may
19 have been the views of some legislators. What
20 we know is --

21 JUSTICE JACKSON: No, I'm talking
22 about the House report, that the reason why the
23 TPS came into being and we still don't have the
24 EVD unregulated scheme was because Congress was
25 concerned about the fact that, for example,

1 "the conditions under which safe haven may be
2 granted, extended, or terminated do not appear
3 in any regulation," that it appeared as though
4 the executive was exercising its discretion in
5 an unregulated fashion, and so Congress created
6 this statute in order to restrict the
7 executive. And wasn't that the reason why
8 President Bush was objecting to it?

9 GENERAL SAUER: Well, I can't speak
10 for President Bush. I don't dispute most of
11 what you said. We do believe Congress moved
12 into an area where there was really, you know,
13 a perception at least of kind of unfettered
14 discretion, unregulation, set forth sort of
15 broad and highly discretionary criteria in
16 which the --

17 JUSTICE JACKSON: All right. So are
18 those reviewable in your view? Now we have a
19 statute in which Congress has clearly required
20 the Secretary to take certain statutory steps,
21 to include, for example, consultation. Are
22 those reviewable in your view?

23 GENERAL SAUER: What is not reviewable
24 is any determination with respect to --

25 JUSTICE JACKSON: I'm asking you what

1 is reviewable. Is it reviewable for a person
2 to allege that the Secretary made this
3 determination without following the statutory
4 steps?

5 GENERAL SAUER: Certainly not.

6 JUSTICE JACKSON: Not?

7 GENERAL SAUER: That would be a
8 determination with respect to a -- for example,
9 here, a -- a -- a termination of --

10 JUSTICE JACKSON: So what was the
11 point of Congress putting this statute into
12 being and having requirements for the Secretary
13 if there was no ability for anyone to challenge
14 the Secretary's compliance?

15 GENERAL SAUER: Congress may presume,
16 as this Court frequently does, that the
17 executive would -- would be presumed to act
18 within the bounds of -- that it set forth, and
19 Congress provided for ongoing congressional
20 oversight. So there's an annual reporting
21 requirement. There is a 6- to 18-month
22 situation.

23 So, in a sense, judicial review is
24 kind of a misfit with this particular statute
25 because the Secretary has to go back every 18

1 months and reconsider and reconsider, and
2 judicial review, as we see here --

3 JUSTICE JACKSON: What -- what do you
4 do -- what do you do with the precedents of
5 this Court -- and I'm thinking about Bowen and
6 I'm thinking about -- gosh, there was another
7 one -- in which we don't agree that a
8 determination is what you're saying it is?

9 In other words, you know, in Bowen, we
10 specifically indicated that -- and it used very
11 similar language -- and we said, let's see --
12 Bowen used the language any determination of
13 the amount of benefits under the Medicare
14 statute was in the judicial review bar. And we
15 said that provision "simply does not speak to
16 the" -- "to challenges mounted against the
17 method by which such amounts are to be
18 determined rather than the determinations
19 themselves."

20 We drew a clear distinction that
21 included the word and concept of determination.
22 So how do you distinguish that from this?

23 GENERAL SAUER: As to Bowen, the
24 statute in Bowen actually had an affirmative
25 grant of the power to judicial review, so as to

1 the Part A Medicare benefits that were at issue
2 there, the stat -- the statute said we are
3 affirmatively granting judicial review of those
4 to an extent.

5 And then, in a prior case, this Court
6 in Erica had said we infer -- we -- we -- we --
7 we sort of imply from that that there is no
8 judicial review of Part B. Then, when it came
9 to Bowen, the Court said we're not going to
10 take that negative inference and hold that
11 that, you know --

12 JUSTICE SOTOMAYOR: General, can I --

13 GENERAL SAUER: -- satisfied the
14 traditional review.

15 JUSTICE SOTOMAYOR: Your position
16 seems to be, and you said it in your opening,
17 any step in the process is not subject to
18 judicial review. If the Secretary posted a
19 notice on X saying, "I hereby terminate Syria's
20 TPS effect" -- "TPS program effective
21 tomorrow," you would say that there's no
22 judicial review of that decision, right?

23 GENERAL SAUER: Correct.

24 JUSTICE SOTOMAYOR: That means that
25 even though the statutory requirements required

1 her to post this not on X but on the Federal
2 Register, it requires that TPS holders be given
3 60 days' notice of the termination, it requires
4 that she consult with department agencies, and
5 she doesn't, let's assume it, all right?

6 That none of those procedural steps
7 required by the statute are reviewable, that's
8 your position?

9 GENERAL SAUER: Correct. And we
10 would -- or I would venture that it's
11 procedural, yeah.

12 JUSTICE SOTOMAYOR: All right. So the
13 agency could have said the -- Congress could
14 have said any termination of TPS status is
15 unreviewable. But it didn't. It did a
16 different formulation. It did determination of
17 termination.

18 That seems to me very close to McNary,
19 where we said you can't challenge the
20 substantive conclusion, but you can challenge
21 the procedural or policies underlying that
22 choice. I don't see how you differentiate
23 McNary.

24 GENERAL SAUER: I would say -- I would
25 point to three things to distinguish McNary.

1 And keep in mind, our position is that there is
2 no McNary exception here at all, but if there
3 is, the Court disagrees, they don't fit within
4 that.

5 JUSTICE SOTOMAYOR: Well, but -- but
6 what you're -- what -- what you're basically
7 saying is Congress wrote a statute for no
8 purpose because it set forth procedural steps
9 that had to be followed and the Constitution,
10 as we have said, due process applies to any
11 alien who lives in the United States. It
12 applies to all people living here -- I know you
13 have said unlawfully, but at least these people
14 until the termination are here lawfully and
15 with permission. They're entitled to due
16 process.

17 And now Congress has given them a
18 process. It may not be a court process, but
19 that's okay. It's a process. And you're
20 saying that the President -- it's unreviewable
21 whether the President has followed that
22 process.

23 GENERAL SAUER: The Secretary. And
24 what Congress says there is --

25 JUSTICE SOTOMAYOR: Well, I mean --

1 CHIEF JUSTICE ROBERTS: Counsel,
2 you -- excuse me. You said a moment ago that
3 there were three points in response to the --
4 my colleague's question. Could you just
5 briefly mention those?

6 GENERAL SAUER: Sure. Yeah. Two
7 buckets and the first has three points. So the
8 first bucket is we say there is no McNary
9 exception that's implied by this statute. And
10 McNary differs in text, there's textual
11 differences in the statute. There's the
12 subject matter, the sort of decision that is
13 exempt here with judicial review as I said at
14 the beginning is the sort of thing that is
15 traditionally, you know, entrusted to the
16 political branches. And then there's the
17 historical background that we -- we -- we -- I
18 discussed with Justice Thomas in the beginning.

19 So, if you look at the textual
20 differences, a determination where both McNary
21 and Reno said that determination is used in a
22 specialized sense --

23 CHIEF JUSTICE ROBERTS: Thank you.

24 GENERAL SAUER: -- in that particular
25 statute is different than any determination

1 with respect to.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Got it.

4 JUSTICE SOTOMAYOR: So I'm not quite
5 sure, and not so long ago you came in and said
6 that every executive officer has to be
7 answerable to the President. So the
8 President's statements have to be attributable
9 to its executive officers, to the Secretary.

10 I don't see how you can take both
11 positions.

12 GENERAL SAUER: I --

13 JUSTICE SOTOMAYOR: Either an
14 executive follows the President's orders or it
15 doesn't.

16 GENERAL SAUER: I -- I would point to
17 what the Court said or at least the Chief
18 Justice's opinion in Regents discussed this and
19 said the President's at a certain remove from
20 this decision. The statute places this,
21 invests this decision in the Secretary, and the
22 Secretary is --

23 JUSTICE SOTOMAYOR: But the Secretary
24 here, Noem, said she was following the
25 President's policy. That's what she announced

1 when she was reviewing these items.

2 GENERAL SAUER: I think --

3 JUSTICE SOTOMAYOR: So I don't know
4 how we can't attribute what the President had
5 said his policy is when she herself says she's
6 following it.

7 GENERAL SAUER: We know what the
8 President directed her to do because it's in
9 the executive order, 14159, the invasion
10 proclamation, where the President said
11 specifically respected TPS that she should
12 ensure that or he now, but she should --

13 JUSTICE SOTOMAYOR: But that
14 doesn't -- but that doesn't give her a right to
15 do what I started with, which is to announce
16 the termination of this policy in contravention
17 of every procedural step, which was the
18 hypothetical I gave you.

19 You're saying that's not reviewable.

20 GENERAL SAUER: But baked into the
21 very concept of a judicial review bar is the
22 possibility that the -- the decision that's not
23 subject to judicial review might be based --
24 totally baseless, arbitrary, you know, wrongly
25 decided or -- or -- or really crazy.

1 JUSTICE KAGAN: Well, that's true,
2 General --

3 JUSTICE BARRETT: General --

4 JUSTICE KAGAN: -- but -- but I guess
5 the question is in what? I -- I mean, this
6 judicial review bar is a broad one, means
7 something.

8 If -- if there's a completely
9 arbitrary understanding of what the country
10 conditions are, there's nothing a court can do
11 about that, right? So, you know, basically,
12 Congress has said this can be the weirdest,
13 strangest, most arbitrary conclusion as to
14 country conditions, and the courts still can't
15 do anything.

16 So point taken there. But that's a
17 different thing than to say that all the things
18 that the statute says that the Secretary is
19 supposed to do in order to determine country
20 conditions are themselves unreviewable. I'm
21 sorry, I'm losing my voice.

22 Because what the statute says is,
23 look, she shall review country conditions after
24 consultation, and if she decides I don't feel
25 like consulting and, more to the point, I don't

1 even feel like reviewing country conditions, I
2 want to do some completely different kind of
3 analysis to determine whether to make this
4 designation, is it really feasible that
5 Congress meant for those decisions to be
6 unreviewable?

7 GENERAL SAUER: I think --

8 JUSTICE KAGAN: I'm really sorry. Go
9 ahead. And, you know, the likelihood of my
10 asking a follow-up is very --

11 (Laughter.)

12 JUSTICE KAGAN: -- is very diminished.

13 GENERAL SAUER: Congress said any --
14 any determination with respect to designation,
15 extension, or termination is not subject to
16 judicial review. In EPA against Calumet, this
17 Court talked about --

18 JUSTICE KAGAN: Right. But the
19 determination -- you see, I'm already going.

20 (Laughter.)

21 JUSTICE KAGAN: I mean, the
22 determination can refer straight back to what
23 the Secretary is supposed to determine, which
24 is whether the conditions for designation
25 continue to be met.

1 Okay. That's it.

2 GENERAL SAUER: I mean, they make an
3 argument like this. They say determination is
4 used in a specialized sense in the statute. I
5 just think that textually is baseless. I mean,
6 by my count, "determination" is used in this --
7 this one statutory section in five different
8 senses. It talks about things about your
9 eligibility for benefits. That's a
10 determination. Admissibility, that's a
11 determination. Whether there's extreme
12 hardship, that's a determination.

13 JUSTICE JACKSON: But does that hurt
14 you or help you? I mean, I'll -- I'll pick up
15 where Justice Kagan left off.

16 You know, we -- we have specific
17 things in the statute that Congress says the
18 Secretary has discretion to determine. And
19 then Congress also has parts of the statute
20 that directs the Secretary specifically with
21 respect to the steps that she is to take in
22 order to make those determinations.

23 So I -- I just think you're kind of
24 struggling against what seems to be the most
25 obvious way and the most straightforward way to

1 understand this statute, which is that when the
2 judicial review bar says that the courts cannot
3 review the determinations of the Secretary, it
4 is referencing the things, the substantive
5 conclusions that the Secretary must make under
6 the statute.

7 And some of them are, you know, not
8 the ultimate. Some of them are findings. For
9 example, the Secretary has to make certain
10 findings, says the statute. And I could see
11 how those could be determinations. So it's not
12 that we're just looking for the word
13 "determination" in the statute, but we're
14 understanding that Congress has directed this
15 Secretary in this statute, in contrast with the
16 prior regime, to make certain findings, make
17 certain determinations, and here is how you go
18 about doing it.

19 And so my question is, when someone
20 says the Secretary has not followed those
21 steps, they didn't -- she didn't consult, she
22 didn't put it in the right place in terms of
23 notice -- this is Justice Sotomayor's
24 example -- it's very hard, I think, to say that
25 the judicial review bar, which speaks only to

1 the determinations of the Secretary, precludes
2 that kind of claim.

3 GENERAL SAUER: Two points.

4 "Determination" is a broad term, as the Court
5 held in EPA against Calumet, that encompasses
6 any decision, opinion, or conclusion. So --

7 JUSTICE JACKSON: Including the
8 decision not to follow the steps? That's your
9 point?

10 GENERAL SAUER: Right. When it says
11 any -- I'd say two things about that. When it
12 says "any determination with respect to," here,
13 a termination decision --

14 JUSTICE JACKSON: It means any --

15 GENERAL SAUER: -- the --

16 JUSTICE JACKSON: -- decision not to
17 follow the steps that we've put in the statute?

18 GENERAL SAUER: So, if there is a
19 determination that, oh, I don't think there are
20 any appropriate agencies to consult with here
21 and, therefore, I'm not to consult, that's a
22 determination within the plain meaning of that
23 term.

24 But, more fundamentally, it -- it bars
25 judicial review -- certainly, everyone concedes

1 it bars judicial review of that final
2 determination. And look at it in the context
3 of this case, where both sets of plaintiffs
4 have filed complaints saying --

5 JUSTICE JACKSON: Yes, we can see
6 that, but that's -- they're saying that's not
7 all the kinds of claims we'd like to make. And
8 we're just now focusing on the kinds of claims
9 that aren't the final determination.

10 There, the Secretary's decision -- and
11 I had a hypothetical -- to pull out a Ouija
12 board. The Secretary says, you know how I'm
13 going to figure this out? I'm going to --
14 another example -- put Syria in a hat and, you
15 know, Haiti in a hat on a slip of paper and all
16 the countries, and I'll pull out the ones that
17 get TPS and I -- that's not following the
18 statutory steps. She's made a determination to
19 do that. And your view would be that no
20 judicial review of that -- of that claim?

21 GENERAL SAUER: And any exception that
22 the Court would craft here would be something
23 that a truck could be driven through. And
24 that's what we see in the lower courts, and
25 that's what we see in the briefing in this

1 case.

2 JUSTICE JACKSON: All right. Okay.

3 GENERAL SAUER: I mean, look, for
4 example, at --

5 JUSTICE BARRETT: General, can I ask
6 you a question? You seem to concede that the
7 constitutional claims are not barred by this
8 very same provision. Is that right? And, if
9 so, why?

10 GENERAL SAUER: We are -- under
11 Webster against Doe, Demore against Kim, and so
12 forth, we have disputed that there be -- may be
13 a little extra clear statement that would be
14 required to exclude constitutional claims. We
15 just haven't disputed that in this case. We're
16 not asking the Court to revisit Webster, for
17 example, in this case.

18 JUSTICE BARRETT: So you think Webster
19 is on all fours with this?

20 GENERAL SAUER: I don't know if it's
21 on all fours. We think Webster and Demore are
22 strong enough to indicate that under those
23 cases, we'd have to be fighting with those
24 cases, so to speak, to argue that there's no
25 judicial review of the constitutional claims

1 here. And, here, of course, we think the
2 constitutional claims -- it's not -- not a
3 close call, basically.

4 But we have not disputed that. We --
5 we -- we don't argue that the judicial review
6 bar extends to the constitutional claim.

7 JUSTICE SOTOMAYOR: So, counsel, let's
8 go back to the Chief's question on Hawaii.
9 Assume that I disagree with you and that
10 Arlington Heights applies because Hawaii and
11 all of the cases that you cited supporting it
12 involve aliens coming into the United States,
13 not aliens in the United States.

14 So let's assume that I believe that
15 due process requires some process for aliens
16 who are here to be removed. Then we can argue
17 about what that process is and -- and how
18 binding it is or not.

19 But, if it's Arlington Heights, a
20 discriminatory purpose just needs to be a
21 reason, not the only reason for acting,
22 correct?

23 GENERAL SAUER: A motivating factor, I
24 think, is what it says.

25 JUSTICE SOTOMAYOR: Motivating factor.

1 Now this Court has explained an
2 additional purpose to discriminate against poor
3 whites would not render nugatory the purpose to
4 discriminate against all blacks.

5 Now we have a President saying at one
6 point that Haiti is a "filthy, dirty, and
7 disgusting S-hole country." I'm quoting him.
8 And where he complained that the United States
9 takes people from such countries instead of
10 people from Norway, Sweden, or Denmark, where
11 he declared illegal -- where he declared
12 illegal immigrants, which he associated with
13 TPS, as poisoning the blood of America.

14 I don't see how that one statement is
15 not a prime example of the Arlington example at
16 work and showing that a discriminatory purpose
17 may have played a part in this decision.

18 GENERAL SAUER: All the statements
19 that they cite as to the Secretary and as to
20 the President -- obviously, there's an issue
21 there about which one you're going to weigh
22 more heavily -- none of them, not a single one
23 of them, mentions race or relates to race in
24 any way.

25 JUSTICE SOTOMAYOR: Well, it -- it

1 certainly does when you're saying we're taking
2 the -- we're taking people from these
3 countries' TPS program, which are all
4 non-white, but, instead, we should be taking
5 people from Norway, Sweden, or Denmark. It --
6 it seems to me that that's as close to the
7 Arlington example as you can get.

8 GENERAL SAUER: All those statements
9 in context refer to problems like crime,
10 poverty, welfare dependence, drugs, drug
11 importation.

12 JUSTICE SOTOMAYOR: Well, but the --
13 the Arlington example is yes, I don't want poor
14 people, but not all people from Norway, Sweden,
15 or Denmark are necessarily rich, but they are
16 all virtually white.

17 GENERAL SAUER: The Chief Justice's
18 opinion in Regents, for example, refers to
19 actually some of the very same statements that
20 they allege here, statements that are now nine,
21 10 years sold.

22 JUSTICE SOTOMAYOR: But Regents --
23 Regents applied a very different standard of
24 review because of the nature of the applicant.
25 This is a very different question. This is

1 whether a race-based classification could --
2 can be or should be permitted to be a
3 motivating factor.

4 GENERAL SAUER: I strongly disagree
5 with that. Regents assumed that Arlington
6 Heights would apply, and it said these kinds of
7 statements are unilluminating. They, you know,
8 raise no plausible inference of discriminatory
9 animus. Yeah?

10 JUSTICE JACKSON: General, what about
11 poisoning the blood of Americans?

12 GENERAL SAUER: If you -- if you look
13 at those statements in context, again, they're
14 clearly talking about problems like crime --

15 JUSTICE JACKSON: What about bad
16 genes, "bad genes"?

17 GENERAL SAUER: Again, poverty --

18 JUSTICE JACKSON: Also not -- not
19 racially --

20 GENERAL SAUER: Yes. Yeah, they --
21 they -- they presented them wrenched from
22 context. You can look at each one of those
23 statements. They're talking about problems of
24 crime, poverty, welfare dependency, again,
25 problems that have been emphasized again and

1 again by not just President Trump, not just the
2 Secretary, but many others who favor a tough
3 immigration policy. And if the position of the
4 district courts here --

5 JUSTICE JACKSON: So your -- the
6 position of the United States is that we have
7 to have an actual racial epithet, that we
8 don't -- we aren't allowed to look at all the
9 contexts, to include the President's insistence
10 that immigrants from certain countries,
11 largely, if not almost exclusively, countries
12 with African immigrants, black African
13 immigrants, are not allowed, and -- and calling
14 these sorts of names and the types of things he
15 said about Haiti, at the same time that it is
16 the policy of the United States to encourage
17 and welcome immigrants from places like Norway
18 and Denmark and white South -- South Africans,
19 your view is that it's not appropriate for the
20 Court to take into account that kind of
21 evidence or the context in which all of this is
22 happening?

23 GENERAL SAUER: It's our view that
24 those statements that they allege, which
25 include statements that were before the Court

1 in both Trump against Hawaii and Regents --
2 keep in mind this is the third time this kind
3 of claim has come before this Court. It
4 rejected it in Trump against Hawaii, rejected
5 it again in Regents --

6 JUSTICE JACKSON: Right. But the
7 immigration policy, the idea -- the white South
8 African immigration policy is recent. So that
9 wasn't in Trump against Hawaii. That wasn't --
10 the statements about Haiti and eating pets and
11 the names that were called with respect to
12 these immigrants even though they are lawfully
13 in the United States, that -- those are pretty
14 recent. So let's separate it out then. What
15 do you say about those kinds of things?

16 GENERAL SAUER: Again, by the -- as
17 the Court held in Regents, these are statements
18 made in different contexts that are remote in
19 time. They are unilluminating. The Court said
20 in Regents, the Chief Justice's opinion in
21 Regents says we're going to give them the most
22 negative possible interpretation. That's
23 provided by the --

24 JUSTICE JACKSON: I'm giving it the
25 most negative interpretation. So tell me my --

1 if I assume or think that these are related to
2 the President's intentions to encourage certain
3 immigrants on the basis of race and discourage
4 others, what do we do with that in light of
5 Arlington Heights?

6 GENERAL SAUER: The Court should
7 conclude that the statements are unilluminating
8 and fail to raise any plausible inference of
9 animus.

10 JUSTICE JACKSON: That's not what
11 Judge -- Judge Reyes found that they were
12 illuminating. Aren't we applying a clear error
13 standard here? What do we do -- we're not
14 looking at this de novo. We have a district
15 court finding that there is evidence of
16 discriminatory intent here, enough early in the
17 case to allow this claim to go forward.

18 So aren't we bound in some regard with
19 respect to what the lower court has already
20 determined about these facts?

21 GENERAL SAUER: I would say --

22 JUSTICE JACKSON: No?

23 GENERAL SAUER: -- I don't -- I don't
24 concede that, but it does not matter.

25 JUSTICE JACKSON: You think there's

1 not --

2 GENERAL SAUER: Under any standard of
3 review --

4 JUSTICE JACKSON: It's not clear error
5 review?

6 GENERAL SAUER: -- the Court's looking
7 at exactly the same statements that -- that --
8 that she is looking at. The Court should apply
9 the logic of Regents, which says, first of all,
10 the President's statements are less relevant;
11 the Secretary's statements are what matter.
12 Again, these kinds of statements don't refer to
13 race.

14 JUSTICE JACKSON: So ignore the
15 findings of fact of the lower court, do not
16 give them any deference, no clear error review,
17 we're just looking at this afresh?

18 GENERAL SAUER: I think it does not --
19 it does not matter with deference or without
20 deference. This claim just doesn't get off the
21 starting blocks. It's the third time this sort
22 of claim has been brought. The lower courts
23 are enamored of these kinds of claims, but this
24 is the third time this kind of claim has come
25 before this Court. It's rejected it in Hawaii,

1 rejected it in Regents, should be rejected
2 again here. It's not --

3 JUSTICE BARRETT: General, can I --

4 JUSTICE KAGAN: So, General, maybe --
5 maybe --

6 JUSTICE BARRETT: -- ask you a
7 question about -- oh.

8 JUSTICE KAGAN: I'm sorry, go ahead.

9 JUSTICE BARRETT: No, no, no.

10 JUSTICE KAGAN: No, no, no, go ahead,
11 I'll have more time to recover.

12 JUSTICE BARRETT: I wanted to take you
13 to the procedural objection. Let's say that
14 you lose on your argument that even the process
15 that the Secretary followed to terminate is not
16 subject to judicial review.

17 What would -- take your best crack at
18 articulating what standards a court would apply
19 when reviewing the sufficiency of the
20 consultation.

21 GENERAL SAUER: In other words, if --
22 if the argument is that the consulting claim
23 alone is procedural and reviewable?

24 JUSTICE BARRETT: Is reviewable, is --
25 yeah, yeah, yeah. So we have this exchange,

1 the email exchange, in Miot. I mean, what --
2 what -- take your best crack at --

3 GENERAL SAUER: I think --

4 JUSTICE BARRETT: -- articulating the
5 standards by which a court would review that.

6 GENERAL SAUER: Again, I think this
7 Court should go to the dictionary definition of
8 "consult." And you see this actually in the
9 Syria brief, where they concede that seeking
10 input is consultation. Seeking advice from
11 someone knowledgeable is a form of
12 consultation. And keep in mind it's not just
13 consult. It also says appropriate.

14 So the word "appropriate," the Court's
15 held in other contexts, confers broad
16 discretion. So the Secretary could decide, I
17 don't think there are any appropriate agencies
18 to talk to here. You know, again, that would
19 be within -- assuming reviewability, which we
20 strongly disagree with --

21 JUSTICE BARRETT: Right. Okay.
22 Taken.

23 GENERAL SAUER: -- but even there,
24 again, it's -- it's a weak claim. It's --
25 this -- the phrase after -- it says three times

1 after consultation with appropriate agencies
2 the Secretary is going to do a bunch of things.
3 And what you have here is the district courts.
4 They initially said she didn't consult at all.
5 But it turns out that she did. There is an
6 exchange with the Department of State. So now
7 they're saying, well, that wasn't quite enough,
8 it wasn't meaningful enough. You see how
9 substance has already crept back into even this
10 case, not --

11 JUSTICE KAGAN: What -- what would
12 happen -- what would happen, General, if the
13 original email had been sent out and no
14 response came back? Would that also be
15 appropriate consultation?

16 GENERAL SAUER: Absolutely, yes. In
17 other words, she can't force the Secretary of
18 or -- or -- or the State Department to respond
19 and so, for that reason, yes, that would be
20 appropriate consultation too.

21 JUSTICE KAGAN: Suppose it were the
22 response that came back said, I've got to run
23 some traps here in the building, we'll get you
24 an answer by Wednesday, and then the Secretary
25 made her determination on Tuesday.

1 GENERAL SAUER: Consultation has
2 happened on her end. And, again, she cannot
3 force the state to provide -- State Department
4 to provide a timely response. The -- the
5 statute regulates what the Secretary does, not
6 what Department of State does.

7 JUSTICE KAGAN: Even though the
8 Secretary was, like, well on her way to getting
9 a timely response?

10 GENERAL SAUER: And, again, if you've
11 asked, you -- you've consulted. And, here, of
12 course, we have an exchange where there's a
13 prompt response.

14 JUSTICE KAGAN: Suppose that, you
15 know, the -- the -- the question is made -- the
16 question is proffered, and then the -- the
17 response comes back, wasn't that baseball game
18 tonight great, last night great?

19 GENERAL SAUER: Again, State can say
20 something completely unresponsive. If she
21 sought input from State, she has consulted.
22 And, again, this is the sort of discretionary
23 call that for very good reasons the statute
24 vests in the Secretary.

25 How much do I need to talk, which

1 agencies do I talk to, is this response good
2 enough? Again, in this case, in the South
3 Sudan example, she said, you know what, I want
4 some more information, I haven't heard back.
5 She did the exact -- I mean, that's really the
6 hypothetical.

7 JUSTICE KAGAN: And then -- and then
8 your -- your -- I think you said that even if
9 the Secretary didn't ask the question, she
10 could have just decided not to ask the question
11 and that would be appropriate consultation too?

12 GENERAL SAUER: If she doesn't ask at
13 all, I don't think I would say that that's
14 consultation.

15 JUSTICE KAGAN: I thought you said --

16 GENERAL SAUER: I would say that's not
17 subject to judicial review. But she --

18 JUSTICE KAGAN: I thought -- I --
19 assuming it's subject to judicial review. I --
20 I -- I had thought that you said that she could
21 have decided that there was no person whose
22 opinions mattered.

23 GENERAL SAUER: Yeah. No, if there's
24 a determination that none of the agencies is
25 appropriate, then as opposed to there is an

1 appropriate agency, but I decline to consult
2 with them, that would be the distinction that I
3 would raise.

4 JUSTICE KAGAN: Okay. But, as to
5 everybody else, as long as you ask a question,
6 whether or not you wait for the answer, whether
7 or not you give them appropriate time for the
8 answer, whatever the answer is, whether the
9 answer is on a completely unrelated topic, it
10 just doesn't matter?

11 GENERAL SAUER: That would fall within
12 the plain meaning of the word "consultation,
13 as we argue, and, again --

14 JUSTICE KAGAN: I mean, really? The
15 plain meaning of the word "consultation"?
16 Like, the plain meaning of the word
17 "consultation" seems to me like you consult
18 with somebody on a topic. That means you ask a
19 question. They give an answer that's on the
20 same topic. You know, it doesn't have to be
21 long. You don't have to lock a person in the
22 room together for three hours. But, I mean,
23 you have to ask the question: Hey, what are
24 country conditions like?

25 And then the answer comes back country

1 conditions are fine or they're not fine. You
2 know, that's appropriate consultation. I'm
3 not, like, asking for the moon, but, you know,
4 what are country conditions like?

5 Weren't the Dodgers great last night?
6 That does not seem like appropriate
7 consultation.

8 GENERAL SAUER: To seek advice or
9 input is consultation. And with -- with
10 respect to the example of locking them in the
11 room for three hours, that's kind of the road
12 that the district courts are going down.
13 They're saying you did check with it, but it
14 wasn't meaningful enough, so we give you kind
15 of a D-plus on your consultation.

16 JUSTICE KAGAN: Well, but that's not
17 the road I'm going down. I mean, I guess I
18 said that because that's not the road I'm going
19 down. And, you know, sometimes consultation is
20 very thorough and sometimes in government it's
21 not very thorough.

22 But, if Congress says to consult about
23 a particular subject matter, then it seems as
24 though what Congress said was you should ask
25 somebody and they should give an answer.

1 GENERAL SAUER: Certainly, you should
2 ask somebody. The statute doesn't say she can
3 compel them to give an answer and she did ask.
4 So regardless of what --

5 JUSTICE JACKSON: But, General, the
6 statute does go a little further than that. I
7 mean, you keep homing in on the word
8 "consultation." But, if we read what the
9 statute says, and I'm paraphrasing the relevant
10 part, "after consultation with appropriate
11 agencies of the government, the Secretary shall
12 review the conditions in the foreign state for
13 which a designation is in effect and such" --
14 "and shall determine whether the conditions for
15 such designation continue to be met."

16 So, surely, the consultation, however
17 long or short, can't be about something other
18 than country conditions. I mean, if you read
19 the whole sentence, what she's consulting about
20 is her determination as to whether the country
21 conditions are still in effect.

22 GENERAL SAUER: I think what she's
23 consulting about is a little more specific than
24 that. She -- it says, you know, after
25 consultation with appropriate agencies, she

1 shall assess the country conditions and
2 determine whether or not the criteria set forth
3 in subsection 1 are still met.

4 So the consultation can relate to not
5 just country conditions but anything else that
6 is relevant to that.

7 JUSTICE JACKSON: But you just said
8 with Justice Kagan it can relate to baseball.
9 What I'm trying to do is figure out whether
10 this statute, when it requires consultation, at
11 least requires some exchange of information
12 concerning this subject, whether the country
13 conditions are still met.

14 GENERAL SAUER: I believe I said, if
15 the response has to do with baseball, there's
16 really nothing she can do about that. She
17 still consulted. If she sends an email to
18 State and says, hey, what do you think of the
19 Dodgers, I don't think we would argue that that
20 constitutes consultation, because I think you
21 correctly pointed out the context of that
22 statute.

23 Now it's not just country conditions.
24 It's the entire determination whether or not
25 the -- the -- the criteria for designation

1 under subsection 1 are still met. If she's
2 seeking input about that, she has consulted.

3 I see my time's up.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 General.

6 Justice Thomas, anything further?

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: General, I don't
10 think you -- I know -- General --

11 GENERAL SAUER: I'm sorry.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: Party's over.
14 No, you've got to stay there.

15 GENERAL SAUER: I'm very sorry.

16 JUSTICE SOTOMAYOR: All right. You're
17 not disputing that the email exchange of
18 July 21st and July 22nd with respect to Syria
19 and September 5th with respect to Hawaii, where
20 the Secretary asked the State Department to
21 discuss country conditions, that that was the
22 extent of the consultation, correct?

23 GENERAL SAUER: I believe that's
24 what's in the administrative record for both
25 cases. Obviously, one case comes to the Court

1 where the administrative record was -- appears
2 later. There's two different email exchanges.

3 The one in the Syria case says we're
4 re-reviewing country conditions with respect to
5 this country. The other one I believe is in
6 the Haiti case says we're, you know,
7 considering -- or I don't remember the exact
8 words, but considering the following four
9 countries.

10 JUSTICE SOTOMAYOR: Right. But the
11 point is that that was the extent of it? There
12 was no other information that the State
13 Department provided?

14 GENERAL SAUER: We haven't pointed to
15 anything else in the administrative record to
16 satisfy that consultation requirement.

17 JUSTICE SOTOMAYOR: All right. And so
18 the question is, if we believe the statute by
19 its terms requires specific consultation with
20 respect to country conditions as opposed to
21 foreign policy concerns, there was no
22 information addressed by the Department of
23 State with respect to the country conditions?

24 GENERAL SAUER: I disagree because,
25 obviously, sending aliens back based on country

1 conditions raises all kinds of foreign policy
2 issues. So, if you say no foreign policy
3 concerns, then --

4 JUSTICE SOTOMAYOR: That -- that's --
5 well, no, because you're also taking the
6 position that irrespective or regardless of --
7 I think I just made up -- I used a
8 grammatically incorrect word -- regardless of
9 whether country conditions were bad or not, our
10 national interests required termination,
11 correct?

12 GENERAL SAUER: Yes.

13 JUSTICE SOTOMAYOR: So we can't assume
14 that the State Department that doesn't answer
15 the question presented is actually describing
16 country conditions?

17 GENERAL SAUER: Yeah. And I think I
18 would stand on what I said in response to
19 Justice Jackson, which is that the consultation
20 relates to not just the assessment of country
21 conditions but the entire determination, as
22 that very same sentence goes on to say, to
23 whether or not the conditions under subsection
24 1 are met.

25 JUSTICE SOTOMAYOR: The only thing --

1 I'm looking at Haiti. The only thing asked
2 for, we are reviewing country conditions in
3 Haiti. Can you advise on State's views on that
4 matter? I mean, all right. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?
6 Justice Gorsuch, anything further?
7 Justice Kavanaugh?

8 JUSTICE KAVANAUGH: Can you explain
9 the reasons why Congress would have barred
10 judicial review as broadly as you assert?

11 GENERAL SAUER: I -- I'd emphasize
12 two. There are several. I think perhaps most
13 importantly, the kind of determination that is
14 at issue here is just the sort of determination
15 that lies kind of at the heartland of what has
16 been traditionally entrusted to the political
17 branches.

18 And given -- let me give you a couple
19 examples of that. If you consider, for
20 example, the determination that is made in both
21 of the termination orders that these are
22 nations that have emerged from difficult times
23 and there are new fledgling governments there.
24 And, for example, in the Syria determination,
25 the Secretary says it's our foreign policy to

1 project a message of confidence to the
2 fledgling government of Syria. The president
3 has taken away sanctions. He has recognized
4 that government. There's refugees returning
5 from all over the world. And if we don't
6 terminate TPS, it will send a message of doubt
7 about that country. That that's the sort of
8 foreign-policy-freighted decision that lies at
9 the heartland of the political branch's
10 competence.

11 And it's the sort of thing that you --
12 as you see in this case, those sorts of
13 determinations being second-guessed by the
14 district courts, it's almost like these
15 district courts are appointing themselves
16 junior varsity Secretaries of State saying I --
17 I second-guess that.

18 So, if you look at the whole package
19 here --

20 JUSTICE KAVANAUGH: Well, that's Syria
21 and the Assad regime. I understand that one.

22 GENERAL SAUER: Yeah.

23 JUSTICE KAVANAUGH: Do you want to
24 give a similar answer on Haiti?

25 GENERAL SAUER: Very similar answer,

1 very similar points are made as to Haiti. I'd
2 emphasize to the Court, if you look at Footnote
3 35 in the Haiti termination and the
4 accompanying text where it talks about the
5 problem of ongoing chain migration out of
6 Haiti, there's an ongoing exodus, and they
7 argue in this case that the TPS holders are
8 some of the most educated, some of the most
9 law-abiding, some of the sort of best and the
10 brightest that are in diaspora. That Footnote
11 35 cites an article that she relied on,
12 "Engaging the Haitian Diaspora," where it talks
13 about how, in neighboring Caribbean countries,
14 the United States, and Canada, there are
15 hundreds of thousands of Haitian nationals who
16 are abroad -- you know, who are abroad now.

17 And the determination, this notion
18 that there's ongoing chain migration, the
19 concern is are we actually creating,
20 contributing to the problem, creating a
21 self-fulfilling prophecy by ensuring that
22 there's an indefinite expectation of all those
23 people. There's this kind of talent drain out
24 of Haiti. That's the sort of, like, foreign
25 policy freighted -- that is weighing

1 incommensurables under conditions of
2 uncertainty, that is the sort of
3 foreign-policy-freighted decision and
4 determination that's naturally left to the
5 political branches.

6 So there can be hypotheticals about,
7 you know, the Secretary could do something
8 lawless or crazy, and Congress has a way, has
9 tools to address that because there's annual
10 reports. In the annual report, she's not going
11 to say or he's not going to say I flipped a
12 coin. The annual report's going to have to
13 give reasons. And if Congress --

14 JUSTICE KAVANAUGH: The annual reports
15 would be after the fact, so --

16 GENERAL SAUER: That is true, but --

17 JUSTICE KAVANAUGH: -- the concern
18 you've heard here is that's already done then.

19 GENERAL SAUER: It is done, but it has
20 to be reviewed every 18 months. And that
21 structure itself kind of makes judicial review
22 a misfit because judicial review takes more
23 than 18 months. So, if we're put under a
24 preliminary injunction, as we saw in the Ramos
25 litigation, you know, from 2018 through 2020,

1 even though there's supposed to be this ongoing
2 18-month re-review, the district -- the
3 district courts enter -- they put in an
4 injunction, and all of a sudden you have this
5 sort of extended thing.

6 Keep in mind this is temporary
7 protected status. The word "temporary" is used
8 again and again in the statute, including its
9 title. And we're looking at a situation where
10 there have been initial designations that go
11 back to 1991 in the case of Somalia, Hurricane
12 Mitch in 1998, 20 -- 27 years ago, as to
13 Honduras and Nicaragua, and these were still in
14 effect until -- still are in effect.

15 So there's a sense that -- and one
16 very important point I'd make there is, if you
17 look at Haiti specifically, the Haitian
18 termination has now been enjoined twice, both
19 in the first Trump administration and in this
20 administration. And so the judicial review is
21 having this effect of really defeating the
22 fundamental purpose of the statute, which is
23 inherently temporary. There's this very
24 frequent periodic review.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: So I have no doubt
5 that there are foreign policy considerations,
6 but do you dispute that the thrust of this
7 statute is actually the humanitarian concern,
8 that the initial designation under this statute
9 is supposed to be a consideration of whether
10 there is an ongoing armed conflict within the
11 state, and due to such a conflict, returning
12 the aliens who are nationals of that state
13 would pose a "serious threat" to their personal
14 safety?

15 It seems to me that this statute does
16 allow the Secretary to take into the account --
17 into account the kinds of things that you
18 discussed with Justice Kavanaugh but against
19 the backdrop of the actual purpose of the
20 statute, which is what conditions are in this
21 country and whether or not it would be safe to
22 return those people.

23 And so I -- I guess I'm just
24 struggling with your argument that the
25 Secretary can make this determination without,

1 as a procedural matter, taking into account
2 country conditions as the statute requires.

3 GENERAL SAUER: The Secretary is
4 obligated to consider country conditions under
5 (b) -- of various kinds, different kinds of
6 country conditions under (b)(1)(A), (b)(1)(B),
7 and (b)(1)(C).

8 JUSTICE JACKSON: And if she doesn't,
9 you say not reviewable?

10 GENERAL SAUER: Not reviewable. Under
11 (b)(1)(C), most relevant, she considers not
12 just country conditions but also whether
13 allowing the aliens to stay here would be
14 contrary to the United States' national
15 interests.

16 If anything is discretionary, if
17 anything exudes deference --

18 JUSTICE JACKSON: Yes, you're picking
19 that part of the statute --

20 GENERAL SAUER: -- to the Secretary,
21 that language does.

22 JUSTICE JACKSON: -- but I've read --
23 I've read other parts of the statute that
24 require her to do country conditions. And
25 you're saying, if she doesn't, that's not

1 reviewable; see the other parts of the statute
2 that talk about foreign policy.

3 I just don't understand the concept of
4 the Secretary being constrained to do certain
5 things and not being required to do them in the
6 sense that they're not enforceable. She can
7 basically do whatever she -- she wants, I hear
8 from your argument.

9 GENERAL SAUER: Congress assumed that
10 risk when it said there is no judicial review
11 of any determination --

12 JUSTICE JACKSON: All right.

13 GENERAL SAUER: -- with respect to
14 termination.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 General.

18 Mr. Arulanantham.

19 ORAL ARGUMENT OF AHILAN T. ARULANANTHAM
20 ON BEHALF OF THE RESPONDENTS IN CASE NO. 25-1083

21 MR. ARULANANTHAM: Thank you,
22 Mr. Chief Justice, and may it please the Court:

23 Congress struck a balance in the TPS
24 statute. It granted the Secretary substantial
25 discretion to designate countries at the outset

1 but constrained the authority to terminate TPS
2 once people have come to rely on it through
3 mandatory procedures and rules.

4 Congress struck a corresponding
5 balance on judicial review. It didn't broadly
6 bar review of all policies and procedures or
7 all questions of law and fact, as in
8 neighboring immigration statutes. It barred
9 review of any determination in subsection (b),
10 which are the country conditions assessments on
11 which the Secretary would be expected to have
12 expertise.

13 Congress thus preserved review to
14 ensure compliance with other requirements in
15 the statute, including in subsection (b), like
16 the obligation to consult and to make decisions
17 based on country conditions.

18 The bottom line is this: The
19 Secretary can terminate TPS, but he must turn
20 square corners, follow the rules Congress set.

21 In contrast, as we've heard today, the
22 government reads this statute like a blank
23 check. Today, they want to use it to expel
24 non-citizens, but the power that they seek is a
25 double-edged sword. The Secretary could

1 designate every country from which an
2 undocumented person has come to the United
3 States explicitly to provide mass immigration
4 relief under this statute, and on their view,
5 the courts could do nothing. That contravenes
6 the text, bedrock administrative law, and
7 common sense.

8 On the merits, this is an easy case.
9 One basis for Syria's designation is armed
10 conflict. But the Secretary never consulted
11 the State Department about the armed conflict.
12 Even today, the State Department's website says
13 armed conflict in Syria remains active.

14 In addition, the other basis for
15 Syria's designation, which is extraordinary and
16 temporary conditions, she terminated based on
17 the national interest. But the plain text
18 makes clear that the termination must be based
19 solely on the conditions in the foreign state.

20 Finally, it matters that this case is
21 here on a preliminary relief order that just
22 preserved TPS while the case proceeds. People
23 like Dr. Sara Doe, a pediatrician giving
24 lifesaving care to children, have no later
25 recourse if they are illegally stripped of

1 their work authorization, let alone face
2 detention or deportation. Laila Doe's daughter
3 came here at the age of three and is now about
4 to graduate high school. She should keep her
5 status while the case proceeds.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Would you be kind
8 enough to say what else is reviewable under --
9 despite the -- the jurisdiction-stripping
10 provision? Because it seems pretty broad. It
11 says there's no judicial review of any
12 determination of the Attorney General.

13 MR. ARULANANTHAM: So we agree it's
14 broad, Your Honor.

15 JUSTICE THOMAS: Yeah.

16 MR. ARULANANTHAM: It bars everything
17 that the Secretary determines in subsection
18 (b). And if you look for the word "determines"
19 in subsection (b), it appears in many places.

20 But there are other words also, like
21 in (b)(3)(A), the Secretary has an obligation
22 after consultation with appropriate agencies.
23 And that is not described as a determination.
24 So we think there's review over consultation.

25 The Secretary also has an -- an

1 obligation to review conditions in the foreign
2 state. So we think that there then should be
3 review over just whether the fact, did she, in
4 fact, review the conditions in the foreign
5 state? Not if she got it right, but did she
6 review it?

7 There are other things in there too.
8 The opening line is "at least 60 days before
9 the end of initial period of designation." So
10 there's a timing rule. When do you get to do
11 this? And, you know, as some of these
12 hypotheticals have suggested, you can't do it
13 immediately. You can't do it -- and so there's
14 review over the timing as well.

15 But -- but it's very minimal. It's
16 only the procedural rules. But I would argue,
17 Your Honor, that in a context where there's no
18 review on the substantive determination, the
19 procedural rules are all the more important
20 then to ensure that we have appropriate
21 government decision-making.

22 JUSTICE THOMAS: So, in the case of
23 appellate courts, for example, they have
24 authority to review judgments. Would you,
25 using the same logic, say they can only review

1 the substantive underlying judgment but not the
2 underlying determinations?

3 MR. ARULANANTHAM: No, Your Honor.
4 I -- if I understand the hypothetical
5 correctly, I think it actually favors us
6 because this statute uses the word
7 "determination" as a distinct act from the
8 ultimate order to either extend, designate, or
9 terminate TPS. This is very clear from the
10 termination provision, which is (b)(3)(B).
11 It's the next one after the one which has the
12 consultation rule in it.

13 It says -- and I'll apologize in
14 advance because the words are very -- sound
15 very similar -- it says, if the Attorney
16 General determines -- determines -- that a
17 foreign state no longer meets the conditions
18 for designation, he shall terminate the
19 designation by publishing notice of the
20 determination in the Federal Register.

21 So it's clearly using them as two
22 distinct ideas. One is the determination,
23 that's the country conditions assessment, then
24 the termination order or the extension order or
25 the designation order. They're distinct acts

1 in this context.

2 JUSTICE THOMAS: Normally, though, we
3 would think that the subsidiary considerations
4 that lead to a judgment would also be
5 reviewable or non-reviewable depending on
6 jurisdiction.

7 MR. ARULANANTHAM: I don't think
8 there's any such general principle of
9 administrative law, Your Honor. We cite the
10 Zuch case just recently in the tax context
11 which literally holds the opposite. It says,
12 you know, the -- the things that make up the
13 determination, the inputs, are different from
14 the output.

15 McNary and Reno v. Catholic Social
16 Services both construed the word
17 "determination" in an immigration statute,
18 contemporaneously with all of this, to
19 distinguish between the determination and the
20 antecedent procedural questions and
21 decision-making criteria, and they relied on
22 Bowen, which we -- we heard discussion of
23 earlier.

24 And I think the last point I'd like to
25 make just on this subject, Your Honor, is even

1 if you might have voted the other way in those
2 cases in the first instance, right, the word
3 "determination" has become embedded in our
4 immigration law with a narrower meaning than
5 what the government ascribes to it here.

6 And you can see that most clearly from
7 the way Congress wrote provisions in 1996, just
8 three years after Catholic Social Services,
9 which is, in turn, two years after McNary.
10 They wrote provisions saying, for example, the
11 expedited removal provisions, they bar review
12 of any individual determination or any other
13 cause or claim related to expedited removal.

14 There's another provision which bars
15 procedures and policies related to expedited
16 removal, in addition to what is already the bar
17 on determination. And then, of course,
18 subsection (b)(9) in the same statute, which
19 Justice Alito's plurality construed in Jennings
20 v. Rodriguez, which we all remember, all
21 questions of law and fact. That's what it bars
22 review of, all questions of law and fact,
23 including substantial statutory and
24 constitutional claims. This is about district
25 court review of removal orders.

1 So they clearly have broader language
2 that they use when they want to cover more
3 than -- when they want to cover all of the
4 antecedent steps.

5 JUSTICE BARRETT: And, counsel --

6 JUSTICE ALITO: In order for you to
7 win this case, is it necessary for us to find
8 that the word "determination" in (b)(5)(A) is a
9 term of art?

10 MR. ARULANANTHAM: No, I don't think
11 it's a term of art, Your Honor. I -- I resist
12 that characterization. I do think there's two
13 way -- paths for us to victory.

14 JUSTICE ALITO: Well, let me put it a
15 different way. Would it be necessary for us to
16 say that we give that term in that provision
17 something other than its ordinary meaning in
18 regular speech?

19 MR. ARULANANTHAM: No, Your Honor, I
20 mean, although I do think context is
21 everything, right, when we're construing
22 statutes, and "determination" there we think
23 has to be understood by reference to
24 "determine," which is used eight times in the
25 same subsection to mean country conditions

1 assessment.

2 JUSTICE ALITO: Well, I take that to
3 be a yes. We have to -- we have to say, look,
4 "determination" is a very broad word, it's used
5 all the time by -- in -- in many different
6 statutory provisions, it's used all the time by
7 this Court.

8 If we apply ordinary meaning of that
9 term here, I -- I -- I -- I -- I really don't
10 understand how you can prevail.

11 MR. ARULANANTHAM: Well, I guess
12 because I don't think that it always has the
13 full potential breadth that the government has
14 ascribed to it. For example, in this statute,
15 we see it's used two times outside of
16 subsection (b), more than two times but in two
17 sentences outside of subsection (b).

18 And I concede and this was discussed
19 that those are not about country conditions
20 assessments. So it has a different meaning
21 there. But the bar only applies to
22 determinations in subsection (b). And so,
23 again, I think it just means -- it refers back.

24 But my fall-back position, Your Honor,
25 even if you're not willing to say determination

1 should be tied tightly to determine, the two
2 claims in particular, the consultation claim
3 and then the claim about national interest and
4 whether it's appropriately considered at the
5 termination phase, those are the kinds of
6 claims that this Court has considered in
7 administrative law cases going back a hundred
8 years.

9 You know, if you look at the
10 administrative law scholars, the Cox, Rick
11 Hills, and Emma Kaufman brief, it talks about
12 this history.

13 Claims that process is reviewable,
14 even if the ultimate decision is final, have
15 been reviewable in immigration statutes going
16 back to Nishimura Ekiu in 1892. Claims that
17 you've read the wrong criteria into the
18 statute, not whether you got it right, but just
19 are you considering a factor which actually is
20 not the one that's supposed to be considered,
21 those go back to 1904, Gonzales v. Williams and
22 other cases like that.

23 So you could say we're not necessarily
24 giving you that determination that has to be
25 hitched directly to determine, but say we are

1 reading the statute to not be the broadest
2 conceivable jurisdictional bar ever,
3 particularly given that Congress wrote broader
4 ones just a couple of years after this Court
5 had decided McNary and CSS.

6 And that would be at least the first
7 two claims. The consultation claim and the
8 claim about the statutory criteria would be --
9 which is a pure question of law. I mean, it's
10 just about how you read the statute and how you
11 read the words, is national interest, you know,
12 incorporated into (b)(3) or only in (b)(1).

13 Those claims could be reviewable even
14 under a much narrower theory than our
15 front-line theory, which is that you should use
16 the text and refer to the term --

17 JUSTICE BARRETT: Counsel, can I give
18 you a hypothetical? Let's imagine that there
19 is a more robust record of consultation here,
20 and the Secretary consults the State Department
21 and the State Department says the country
22 conditions in Syria remain terrible, armed
23 conflict continues, and, you know, I -- I think
24 it would be fine and in the national interest
25 to continue TPS status for Syrian refugees.

1 The Secretary says, yeah, you know
2 what, I'm going to terminate it anyway.

3 Is that reviewable?

4 MR. ARULANANTHAM: So just two
5 thing -- a quick point about your hypo.
6 National interest is not a factor on armed
7 conflict. I just want to flag that for later
8 when we get there.

9 JUSTICE BARRETT: Okay. Okay. I
10 mean, my point here doesn't really matter.

11 MR. ARULANANTHAM: Yes, entirely.

12 JUSTICE BARRETT: I mean, I'm just
13 saying, like, let's imagine that consultation
14 happens, it's a robust consultation, but
15 everything that she hears cuts in favor of
16 keeping TPS status, and she says, I'm
17 terminating it.

18 MR. ARULANANTHAM: We --

19 JUSTICE BARRETT: Is that -- is that
20 reviewable?

21 MR. ARULANANTHAM: We could not
22 challenge on the ground that she is wrong and
23 the State Department is right. What the
24 statute does is it tries to get the government
25 to speak in one voice, which this Court has

1 said is very important and is a huge problem
2 here when, you know, you have them going back
3 and forth, but if ultimately the Secretary
4 says, you know, speaking in one voice is
5 important, but my people, country conditions
6 people think that the armed conflict is over,
7 so that's what we're doing, that is not
8 reviewable.

9 But what is reviewable is whether she
10 actually asks anything and gets any information
11 about country conditions.

12 JUSTICE BARRETT: Is this going to get
13 you very much? I mean, if it's just kind of a
14 box-checking exercise, I mean, why would
15 Congress permit review of the procedural aspect
16 when, really, what everybody cares about much
17 more is the substance?

18 MR. ARULANANTHAM: I think it's
19 because Congress and us too and the millions of
20 people who live with TPS holders have some
21 faith in government, and they believe that if
22 there is consultation, the decisions will be
23 better.

24 JUSTICE JACKSON: And that's really
25 not unusual, right? I mean, isn't that the

1 whole thrust of something like the APA?

2 MR. ARULANANTHAM: Absolutely.

3 JUSTICE JACKSON: That Congress has
4 always sort of understood that agencies are
5 going to have a lot of discretion at the end of
6 the day to make the determinations, but we
7 still need to police to some extent the inputs,
8 what they're looking at, whether they give the
9 public notice and comment, all of the things
10 about procedural rules and requirements for
11 decision-making are important even if the
12 ultimate decision is still left to the agency.

13 MR. ARULANANTHAM: Absolutely, Your
14 Honor. You know, our view is that even if it
15 comes back like a box-checking exercise, people
16 will at least know that somebody talked to
17 somebody else.

18 And it makes sense, of course, DHS has
19 foreign policy expertise. They have their
20 asylum and refugee office and all those people.
21 But the State Department also has a lot of
22 foreign policy expertise and information.

23 JUSTICE KAGAN: Can I ask --

24 JUSTICE ALITO: Would you, I mean,
25 would you, and just to follow up on what

1 Justice Jackson is asking, do you think we can
2 read (b)(5)(A) at least to say we're ruling out
3 APA review here?

4 MR. ARULANANTHAM: Your Honor, I don't
5 want to belabor that point because our brief
6 addresses it at great length. In our view,
7 there is a difference from the Department of
8 Commerce case between whether the record
9 evidence supports the conclusion and whether
10 the decision is motivated by some impermissible
11 criteria.

12 And in Department of Commerce,
13 obviously, the record evidence did support the
14 conclusion, but nonetheless, the decision was
15 based on, you know, a contrived reason. That
16 is the reason why we think pretext claims are
17 reviewable.

18 But it doesn't matter because the
19 first two claims are -- are much more
20 canonically sort of old -- you know, older than
21 SEC v. Chenery. You know, I think that
22 decision really becomes reviewable. This
23 becomes canonical APA law that pretext claims
24 should be understood differently after Chenery
25 I, but these other ideas are much, much older

1 than that, and that's really, you know, all we
2 have to say about it.

3 CHIEF JUSTICE ROBERTS: Well, in
4 Department of Commerce, of course, we said that
5 political considerations are a permissible
6 factor. How are we supposed to determine how
7 much political influence is too much?

8 MR. ARULANANTHAM: Yeah. I -- I
9 think, in this case, the Secretary said on CNN
10 the day after her first TPS decision that we
11 are taking direction from the direction of the
12 President. He is pausing this program. And
13 after that -- meaning the TPS program. And
14 then there have been 13 terminations in a row.

15 So the district court just said on --
16 we're here on preliminary relief. I think it's
17 a factual finding for clear error review.
18 The -- the district court said, you know, I
19 think that I will take that statement, when
20 coupled with the confirmatory action of all the
21 TPS terminations and the absence of
22 consultation and all the rest of it, to mean
23 that --

24 CHIEF JUSTICE ROBERTS: Well, that's a
25 particular circumstance, but, I mean, in

1 general, how would you articulate the principle
2 that this is too much? How do you judge, as a
3 general matter, how much political influence is
4 too much?

5 MR. ARULANANTHAM: Only --

6 CHIEF JUSTICE ROBERTS: Not -- not
7 that you're saying, well, it was too much in
8 this case but more generally.

9 MR. ARULANANTHAM: Yeah. I mean, I
10 don't think -- I wouldn't change a word of
11 Commerce, Your Honor.

12 CHIEF JUSTICE ROBERTS: I wouldn't
13 either.

14 (Laughter.)

15 MR. ARULANANTHAM: Yes. I figured you
16 would say that. And -- and I just -- I just
17 think this is also a very rare outlier case
18 where the Secretary actually said on national
19 television the day after the decision that she
20 was motivated by an impermissible factor.

21 You know, I want to come back to this
22 consultation question, though, to talk about
23 this email. As Justice Sotomayor had said, the
24 entire consultation in this case is reprinted
25 on less than one page, page 41 of our brief.

1 JUSTICE KAGAN: Well, could I ask
2 about that particularly? Suppose that there
3 was the same question asked from DHS to State
4 Department, and instead of the answer being
5 State has no foreign policy concerns with
6 ending these TPS designations, suppose the
7 answer was just State has no concerns with
8 ending these TPS designations.

9 Would that be appropriate? Would that
10 be -- would that cross the line into that's
11 fine?

12 MR. ARULANANTHAM: I mean, that is a
13 much harder case than ours because it might be
14 true that no concerns encompasses country
15 conditions, you know, and I'm not saying that
16 definitely that person should win because I
17 think, you know, you -- the -- the
18 government -- I mean the plaintiffs may be
19 entitled to -- to -- to argue that that's not
20 actually what happened there.

21 But our case is so much easier than
22 that because --

23 JUSTICE KAGAN: Well, is it so much
24 easier? I mean, I wonder -- I mean, the State
25 Department probably says no foreign policy

1 concerns five times before breakfast every day.
2 It's just -- it's -- that's what -- the State
3 Department. They deal with foreign policy
4 concerns. So, if somebody asks them something,
5 they say no foreign policy concerns.

6 Does that really -- is that really
7 going to make the difference between what is
8 permissible consultation and what is not
9 permissible consultation, the fact that they
10 put the words "foreign policy" in the answer?

11 MR. ARULANANTHAM: So -- so two
12 things. First, this same exact worded email,
13 no foreign policy concerns or sometimes they
14 said foreign policy objections, but foreign
15 policy concerns or objections is now the record
16 in seven consecutive TPS terminations under
17 this statute. And that's why all these
18 district courts that they're talking about,
19 right, it's the same thing.

20 So it's not obvious to me that, oh,
21 they could have just written country conditions
22 and they chose to write foreign policy. You
23 know, but, you know, I'd still say turn the
24 square corner and make them -- make them do it.

25 But, beyond that, there is -- you

1 know, we -- we have also --

2 JUSTICE KAGAN: When you say that,
3 when you say, look, this is -- this is
4 obviously deliberate language because it was
5 used in seven, what are you suggesting about
6 why they used this language?

7 MR. ARULANANTHAM: So, look, I -- I
8 don't -- I don't know, but I think it is
9 possible that they don't have a foreign policy
10 concern, but they're not comfortable saying
11 that the armed conflict in Syria is over when
12 their own website is saying, if you go to
13 Syria, leave a DNA sample, execute a will
14 before you go, it's active armed conflict, no
15 part of Syria is safe, every part is wracked
16 with violence --

17 JUSTICE KAVANAUGH: Well, it's not the
18 Assad regime anymore, though. I mean, that --
19 the whole thing was the Assad regime after 53
20 years of complete oppression and brutal
21 treatment is gone.

22 MR. ARULANANTHAM: So, Your Honor --

23 JUSTICE KAVANAUGH: So do you agree
24 the Assad regime change is a significant change
25 in the history of that country and the -- and

1 the Middle East more broadly?

2 MR. ARULANANTHAM: I mean, of course,
3 anybody would agree with that, Your Honor, but
4 I -- but --

5 JUSTICE KAVANAUGH: Okay. Well,
6 that's an important marker then because
7 that's -- that's a big shift in both Syria but
8 also the posture of other countries towards
9 Syria, at least as I -- I don't pretend to be
10 an expert, but that's my understanding of
11 what's the backdrop here.

12 MR. ARULANANTHAM: So -- so two
13 thoughts, Your Honor. Then I want to briefly
14 talk about national interest if -- if there's
15 time.

16 So, first, you know, we're not --
17 we're not interested in a debate about whether
18 Syria is or is not safe, so, you know, we
19 haven't gotten into that precisely because it's
20 barred by the judicial review bar, right? Our
21 view is they have to consult and that's the end
22 of it.

23 And the second thing I would say is
24 the State Department's own reports believe, of
25 course, Assad -- they recognize Assad has

1 ended, but they say active violence in every
2 part of the country, the daycare that Laila
3 Doe's daughter went to got bombed, the building
4 next to it has been bombed again in southern
5 Syria. That's not the same conflict. It's the
6 Israeli incursion. There's a war between
7 Turkey and Kurdistan -- Kurds going on in the
8 north. There's still lots of conflict
9 according to the State Department's accounts
10 and the -- the CRS report about this. These
11 are in the Joint Appendix.

12 So I don't think it's as simple as
13 that, but we don't contest, if the Secretary
14 says I disagree, Syria is safe, that's fine,
15 but she still has to turn the square corners
16 and follow the steps.

17 JUSTICE KAVANAUGH: Yeah.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas, anything further?

21 JUSTICE THOMAS: Just briefly. With
22 respect to the jurisdiction-stripping provision
23 again, if the Secretary actually designates --
24 does not terminate but designates in favor
25 of -- of a particular group, can others use the

1 exact same objection that you're offering?

2 MR. ARULANANTHAM: I'm not sure I
3 understand the question, Your Honor.

4 JUSTICE THOMAS: Well, would they be
5 able to challenge the same way that you're
6 challenging --

7 MR. ARULANANTHAM: I got it.

8 JUSTICE THOMAS: -- a positive
9 designation?

10 MR. ARULANANTHAM: Got it. So, no,
11 Your Honor, but not because of the review bar.
12 What they can challenge -- the statute says the
13 Secretary may designate -- this is -- now we're
14 talking about (b)(1), right?

15 JUSTICE THOMAS: Yeah, yeah.

16 MR. ARULANANTHAM: May designate only
17 if, and then one of these three criteria have
18 to be met.

19 JUSTICE THOMAS: Yeah.

20 MR. ARULANANTHAM: So, even if a
21 country is horribly in crisis, there's no
22 obligation to designate. And that's the reason
23 why that's unreviewable, you know.

24 But, of course, it doesn't cut the
25 other way, right? On their view, if the

1 Secretary -- this was my opening
2 hypothetical -- if the Secretary designated
3 Mexico for immigration relief, it's
4 unreviewable. On our view, it is reviewable
5 because you look to the -- to the criteria to
6 see whether they actually applied. Did they
7 care at all about conditions, or were they just
8 trying to achieve some political end?

9 JUSTICE THOMAS: Yeah.

10 CHIEF JUSTICE ROBERTS: Justice Alito?

11 JUSTICE ALITO: One of the points that
12 General Sauer made was that if we accept your
13 arguments, it will create a hole in the
14 judicial review bar that you could drive a
15 convoy of trucks through.

16 And you have now said repeatedly that
17 it's necessary for the Secretary to turn square
18 corners, which seems to open -- which seems to
19 support what he says, that if we depart from
20 the ordinary meaning of the review bar, then it
21 is always going to be possible to pick
22 procedural faults in -- to raise procedural
23 objections to what's been done.

24 And what you've said about
25 consultation makes me think that that may be

1 true because, here, there was some
2 consultation. All right, it was very brief
3 and maybe it's not what one would hope for, but
4 still, once you say, well, it's -- it's
5 permissible to review the adequacy of the -- of
6 the consultation, it's always going to be
7 possible to pick -- to -- to raise objections
8 about the adequacy of the -- of the
9 consultation and the words that the State
10 Department comes back with.

11 MR. ARULANANTHAM: So two thoughts,
12 Your Honor. First, our consultation claim in
13 this sense is extremely narrow. We don't argue
14 about the levels. We don't argue about the
15 amount. All we say is it has to be about a
16 subject, deliberation about a subject, so they
17 have to talk about country conditions.

18 And you could hold that, Your Honor,
19 and leave aside, just say we're not saying it's
20 okay to police meaningfulness, even though, in
21 other statutes, lower courts do -- you know,
22 consultation claims -- consultation provisions
23 are in other -- other statutes and, you know,
24 the sky doesn't fall.

25 But, if -- if your -- that's Your

1 Honor's concern, just only say it has to be
2 about the topic, and -- and we don't say
3 anything about, you know, meaningfulness in a
4 broader sense. That's my first answer.

5 My second answer is, you know, the
6 State Department actually provided reports
7 because they did care about speaking in one
8 voice for 35 years under this statute. This is
9 in the former senior government officials'
10 brief, a bipartisan brief, including somebody
11 from the first Trump administration talking
12 about the fact that they used to actually look
13 at all the different components of the State
14 Department and talk about this so that they
15 could make sure that the decision was good.

16 There was never a challenge to
17 consultation under that. Even in the first
18 Trump administration --

19 JUSTICE ALITO: You think that sort of
20 elaborate process is necessary --

21 MR. ARULANANTHAM: No.

22 JUSTICE ALITO: -- under this statute?

23 MR. ARULANANTHAM: No, I do not, Your
24 Honor, I do not. My point is just, you know,
25 it wasn't a problem until the foreign e-mails

1 started. Even in the first Trump
2 administration when there were -- that was the
3 first time there were other TPS challenges.
4 Before that 16 designations -- terminations,
5 never a challenge, right? It started then.

6 Even after that, this -- this
7 consultation claim is only arisen because now
8 they're doing the foreign e-mail.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: Justice Barrett
13 sort of was asking a question about -- almost
14 sounded a little bit like harmless error, even
15 if they didn't consult. That's okay because,
16 you know, they were going to make the same
17 decision? How do you deal with that?

18 I mean, this is a due process claim.
19 And we've never said what the final
20 determination is important to due process,
21 correct?

22 MR. ARULANANTHAM: Yeah, correct, Your
23 Honor. You know, I think I would say two
24 things about it. The first, there isn't a
25 basis in this record to say that she would have

1 done the same thing if the state, particularly
2 on the armed conflict designation, where
3 national interest is not a criteria, so you
4 have to find --

5 JUSTICE SOTOMAYOR: That's under the
6 (A) section of the statute?

7 MR. ARULANANTHAM: Correct, that's
8 under (b)(1)(A). There's two designations
9 under Syria. One under armed conflict and the
10 other under extraordinary temporary conditions.

11 Our position is that even under the
12 latter one it is not permissible to consider
13 national interest at the periodic review stage
14 because what is required is that there be
15 review of conditions in the foreign state.

16 And we think when the word
17 "conditions" is used, you know, just a couple
18 lines later, it's referring back to conditions
19 in the foreign state and not criteria, which is
20 what my friend kept saying. And if you look at
21 the -- the word, the name, the label of it is
22 extraordinary and temporary conditions, which
23 is talking about country conditions, (b)(1)(B)
24 also says living conditions.

25 So every time the word "conditions" is

1 used in subsection (b), it's talking about
2 country conditions; national interest is not a
3 condition, right? So that -- that's our -- our
4 argument, our -- our argument on the merits as
5 to the second one.

6 But on the first one, even as to
7 process, there's nothing in this record to tell
8 you that if they had actually consulted, the
9 Secretary would have said I don't care what the
10 State Department says. Maybe she would have
11 said oh, wow, that's not good. And they would
12 have perhaps, you know, led to a different
13 view.

14 And so I think even if harmless error
15 is permissible in this context, there just
16 isn't a basis to find it and it -- it is again
17 important for the government to speak in one
18 voice. And I think that would be the benefit
19 of -- of imposing -- enforcing the consultation
20 requirement here.

21 JUSTICE SOTOMAYOR: Well, I mean, the
22 whole purpose of -- of the TPS is to ensure
23 that the executive is open about what it's
24 doing, correct?

25 MR. ARULANANTHAM: Yes, Your Honor,

1 transparency is all through the statute, Your
2 Honor.

3 JUSTICE SOTOMAYOR: And so to the
4 extent that a president says country -- it's
5 not safe for these people to come back or I'm
6 unwilling to say it's safe for those people to
7 come back, Haiti shows that the four groups of
8 people who were sent back, that have gone back,
9 were killed.

10 So I'm not going to say it, but I
11 don't care, I'm still going to end the program,
12 that that's a different impact than saying it's
13 safe --

14 MR. ARULANANTHAM: And I --

15 JUSTICE SOTOMAYOR: -- and I have an
16 alternative reason anyway?

17 MR. ARULANANTHAM: It absolutely is,
18 Your Honor. And I think it's also important to
19 remember that this issue about whether you can
20 terminate on the basis of national interest, it
21 only arises if the country is still unsafe, the
22 alternative ground, right, it only arises in
23 the country is still unsafe and as to people
24 who have been able to keep their TPS because
25 despite being vetted, 18 months, every 18

1 months, resubmitting their background,
2 resubmitting criminal history checks, they have
3 been found not to have even a single felony or
4 more than one misdemeanor or any of the other
5 grounds. So we're talking about the power to
6 mass expel people who have done nothing wrong
7 to countries that remain unsafe.

8 And our view is it is unlikely that a
9 refugee protection statute would have given
10 that power to the Secretary.

11 JUSTICE SOTOMAYOR: What do you do
12 with -- there are two pools here. One is the
13 people who have been given TPS status for a
14 long period of time. And then the new
15 applicants for which there hasn't been checking
16 yet.

17 Could a president come and say the
18 problem -- I'm not going to terminate the
19 program because the country is still not safe
20 but I'm not going to give new applicants
21 permission to stay because I can't vet those
22 guys?

23 MR. ARULANANTHAM: Yes, absolutely,
24 Your Honor. So in the periodic review process,
25 there's three options. You can terminate, you

1 can extend, and if you extend, you can also
2 designate -- designate again. But you don't
3 have to.

4 If you designate again, that updates
5 the date and has the effect of them bringing
6 new people into the eligibility criteria. But
7 the statute doesn't mandate that. It mandates
8 extension if the country is unsafe but it does
9 not mandate designation. That is like a new
10 designation.

11 And so absolutely, the government
12 could take the position either individually or
13 categorically that we're not going to do any
14 new designations, no more TPS holders, but this
15 fixed population, the people who already have
16 it and have come to rely on the fact that if
17 the government is -- determines that their
18 country is unsafe, then they get to stay, they
19 would still -- that closed population would
20 still be protected, Your Honor.

21 JUSTICE SOTOMAYOR: So that answers
22 the General's position about this being a pull
23 country in some way, that our policy is a pull?

24 MR. ARULANANTHAM: Yes, Your Honor,
25 and I think my -- my friend for the Miot

1 plaintiffs will also point out that there's no
2 evidence for this -- this claim about the pull
3 factor. I'll leave that to them, but yes, Your
4 Honor --

5 JUSTICE SOTOMAYOR: There are --

6 MR. ARULANANTHAM: -- there is no
7 need, you can -- you can just solve the problem
8 by saying we're not going to let any new people
9 into the program. We are going to limit our
10 extensions to countries that are unsafe for
11 people who already have TPS.

12 JUSTICE SOTOMAYOR: The people who are
13 here, however, and previously been vetted, no
14 -- there's no new problem with that vetting for
15 them?

16 MR. ARULANANTHAM: No, Your Honor. In
17 fact, the -- the statute requires that their
18 TPS be rescinded if they commit a felony or
19 become inadmissible, on any of a very broad set
20 of grounds.

21 So it's -- it's extremely narrow
22 protection. But if they -- if they don't, if
23 they do nothing wrong, then -- and their
24 country is still unsafe, the statute requires
25 that they remain protected.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: Your argument that the
4 national interest claim is reviewable seems
5 harder to me than the procedural argument. And
6 here's why.

7 I mean, I would have thought it's a --
8 it's just a -- a version of an argument that is
9 made all the time when it comes to
10 administrative action, like you took the wrong
11 factors into account, or, you know, you didn't
12 take the right factors into account. That's a
13 kind of standard part of arbitrary and
14 capricious review.

15 And I would have thought that if this
16 judicial review provision does anything, it
17 basically says don't subject the Secretary's
18 determination to arbitrary and capricious
19 review as we know it.

20 So why should we treat this argument,
21 this national interest argument any
22 differently?

23 MR. ARULANANTHAM: So I think there's
24 some categorical distinction in my head between
25 an argument like oh, you looked at the

1 earthquake recovery in this portion of the
2 country but not in that portion of the country
3 or you didn't consider this evidence about how
4 the armed conflict is in the southern part but
5 not if eastern part.

6 Those are still within the purview of
7 the statutory criteria about armed conflict or
8 temporary living conditions, right? But it's
9 something else if a Secretary says oh, I'm
10 designating the -- I'm terminating the armed
11 conflict designation because there -- there's
12 been earthquake recovery. But earthquake is
13 not a criteria for the armed conflict. It's
14 only a criteria under (b)(1)(B).

15 JUSTICE KAGAN. Well, that makes it
16 sound if there's any legal error attached to
17 the Secretary's determination, review can come
18 in. And is -- is -- is -- are -- are you
19 reading the review provision that way, that
20 it's just about factual errors, not legal
21 errors?

22 MR. ARULANANTHAM: I -- I do think --
23 I do think there can be -- I mean we're talking
24 about Guerrero-Lasprilla and Wilkinson
25 definition of legal error. Obviously that

1 might be broad. I don't think the Court has to
2 say that those are reviewable. But the claim
3 that we're making here is that the national
4 interest, you heard me say it, right, the
5 national interest is only at the outset, and
6 it's not in the periodic review because
7 periodic review is a conditions analysis
8 whereas national interest is not described as a
9 condition, it's in contradistinction to
10 conditions. That is a pure question of law.
11 You don't need to know anything, anything at
12 all about facts in order to assess that
13 criteria question.

14 And, Your Honor, there --

15 JUSTICE KAGAN: But it's also very
16 easy for Congress to write a review provision
17 that's confined to non-legal questions. And
18 that's not what Congress did here.

19 MR. ARULANANTHAM: That's true, Your
20 Honor, although they also can easily say --

21 JUSTICE KAGAN: I mean --

22 MR. ARULANANTHAM: -- all questions --

23 JUSTICE KAGAN: -- it has nothing to
24 do with like even if I read this statute as
25 saying determination, is with respect to the

1 determination about country conditions, but if
2 -- if you're in that world where the question
3 is like how did you determine country
4 conditions, whether you made a factual error,
5 whether you made a legal error, Congress in
6 this provision seems not to care.

7 MR. ARULANANTHAM: So I -- I agree
8 that this provision doesn't read fact law into
9 it one way or another. And I -- I think our
10 narrower argument -- Justice Alito had said --
11 you know, I took the question to be maybe --
12 maybe I'm not buying your full -- full-bore
13 determination argument, do you have anything to
14 fall back? And what I was saying was, if you
15 -- if you don't want to take the full textual
16 view, then read it against the backdrop of
17 administrative law, where obviously this Court
18 generally or courts generally have the last
19 view on questions of law.

20 But I think if you say no, that's not
21 the -- what they're doing here, so some legal
22 questions are going to be barred, what I would
23 say is whether or not this is within the scope
24 of the determination, that is our -- what we
25 are disputing, right? Because we're saying

1 it's not a country condition because it doesn't
2 use the word "condition" to describe it, and
3 the review provision is limited to conditions
4 in the foreign state. And this is not in the
5 foreign state.

6 So at least that claim, the threshold
7 question of, like, do you get into the
8 reviewability bar or not, that should be
9 reviewable, even if once we're in it, you would
10 say, like, a legal -- a -- a legal dispute
11 about which kinds of conditions should be in it
12 or not, that that would be barred. You know?

13 And we don't -- we don't believe that
14 -- that necessarily is the case either, but
15 just to be clear, like, our claim is -- at the
16 very highest level, it's just about the
17 criteria of even what counts as a condition.

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: How many Syrians
23 have returned to Syria since the end of the
24 Assad regime? And is that of any relevance to
25 what you've been saying about country

1 conditions?

2 MR. ARULANANTHAM: I mean, I'd say the
3 same thing that I said to you earlier, Your
4 Honor. Two answers. First is it is of no
5 relevance because even if the Secretary is
6 right and the State Department is wrong, it
7 doesn't change the fact that they didn't talk
8 to each other, and the national interest is not
9 a criteria and those are claims that are
10 clearly reviewable under the statute. So, A,
11 that's my answer.

12 Second, it is true that people have --
13 many people have gone from Lebanon back into
14 Syria, but if we're -- if we're reading the
15 newspaper now and sort of outside the
16 administrative record, there might be good
17 reasons why people are going from southern
18 Lebanon back to Syria if they're having to pick
19 between the two places. And that is not the
20 same thing as saying, oh, we're going from
21 California to Syria.

22 And so I don't think the fact that you
23 have this mass movement of people is
24 necessarily indicative of whether it is safe to
25 go there or not. As I said, there is still

1 active armed conflict. There's bombing
2 happening now in Syria. So, you know, it may
3 be better or worse. Some people say the
4 mortality rate is higher. I haven't -- you
5 know, I don't know.

6 But, anyway, yeah, that -- I think --
7 I think it does not answer the question
8 ultimately, even though -- even if it did, we
9 still should win.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 Justice Jackson?

14 JUSTICE JACKSON: So I'm interested in
15 the standards applicable to our decision-making
16 in this case. And one of them is the thought
17 that even if "determination" could be read to
18 mean different things, the final conclusion or
19 close to it, versus the final conclusion plus
20 the antecedent steps, I thought we had a
21 presumption of reviewability that was supposed
22 to apply to our interpretive analysis in a
23 situation like this.

24 So am I wrong about that?

25 MR. ARULANANTHAM: You're absolutely

1 right, Your Honor. It's applied in Bowen, in
2 McNary, in Catholic Social Services, and, of
3 course, in Guerrero-Lasprilla, you know, and --
4 and Wilkinson.

5 JUSTICE JACKSON: So when Justice
6 Thomas says, well, the background is that we
7 wouldn't interpret this if we're sort of trying
8 to figure out what "determination" is, we -- we
9 -- we wouldn't allow for you to review it, I
10 think the opposite is true. In other words,
11 there's some confusion about the express -- the
12 scope of the express determination -- the
13 express review bar.

14 I thought our rules under our
15 precedents say you're supposed to interpret it
16 narrowly.

17 MR. ARULANANTHAM: Yes, Your Honor.
18 Two things on this. First, the presumption is
19 clear that they have to show clear and
20 convincing evidence. So the question is, you
21 know, is what we have said by hooking it to
22 "determine" or read it against the hundred
23 years of administrative law good enough to just
24 get above what would be needed, you know, to
25 beat clear and convincing. And I think it is.

1 And the second thing I'd say on that
2 subject is, Your Honor, *Biden v. Texas*, from
3 just a couple of years ago, this Court holds
4 the APA governs the DHS's parole policy, and it
5 has to be reasonable and reasonably explained
6 against -- and it reaches that holding, every
7 justice of this Court endorses that idea in the
8 face of a jurisdiction-stripping argument which
9 the government makes about the scope of the
10 injunction. You know, all of that I'm sure you
11 all remember.

12 And so it's both true that, as a
13 general matter, this Court has applied the
14 presumption in both large and small immigration
15 cases, and also that it has done it
16 particularly in a context like this one where
17 the issue is about whether Mexico, you know,
18 basically the -- had to be -- the U.S. had to
19 be forced to negotiate with Mexico. And so --

20 JUSTICE JACKSON: All right. And my
21 second -- my second issue about standards, is
22 there a clear error standard that is applicable
23 to the district court's findings here, findings
24 of fact, for example, about whether or not
25 there was likely discriminatory intent with

1 respect to this policy?

2 MR. ARULANANTHAM: Yes, absolutely,
3 Your Honor. It is both true -- it's double
4 deference, I would argue, because it's both
5 here on preliminary relief, there may be more
6 evidence to come if the case is allowed to
7 survive, certainly the constitutional claim is
8 going to be allowed to survive, given the -- on
9 -- on jurisdiction anyway, and, in addition,
10 because factual findings are reviewed for clear
11 error in general, then it is true that the
12 clear error operates there.

13 I think that now, since we have the
14 e-mail about consultation and we all agree that
15 that's the scope of it, it's not really
16 relevant. You can read that one page of our
17 brief --

18 JUSTICE JACKSON: Or it's just so
19 obviously not an error, not a clear error as a
20 result of that evidence, right?

21 MR. ARULANANTHAM: Well, yes, Your
22 Honor, absolutely. I mean --

23 JUSTICE JACKSON: I mean, we're still
24 applying the clear error -- you're not saying
25 jettison the clear error or standard; you're

1 saying look at this evidence. If the district
2 court found it to be that -- the e-mail in
3 terms of consultation or the discriminatory
4 intent in terms of what the President said, our
5 -- our burden is to determine whether or not
6 she made a clear error in her fact finding
7 related to those issues, correct?

8 MR. ARULANANTHAM: Yes, absolutely,
9 Your Honor. And the last thing I would just
10 say about that is, on the pretext claim, where
11 I know there -- maybe everybody doesn't think
12 that we have all the evidence, it's not the
13 evidence that was in Commerce because it was a
14 full trial in Commerce. I think in that
15 context too it is relevant we are here on
16 preliminary relief because the district court
17 was looking at it and that's -- that's what
18 you've got.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Pipoly.

23 ORAL ARGUMENT OF GEOFFREY M. PIPOLY
24 ON BEHALF OF THE RESPONDENTS IN CASE NO. 25-1084

25 MR. PIPOLY: Mr. Chief Justice, and

1 may it please the Court:

2 For decades, administrations of both
3 parties successfully terminated TPS
4 designations without inviting litigation. They
5 did so by following the process Congress set
6 forth in the TPS statute.

7 The termination of Haiti's TPS was
8 different. It was not the result of the
9 mandatory review process but was instead a
10 preordained result driven by the President's
11 resolve to end TPS for Haiti, no matter what.

12 The reasons Secretary Noem gave for
13 the termination were pretextual. The DHS
14 documents that we already lodged with this
15 Court show that the Secretary's purported
16 review was a sham. Agency staff was "forced"
17 to include rationales for termination that had
18 no empirical support.

19 The true reason for the termination of
20 the -- for the termination is the President's
21 racial animus towards non-white immigrants and
22 bare dislike of Haitians, in particular. The
23 President has disparaged Haitian TPS holders
24 specifically as undesirables from a "shithole
25 country," and days after falsely accusing them

1 of "eating the dogs and eating the cats of
2 Americans," he vowed that he would terminate
3 Haiti's TPS. And that is exactly what
4 happened.

5 Recognizing all this, the district
6 court correctly postponed the termination.
7 This Court should affirm.

8 And I welcome the Court's questions.

9 JUSTICE THOMAS: What weight do you --
10 how would you interpret the
11 jurisdiction-stripping provision?

12 MR. PIPOLY: No different than the Doe
13 plaintiffs do, Justice Thomas.

14 CHIEF JUSTICE ROBERTS: More
15 generally, is there anything that your friend
16 said that you disagree with?

17 MR. PIPOLY: No, Justice -- Chief
18 Justice -- Mr. Chief Justice. My apologies.

19 CHIEF JUSTICE ROBERTS: Whatever.

20 (Laughter.)

21 JUSTICE KAGAN: Can I ask about your
22 equal protection claim?

23 MR. PIPOLY: Certainly.

24 JUSTICE KAGAN: Is this -- is this a
25 -- a race claim or is it a national origin

1 claim, or does it matter?

2 MR. PIPOLY: It's -- it's -- it's a --
3 it's certainly a race-based claim, we would
4 argue, given the -- as -- as some of the
5 questioning earlier got to, the evidence
6 certainly suggests racial animus, which, under
7 -- which the Arlington Heights framework is
8 specifically designed to suss out.

9 The -- the statements, "I would like
10 fewer people from places like Haiti," that were
11 described with the word that I won't repeat
12 again, and countries like Norway and Denmark
13 and Sweden, as Justice Sotomayor suggested
14 earlier, that's very close to what we had in
15 Arlington Heights itself.

16 So we do frame this as a race-based
17 claim. We do think it's racially motivated,
18 particularly in light of the cross-cutting
19 terminations we've seen. As the district court
20 in our case put it, 13 up, 13 down, all
21 non-white. While --

22 JUSTICE KAGAN: So is -- is that it?
23 It's -- it's not Haiti particularly; it's all
24 these countries have people of color as opposed
25 to Denmark and Scandinavian -- you know,

1 Scandinavia generally and whatever?

2 MR. PIPOLY: Sure. I certainly think
3 that the record supports the idea that the
4 President in particular has focused in on
5 Haitians, but it is broader than that.
6 Haitians are our plaintiffs. But the relevant
7 compare -- the relevant group here is -- is all
8 TPS countries, all of which are non-white.

9 JUSTICE KAGAN: And -- and what if one
10 thinks that -- you know, if -- you said there
11 was a determination that no matter what, there
12 was going to be a change to Haiti's TPS status.

13 You know, there seems to have been a
14 pretty clear determination that all TPS status
15 should go, right? There are no -- there's --
16 there's -- there's no TPS status that hasn't
17 been renounced. So how does that fact --
18 factor into this equal protection claim?

19 MR. PIPOLY: Sure. Our position is is
20 that you cannot have, for whatever reason,
21 race-based or otherwise, a pre -- a -- an
22 agenda to end TPS because these are
23 country-specific --

24 JUSTICE KAGAN: Quite -- quite right.
25 But that's a different kind of claim. I -- I

1 guess I'm just wondering like how to think
2 about the racial component of this, if there
3 seems to have been, you know, wherever and
4 whatever TPS I can find, it's not going to
5 exist tomorrow.

6 MR. PIPOLY: I'm sorry, I'm not
7 following. Well, the race-based, you know --

8 JUSTICE KAGAN: You -- you know, that
9 there's -- you -- you can -- you can argue that
10 there was just like an across the board, we
11 have to get rid of all these TPS and the
12 statutory requirements weren't followed and --
13 and -- and all of that, but -- but the
14 objection of this racial component into it, I
15 guess I don't quite see how that operates when
16 all of these programs went.

17 MR. PIPOLY: Well, again, I would
18 point you back to both the President's
19 statements and the Secretary's statements. The
20 Secretary herself described people from Haiti
21 and from 18 other all non-white countries as
22 killers, leaches, entitlement junkies saying we
23 don't want them, not one, while simultaneously
24 enacting a policy, another humanitarian form of
25 relief, for white and only white South

1 Africans.

2 So if you want the comparator group,
3 that's part of it. And -- and it's true that
4 the program, the refugee program under which
5 the South -- the white South Africans were
6 admitted is not TPS as such, but both statutes
7 are -- are motivated by the same policy from
8 Congress -- motivated by the same policy.
9 They're both humanitarian programs.

10 In both TPS and with the special
11 refugee program, it's the United States saying
12 these folks are facing some hardship in their
13 home country, at least that's the stated basis,
14 and we're going to let them in. So it's --
15 it's not -- it's -- it's the President's
16 statements in which there is a comparative
17 group, white versus -- non-white countries
18 versus white countries, and it's the fact that
19 you've got the -- the -- that -- those sort of
20 sentiments being art -- articulated into policy
21 --

22 JUSTICE JACKSON: But more directly --

23 MR. PIPOLY: -- with regard to South
24 African --

25 JUSTICE JACKSON: -- more directly to

1 Justice Kagan's point, is it -- is it your view
2 that the reason why the President was saying
3 all of the TPS programs have to go is because
4 the TPS program relates to countries that have
5 large minority or large racial compositions?

6 MR. PIPOLY: Yes, that's exactly
7 right, Justice.

8 JUSTICE JACKSON: In other words, the
9 motivation for getting rid of all of them is
10 that these programs "benefit" these kinds of
11 people.

12 MR. PIPOLY: That -- that -- yes,
13 that's exactly right. And I apologize if I
14 didn't follow that but, yes, that is -- that is
15 absolutely correct.

16 And under Arlington Heights, the --
17 the racial motivation need be only one of many
18 factors. In every government policy I can
19 imagine, there is a facially-legitimate reason
20 given for the termination and the -- for the
21 government action. The Arlington Heights
22 framework exists precisely for the purpose of
23 sussing out whether impermissible racial
24 considerations were part of -- were -- were
25 impermissibly in the mix.

1 JUSTICE ALITO: But isn't it the case
2 that TPS was terminated for quite a list of
3 countries. And I -- I -- I -- I can't seem to
4 find the particular page of the transcript
5 where the district court goes through them all.

6 And, yes, none of those is a Nordic
7 country. But -- and I don't like dividing up
8 the people of the world arbitrarily into three
9 racial groups, but you -- you say they're all
10 non-white. And that's the -- that's the
11 distinguishing characteristic?

12 MR. PIPOLY: That is the
13 distinguishing characteristic that the district
14 court held. But I would -- I would emphasize,
15 Justice Alito, that --

16 JUSTICE ALITO: But do you think that
17 if -- if you put Syrians, Turks, Greeks, and
18 other people who live around the Mediterranean
19 in a lineup, do you think you could say those
20 people are -- are -- that all of them, are they
21 all non-white?

22 MR. PIPOLY: I understand that Syrians
23 I think may be classified as white for purposes
24 of the State Department. I -- or -- or
25 for under -- under certain government -- you

1 know, certain government programs but again, I
2 think race is -- I think, you know, you'd have
3 to pole the public to know what they think the
4 race of a Syrian is. I certainly think they're
5 not white --

6 JUSTICE ALITO: Pole -- pole the
7 American people? Do they -- do they think
8 Syrians are white?

9 MR. PIPOLY: I -- I'm -- I wouldn't
10 think that most would, Justice Alito.

11 JUSTICE ALITO: Really?

12 MR. PIPOLY: I really don't.

13 JUSTICE ALITO: How about Turks?

14 MR. PIPOLY: I honestly haven't
15 considered what racial component I would sort
16 Turks into.

17 JUSTICE ALITO: How about Greek's?

18 MR. PIPOLY: I -- I don't know the
19 answer to that either.

20 JUSTICE ALITO: How about southern
21 Italians?

22 (Laughter.)

23 MR. PIPOLY: Well, certainly --
24 certainly 120 years ago when we had our last
25 wave of European immigration, southern Italians

1 were not considered white. So I think our
2 concept of these things evolves over time.

3 JUSTICE ALITO: How about Spaniards?

4 MR. PIPOLY: I think same answer about
5 120 years ago, I don't think they were
6 considered white.

7 JUSTICE ALITO: You have a really
8 large -- you have a really broad definition of
9 who's white and who's not white. As I said, I
10 don't like dividing the people of the world
11 into these groups.

12 MR. PIPOLY: I -- I understand. I --
13 I would that say even under this Court's
14 rationality jurisprudence if you look at cases
15 like Moreno, it is not necessary for us to get
16 strict scrutiny to win here because
17 irrespective of how you do the classification
18 at issue here, under those Court's -- under
19 those decisions -- excuse me, under those
20 precedents, bare dislike of -- of an unpopular
21 group is a sufficient basis to find that
22 rational basis is not even satisfied.

23 CHIEF JUSTICE ROBERTS: Given your
24 understanding of the review bar, wouldn't your
25 APA arguments be exactly the same if there were

1 no review bar?

2 In other words, what function does it
3 -- with respect to your APA arguments, in what
4 way does the review bar restrict what you --
5 what -- what you want to argue?

6 MR. PIPOLY: I -- I would give the
7 same answer that counsel for the Doe plaintiffs
8 gave, which is that there are -- that
9 determination has the same meaning in the TPS
10 statute that it had in the SAW statute at issue
11 in the McNary case, that in that case, the
12 antecedent obligations procedurally were
13 subject to judicial review even if the
14 substantive determination was not.

15 JUSTICE GORSUCH: On that score,
16 counsel, you agreed that the determination --
17 the country conditions no longer meet the
18 criteria is unreviewable?

19 MR. PIPOLY: Yes, the Secretary's
20 substantive --

21 JUSTICE GORSUCH: And final
22 determination under what is it (B), right,
23 (4)(B) -- (3)(B), sorry? That's unreviewable?

24 MR. PIPOLY: The Secretary's
25 substantive conclusion as to the existence or

1 non-existence --

2 JUSTICE GORSUCH: Well, it's a
3 determination, right, and that's what the
4 statute says.

5 MR. PIPOLY: Correct. And that's how
6 we define determination.

7 JUSTICE GORSUCH: Yeah. And -- and
8 that takes effect once it's published in the
9 Federal Register plus 60 days or something like
10 that, under -- under (3)(B), right?

11 MR. PIPOLY: That's correct.

12 JUSTICE GORSUCH: Okay. And that's
13 the determination and that's the effect of the
14 statute, but you say that a court can enjoin it
15 anyway.

16 MR. PIPOLY: No, they can -- well, for
17 -- we didn't get an injunction here. We got
18 705 relief --

19 JUSTICE GORSUCH: 705 postponement.
20 Yeah, I mean, I'm -- I'm just looking at what
21 the court said. I think in the Syria case,
22 said that the -- the defendants' termination of
23 TPS status for Syrians is hereby postponed.
24 And the D.C. Circuit in your case said the
25 district court's postponed termination, right?

1 MR. PIPOLY: That's correct. That's
2 Section 705 of the --

3 JUSTICE GORSUCH: How is that not
4 judicial review of the Secretary's
5 determination?

6 MR. PIPOLY: Well, I would say that,
7 again, the -- the claim --

8 JUSTICE GORSUCH: I understand your
9 process point, that you want to look at some
10 antecedent things. But how can it not be
11 judicial review of the determination if you're
12 postponing the determination?

13 MR. PIPOLY: Because determination --
14 well, it -- I -- I can't -- it's difficult for
15 me to answer that question without pointing out
16 --

17 JUSTICE GORSUCH: It's difficult for
18 me to answer the question too.

19 (Laughter.)

20 MR. PIPOLY: Well, no, probably for
21 different reasons.

22 (Laughter.)

23 JUSTICE GORSUCH: Well, no, I don't
24 know. I'm asking -- I'm -- I'm just-- I'm
25 struggling with that.

1 MR. PIPOLY: No, I understand. The
2 question comes down to do you define
3 determination as coextensive with a broader
4 term like decision. And we see --

5 JUSTICE GORSUCH: No, no, no. I'm --
6 I'm working within your framework for purposes
7 of this question. You know, (3)(B) says once
8 the attorney general, but we all agree that's
9 the Secretary, makes the determination, the
10 country conditions are no longer met, the
11 determination decision takes effect, published
12 in the Federal Register, plus 60 days,
13 something like that. And we -- we all agree on
14 that.

15 And that -- that's what the statute
16 says about the effectiveness of the
17 determination.

18 MR. PIPOLY: Right. We have -- we --
19 the -- the final agency action here that was --
20 that was postponed is as counsel --

21 JUSTICE GORSUCH: Is the
22 determination.

23 MR. PIPOLY: It is the termination,
24 not the determination, which is not subject to
25 judicial review.

1 JUSTICE GORSUCH: That -- that's what
2 you got?

3 MR. PIPOLY: That is consistent with
4 McNary. It's consistent with Bowen.

5 JUSTICE JACKSON: Counsel, is your
6 point that the -- that judicial review runs to
7 the claim? In other words, what -- what is
8 happening in the judicial review bar, when it
9 says there's no judicial review, it means that
10 the court cannot consider the claim that's
11 being made but that's different than what the
12 court having considered the claim ultimately
13 does?

14 MR. PIPOLY: Yeah. That's exactly
15 right. I mean, again --

16 JUSTICE JACKSON: So at the end of the
17 day, if the court considers a claim about a
18 defect in the procedure, and thinks it likely
19 and, therefore, postpones the termination while
20 that claim is under review, that's not the same
21 thing as reviewing the ultimate determination?

22 MR. PIPOLY: That's exactly right.
23 The determination here has the same meaning
24 that it had in McNary and Bowen, which is the
25 substantive existence -- the existence

1 substantively of the -- of the -- of the
2 conditions for designation; i.e., is Haiti
3 still safe?

4 The final agency action at issue here
5 is the termination that was published in the
6 Federal Register.

7 JUSTICE GORSUCH: I -- I appreciate
8 all of Justice Jackson's points and yours, but
9 the statute says that determination is
10 effective basically automatically, right? And
11 it -- it tells us when it's effective. And it
12 tells us how it's effective. And that's what
13 the statute -- that's what Congress told us, is
14 once that determination is made, boom, it goes.

15 And -- and I -- I'm just struggling
16 with how -- how that -- that could be true
17 and -- and yet it could also be true that --
18 that judicial review postponing that -- that
19 termination decision is not judicial review of
20 that judicial determination -- of that
21 determination.

22 MR. PIPOLY: Right. Because the
23 termination decision, the final agency action,
24 includes substantially more than the
25 determination. It includes things like when

1 the --

2 JUSTICE GORSUCH: It includes
3 antecedent things, of course --

4 MR. PIPOLY: Correct.

5 JUSTICE GORSUCH: -- that feed into
6 that determination. I -- I appreciate that.
7 Okay. All right.

8 MR. PIPOLY: Right.

9 JUSTICE GORSUCH: Thank you.

10 JUSTICE BARRETT: Would you like to
11 address -- would you like to address the
12 General's point, the Solicitor General's point,
13 that this would drive a truck through the
14 judicial review bar?

15 MR. PIPOLY: I don't think it would
16 and no more so than, again, McNary or Bowen
17 already did.

18 And -- and I would remind the Court
19 that in Bowen and McNary -- excuse me, in
20 McNary, the plaintiffs in that case won, and
21 maybe this is responsive to Justice Gorsuch's
22 point. Even though they were challenging the
23 procedure by which their SAW determinations was
24 made, they still obtained injunctions and
25 invalidation of the underlying determinations

1 that they were challenging. So this tension
2 that we're identifying between the process and
3 the outcome is one that this Court has been --
4 and that the law has been comfortable with for
5 over 30 years now.

6 As far as it driving a hole through
7 the review bar, I would come back to the exact
8 same point -- well, to a similar point, which
9 is the determination is -- is -- is off the
10 table. We agree with that. Congress could not
11 have intended, we say, for the -- for things --
12 for these antecedent considerations not to be
13 considered because, when it enacted the TPS
14 statute, it already had the benefit of Bowen,
15 and after it passed the review bar, Congress --
16 several years after it passed the review bar,
17 Congress enacted IIRIRA, in which it -- it
18 retained the language from Bowen -- from Bowen,
19 from McNary. So it's reasonable to read the
20 review bar in this case as consistent with that
21 in Bowen and McNary.

22 In other words, Congress knows how to
23 write broader language encompassing more than a
24 specific determination. It could write all
25 questions of law are fact. And, in fact, in

1 some other sections of Title VIII, it even
2 writes language that we think would preclude
3 procedure and process claims, like in -- in
4 another section of Title VIII, it refers to all
5 procedures and policies. That's
6 1252(a)(2)(A)(iv).

7 So Congress knows how to write broader
8 language if it wants to, but it chose not to do
9 so here, even within the background of Bowen
10 and McNary.

11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas, anything further?

13 JUSTICE THOMAS: How exactly does your
14 equal protection argument work? The Equal
15 Protection Clause applies to states.

16 MR. PIPOLY: Well, this is a claim
17 that arises under the Fifth Amendment -- the
18 Fifth Amendment's equal protection guarantee.

19 JUSTICE THOMAS: Of life, liberty, and
20 property?

21 MR. PIPOLY: That is the equal
22 protection component of the Fifth Amendment due
23 process guarantee. That's correct.

24 JUSTICE THOMAS: So how does it work?

25 MR. PIPOLY: Well, this Court has held

1 repeatedly --

2 JUSTICE THOMAS: No. How does your
3 claim work? How do you get to the Fifth
4 Amendment?

5 MR. PIPOLY: Because the Fifth
6 Amendment constrains the federal government in
7 the same way that the Fourteenth Amendment
8 constrains states.

9 CHIEF JUSTICE ROBERTS: Justice Alito,
10 anything further?

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: The Fifth
13 Amendment says the federal government can't
14 discriminate on the basis of race, correct?

15 MR. PIPOLY: That's exactly right.
16 And -- and the other thing I would -- I would
17 emphasize that I was trying to get at earlier
18 is that even under this case -- this Court's
19 rationality cases, we still win.

20 Remember the -- the facts of Moreno.
21 There was a facially plausible FDA program that
22 did not allow unmarried households to receive
23 food stamps. This Court nonetheless said that
24 there was something else at play there, animus
25 against a particular group, a bare dislike of a

1 particular group.

2 And the President's statements,
3 regardless of whether you consider them
4 inherently racial or some other type of
5 classification, reflect a bare dislike for
6 Haitians in particular.

7 CHIEF JUSTICE ROBERTS: Justice Kagan,
8 anything further?

9 Justice Gorsuch?

10 Justice Kavanaugh?

11 Justice Barrett?

12 Justice Jackson?

13 Thank you, counsel.

14 Rebuttal, General?

15 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

16 ON BEHALF OF THE PETITIONERS

17 GENERAL SAUER: Very briefly,

18 Mr. Chief Justice.

19 Congress balanced the risk that -- by
20 enacting a judicial review bar, Congress
21 balanced the risk that there might be some
22 decision that's erroneous or baseless or
23 off-base against -- that would evade judicial
24 review against the risk of what we're living
25 through here, which is judicial micromanagement

1 of the sorts of foreign-policy-laden
2 determinations and decisions that are naturally
3 conferred upon the -- the political branches.

4 Justice Alito, turning to your "convoy
5 of trucks" question, if you look at the
6 briefing in this case, I think it vividly
7 illustrates the -- the concern that any
8 exception that they put forth, and the
9 exception morphs when they talk about it with
10 different -- you know, different -- different
11 formulations, any one of those exceptions
12 creates a -- a -- an exception that would
13 eviscerate the statutory -- or the judicial
14 review bar here.

15 So, if you look, for example, at the
16 Syria Respondents, the claims they raise, they
17 raise the consultation claim, but as I pointed
18 out earlier, even those consultation claims are
19 starting to bake in substantive criteria. In
20 other words, the district courts are saying,
21 well, you did consult, but your consultation
22 wasn't thorough enough. Therefore, we give you
23 a D-plus. Come back when you've got a B-minus
24 consultation. Maybe we'll let you terminate at
25 that time.

1 And it gets even more striking when
2 you get to their claims and things about the
3 national interest criteria, which is
4 unquestionably a substantive criteria. And
5 then even further, if you look, for example, at
6 the Syria Respondents, their pretext claim,
7 they say, well, we're raising a pretext claim
8 and here's four reasons why we think this
9 decision was pretextual. Reason 3 is a long
10 discussion of how they think the Secretary got
11 the administrative record wrong and made the
12 wrong kinds of judgments and so forth.

13 It gets even more striking when you
14 read the Haiti Respondents' brief, where, in
15 the 11 pages or so in which they discuss the --
16 the merits of their claims, by the second or
17 third page, they've kind of abandoned any
18 pretense that what they're raising is
19 procedural, and they're raising the whole
20 panoply of substantive challenge -- APA-type
21 challenges to this particular decision.

22 So, to the extent there is a -- you
23 know, a -- a -- a -- a judicial -- or any
24 exception to the judicial review bar here,
25 their own briefs, I think, demonstrate that

1 it's going to collapse under its own weight.
2 There's been reference to the
3 presidential directives that we're supposed to
4 provide. There is a presidential directive
5 that was provided. It was provided in the
6 executive order. And the President directed
7 the Secretary to ensure that TPS designations
8 are "appropriately limited in scope" and only
9 as long as necessary to achieve the -- the
10 textual directives in the statute. And that is
11 what the -- that is what the Secretary did
12 here.

13 And then, Justice Gorsuch, as to your
14 question, I do think it's helpful to end this
15 case by look -- or end this argument by looking
16 at their prayer for relief in their complaints,
17 which says we are challenging the termination
18 decision as to these two -- these two
19 countries. We are saying that that termination
20 decision was unlawful. It should be declared
21 unlawful. It should be set aside under the
22 APA. It should be postponed under Section 705.

23 And I think, at that point, at a very
24 high level, we are looking at a -- a request
25 for judicial review of the termination

1 determination, and that is exactly what the
2 statute bars.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 The case is submitted.

7 (Whereupon, at 12:21 p.m., the case
8 was submitted.)

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1	<p>able [2] 77:5 84:24 above [1] 95:24 abroad [2] 49:16,16 absence [1] 70:21 absolutely [11] 37:16 68:2,13 84:17 85:23 86:11 94:25 97:2,22 98:8 105:15 accept [1] 78:12 accommodated [1] 7:4 accompanying [1] 49:4 according [1] 76:9 account [6] 31:20 52:16,17 53:1 88:11,12 accounts [1] 76:9 accusing [1] 99:25 achieve [2] 78:8 122:9 across [2] 9:20 103:10 act [2] 12:17 59:7 acting [1] 27:21 action [6] 70:20 88:10 105:21 112:19 114:4,23 active [4] 56:13 74:14 76:1 94:1 acts [1] 59:25 actual [2] 31:7 52:19 actually [16] 13:24 29:19 36:8 46:15 49:19 52:7 59:5 64:19 67:10 71:18 72:20 76:23 78:6 80:6,12 83:8 addition [3] 56:14 61:16 97:9 additional [1] 28:2 address [3] 50:9 115:11,11 addressed [1] 45:22 addresses [1] 69:6 adequacy [2] 79:5,8 administration [5] 51:19,20 80:11,18 81:2 administrations [1] 99:2 administrative [12] 44:24 45:1,15 56:6 60:9 64:7,10 88:10 91:17 93:16 95:23 121:11 admissibility [1] 22:10 admitted [1] 104:6 adopted [1] 6:8 advance [1] 59:14 advice [2] 36:10 41:8 advise [1] 47:3 affirm [1] 100:7 affirmative [1] 13:24 affirmatively [1] 14:3 afresh [1] 34:17 african [4] 31:12,12 32:8 104:24 africans [3] 31:18 104:1,5 age [1] 57:3 agencies [11] 5:19 15:4 24:20 36:17 37:1 39:1,24 42:11,25 57:22 68:4 agency [7] 15:13 40:1 68:12 99:16 112:19 114:4,23 agenda [1] 102:22</p>	<p>ago [6] 17:2 18:5 51:12 96:3 107:24 108:5 agree [9] 13:7 57:13 74:23 75:3 91:7 97:14 112:8,13 116:10 agreed [1] 109:16 ahead [3] 21:9 35:8,10 ahilan [1] 54:19 alien [1] 16:11 aliens [7] 8:23 27:12,13,15 45:25 52:12 53:13 alito [24] 44:7 62:6,14 63:2 68:24 78:10,11 80:19,22 81:9 91:10 106:1,15,16 107:6,10,11,13,17,20 108:3,7 118:9 120:4 alito's [1] 61:19 allege [3] 12:2 29:20 31:24 allow [4] 33:17 52:16 95:9 118:22 allowed [4] 31:8,13 97:6,8 allowing [1] 53:13 almost [3] 31:11 48:14 81:13 alone [2] 35:23 57:1 already [12] 8:24 9:17 21:19 33:19 37:9 50:18 61:16 86:15 87:11 99:14 115:17 116:14 alternative [2] 84:16,22 although [3] 10:11 62:20 90:20 amendment [6] 117:17,22 118:4,6,7,13 amendment's [1] 117:18 america [1] 28:13 american [1] 107:7 americans [2] 30:11 100:2 amount [2] 13:13 79:15 amounts [1] 13:17 analysis [3] 21:3 90:7 94:22 animus [5] 30:9 33:9 99:21 101:6 118:24 announce [1] 19:15 announced [1] 18:25 annual [5] 12:20 50:9,10,12,14 another [6] 13:6 25:14 61:14 91:9 103:24 117:4 answer [24] 37:24 40:6,8,8,9,19,25 41:25 42:3 46:14 48:24,25 72:4,7 73:10 80:4,5 93:11 94:7 107:19 108:4 109:7 111:15,18 answerable [1] 18:7 answers [2] 86:21 93:4 antecedent [8] 5:3 60:20 62:4 94:20 109:12 111:10 115:3 116:12 anybody [1] 75:3 anyway [5] 66:2 84:16 94:6 97:9 110:15 apa [7] 68:1 69:3,23 96:4 108:25 109:3 122:22 apa-type [1] 121:20 apologies [1] 100:18</p>
2	<p>20 [1] 51:12 2018 [1] 50:25 2020 [1] 50:25 21st [1] 44:18 22nd [1] 44:18 25-1083 [2] 4:4 54:20 25-1084 [1] 98:24 27 [1] 51:12</p>	
3	<p>3 [1] 121:9 3)(b [3] 109:23 110:10 112:7 30 [1] 116:5 35 [3] 49:3,11 80:8</p>	
4	<p>4)(b [1] 109:23 41 [1] 71:25</p>	
5	<p>53 [1] 74:19 5th [1] 44:19</p>	
6	<p>6 [1] 12:21 60 [4] 15:3 58:8 110:9 112:12</p>	
7	<p>705 [4] 110:18,19 111:2 122:22</p>	
A	<p>a.m [1] 4:2 abandoned [1] 121:17 ability [1] 12:13</p>	

<p>apologize [2] 59:13 105:13 appear [1] 11:2 appeared [1] 11:3 appears [2] 45:1 57:19 appellate [1] 58:23 appendix [1] 76:11 applicable [2] 94:15 96:22 applicant [1] 29:24 applicants [2] 85:15,20 applied [4] 29:23 78:6 95:1 96:13 applies [6] 9:20 16:10,12 27:10 63:21 117:15 apply [6] 9:5 30:6 34:8 35:18 63:8 94:22 applying [2] 33:12 97:24 appointing [1] 48:15 appreciate [2] 114:7 115:6 appropriate [19] 24:20 31:19 36:13,14, 17 37:1,15,20 39:11,25 40:1,7 41:2,6 42:10,25 57:22 58:20 72:9 appropriately [2] 64:4 122:8 arbitrarily [1] 106:8 arbitrary [5] 19:24 20:9,13 88:13,18 area [5] 6:25 7:7,17 8:14 11:12 aren't [4] 25:9 31:8 33:12,18 argue [14] 26:24 27:5,16 40:13 43:19 49:7 58:16 72:19 79:13,14 97:4 101:4 103:9 109:5 argument [25] 4:4,7 8:21,24 22:3 35:14,22 52:24 54:8,19 83:4,4 88:3,5,8, 20,21,25 91:10,13 96:8 98:23 117:14 119:15 122:15 arguments [3] 78:13 108:25 109:3 arisen [1] 81:7 arises [3] 84:21,22 117:17 arlington [12] 9:6 27:10,19 28:15 29:7, 13 30:5 33:5 101:7,15 105:16,21 armed [16] 52:10 56:9,11,13 65:22 66:6 67:6 74:11,14 82:2,9 89:4,7,10,13 94:1 around [1] 106:18 art [3] 62:9,11 104:20 article [1] 49:11 articulate [1] 71:1 articulated [1] 104:20 articulating [2] 35:18 36:4 arulanantham [56] 54:18,19,21 57:13, 16 59:3 60:7 62:10,19 63:11 66:4,11, 18,21 67:18 68:2,13 69:4 70:8 71:5,9, 15 72:12 73:11 74:7,22 75:2,12 77:2, 7,10,16,20 79:11 80:21,23 81:22 82:7 83:25 84:14,17 85:23 86:24 87:6, 16 88:23 89:22 90:19,22 91:7 93:2 94:25 95:17 97:2,21 98:8 ascribed [1] 63:14 ascribes [1] 61:5 aside [2] 79:19 122:21</p>	<p>asks [2] 67:10 73:4 aspect [1] 67:15 assad [7] 48:21 74:18,19,24 75:25,25 92:24 assert [1] 47:10 assess [2] 43:1 90:12 assessment [3] 46:20 59:23 63:1 assessments [2] 55:10 63:20 associated [1] 28:12 assume [5] 15:5 27:9,14 33:1 46:13 assumed [2] 30:5 54:9 assuming [2] 36:19 39:19 asylum [1] 68:20 attached [1] 89:16 attempts [1] 5:5 attorney [3] 57:12 59:15 112:8 attributable [1] 18:8 attribute [1] 19:4 authority [5] 7:10,22,25 55:1 58:24 authorization [1] 57:1 automatically [1] 114:10 away [1] 48:3</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>b)(1 [2] 65:12 77:14 b)(1)(a [2] 53:6 82:8 b)(1)(b [3] 53:6 82:23 89:14 b)(1)(c [3] 5:21 53:7,11 b)(3 [2] 5:19 65:12 b)(3)(a [1] 57:21 b)(3)(b [1] 59:10 b)(5)(a [2] 62:8 69:2 b)(9 [1] 61:18 back [31] 10:9 12:25 21:22 27:8 37:9, 14,22 38:17 39:4 40:25 45:25 51:11 63:23 64:7,16,21 67:2 68:15 71:21 79:10 82:18 84:5,7,8,8 91:14 93:13, 18 103:18 116:7 120:23 backdrop [3] 52:19 75:11 91:16 background [5] 6:20 17:17 85:1 95:6 117:9 bad [3] 30:15,16 46:9 bake [1] 120:19 baked [1] 19:20 balance [2] 54:23 55:5 balanced [2] 119:19,21 banc [1] 6:13 bar [31] 5:6 7:4 13:14 19:21 20:6 23:2, 25 27:6 55:6 61:11,16 63:21 65:2 75:20 77:11 78:14,20 92:8 95:13 108:24 109:1,4 113:8 115:14 116:7,15,16,20 119:20 120:14 121:24 bare [4] 99:22 108:20 118:25 119:5 barred [7] 5:16 26:7 47:9 55:8 75:20 91:22 92:12 barrett [21] 20:3 26:5,18 35:3,6,9,12, 24 36:4,21 52:2 62:5 65:17 66:9,12,</p>	<p>19 67:12 81:12 94:12 115:10 119:11 bars [6] 4:25 24:24 25:1 57:16 61:14, 21 baseball [3] 38:17 43:8,15 based [6] 19:23 45:25 55:17 56:16,18 69:15 baseless [3] 19:24 22:5 119:22 basically [7] 16:6 20:11 27:3 54:7 88:17 96:18 114:10 basis [12] 9:4 10:4 33:3 56:9,14 81:25 83:16 84:20 104:13 108:21,22 118:14 beat [1] 95:25 become [2] 61:3 87:19 becomes [2] 69:22,23 bedrock [1] 56:6 beginning [2] 17:14,18 behalf [4] 4:8 54:20 98:24 119:16 belabor [1] 69:5 believe [9] 11:11 27:14 43:14 44:23 45:5,18 67:21 75:24 92:13 benefit [3] 83:18 105:10 116:14 benefits [3] 13:13 14:1 22:9 best [3] 35:17 36:2 49:9 better [2] 67:23 94:3 between [7] 60:19 69:8 73:7 76:6 88:24 93:19 116:2 beyond [1] 73:25 biden [1] 96:2 big [1] 75:7 binding [1] 27:18 bipartisan [1] 80:10 bit [1] 81:14 black [1] 31:12 blacks [1] 28:4 blank [1] 55:22 blocks [1] 34:21 blood [2] 28:13 30:11 b-minus [1] 120:23 board [2] 25:12 103:10 bombed [2] 76:3,4 bombing [1] 94:1 boom [1] 114:14 both [20] 4:22,25 17:20 18:10 25:3 32:1 44:24 47:20 51:18 60:16 75:7 96:12,14 97:3,4 99:2 103:18 104:6,9,10 bottom [1] 55:18 bound [1] 33:18 bounds [1] 12:18 bowen [17] 13:5,9,12,23,24 14:9 60:22 95:1 113:4,24 115:16,19 116:14,18, 18,21 117:9 box-checking [2] 67:14 68:15 branch [1] 7:9 branches [5] 5:15 17:16 47:17 50:5 120:3 branch's [1] 48:9</p>
---	--	--

<p>breadth [1] 63:13 breakfast [1] 73:1 brief [9] 36:9 64:11 69:5 71:25 79:2 80:10,10 97:17 121:14 briefing [2] 25:25 120:6 briefly [4] 17:5 75:13 76:21 119:17 briefs [1] 121:25 brightest [1] 49:10 bringing [1] 86:5 broad [10] 11:15 20:6 24:4 36:15 57:10,14 63:4 87:19 90:1 108:8 broadening [1] 4:24 broader [7] 62:1 65:3 80:4 102:5 112:3 116:23 117:7 broadest [1] 65:1 broadly [4] 4:21 47:10 55:5 75:1 brought [1] 34:22 brutal [1] 74:20 bucket [1] 17:8 buckets [1] 17:7 building [2] 37:23 76:3 bunch [1] 37:2 burden [1] 98:5 bush [5] 6:23 7:13 10:11 11:8,10 buying [1] 91:12</p>	<p>categorical [1] 88:24 categorically [1] 86:13 catholic [3] 60:15 61:8 95:2 cats [1] 100:1 cause [1] 61:13 certain [10] 11:20 18:19 23:9,16,17 31:10 33:2 54:4 106:25 107:1 certainly [13] 10:18 12:5 24:25 29:1 42:1 97:7 100:23 101:3,6 102:2 107:4,23,24 chain [2] 49:5,18 challenge [11] 5:7,12 12:13 15:19,20 66:22 77:5,12 80:16 81:5 121:20 challenged [1] 7:25 challenges [3] 13:16 81:3 121:21 challenging [4] 77:6 115:22 116:1 122:17 change [5] 71:10 74:24,24 93:7 102:12 characteristic [2] 106:11,13 characterization [1] 62:12 characterized [1] 6:15 check [2] 41:13 55:23 checking [1] 85:15 checks [1] 85:2 chenery [2] 69:21,24 cheney [1] 6:18 chief [36] 4:3,9 8:19 17:1,23 18:2,17 29:17 32:20 44:4,13 47:5 52:1 54:16,22 70:3,24 71:6,12 76:18 78:10 81:10 88:2 92:19 94:11 98:20,25 100:14,17,18,19 108:23 117:11 118:9 119:7,18 chief's [1] 27:8 children [1] 56:24 choice [1] 15:22 chose [2] 73:22 117:8 circuit [2] 6:14 110:24 circumstance [1] 70:25 cite [2] 28:19 60:9 cited [3] 9:22,24 27:11 cites [1] 49:11 claim [47] 5:8 6:4 10:5,6 24:2 25:20 27:6 32:3 33:17 34:20,22,24 35:22 36:24 61:13 64:2,3 65:7,8 79:12 81:7,18 87:2 88:4 90:2 92:6,15 97:7 98:10 100:22,25 101:1,3,17 102:18,25 111:7 113:7,10,12,17,20 117:16 118:3 120:17 121:6,7 claims [28] 5:9,10,16 9:21 25:7,8 26:7,14,25 27:2 34:23 61:24 64:2,6,13,16 65:7,13 69:16,19,23 79:22 93:9 117:3 120:16,18 121:2,16 classification [3] 30:1 108:17 119:5 classified [1] 106:23 clause [1] 117:15 clear [20] 13:20 26:13 33:12 34:4,16</p>	<p>56:18 59:9 70:17 92:15 95:19,19,25 96:22 97:10,12,19,24,25 98:6 102:14 clearly [6] 11:19 30:14 59:21 61:6 62:1 93:10 close [5] 15:18 27:3 29:6 94:19 101:14 closed [1] 86:19 cnn [1] 70:9 coextensive [1] 112:3 coin [1] 50:12 collapse [1] 122:1 colleague's [1] 17:4 color [1] 101:24 come [13] 32:3 34:24 55:2 56:2 71:21 84:5,7 85:17 86:16 89:17 97:6 116:7 120:23 comes [8] 8:13 38:17 40:25 44:25 68:15 79:10 88:9 112:2 comfortable [2] 74:10 116:4 coming [1] 27:12 comment [1] 68:9 commerce [6] 69:8,12 70:4 71:11 98:13,14 commit [1] 87:18 common [1] 56:7 comparative [1] 104:16 comparator [1] 104:2 compare [1] 102:7 compel [1] 42:3 competence [1] 48:10 complained [1] 28:8 complaints [2] 25:4 122:16 complete [1] 74:20 completely [4] 20:8 21:2 38:20 40:9 compliance [2] 12:14 55:14 component [4] 103:2,14 107:15 117:22 components [1] 80:13 compositions [1] 105:5 concede [4] 26:6 33:24 36:9 63:18 concedes [1] 24:25 conceivable [1] 65:2 concept [4] 13:21 19:21 54:3 108:2 concern [6] 49:19 50:17 52:7 74:10 80:1 120:7 concerned [2] 8:22 10:25 concerning [1] 43:12 concerns [12] 9:11,12 45:21 46:3 72:5,7,14 73:1,4,5,13,15 conclude [1] 33:7 conclusion [8] 15:20 20:13 24:6 69:9,14 94:18,19 109:25 conclusions [2] 4:22 23:5 condition [5] 83:3 90:9 92:1,2,17 conditions [73] 5:24 11:1 20:10,14,20,23 21:1,24 40:24 41:1,4 42:12,14,18,21 43:1,5,13,23 44:21 45:4,20,23 46:</p>
C		
<p>cabin [1] 10:13 california [1] 93:21 call [4] 8:8,9 27:3 38:23 called [1] 32:11 calling [1] 31:13 calumet [2] 21:16 24:5 came [6] 10:23 14:8 18:5 37:14,22 57:3 canada [1] 49:14 cannot [5] 5:10 23:2 38:2 102:20 113:10 canonical [1] 69:23 canonically [1] 69:20 capricious [2] 88:14,18 care [6] 56:24 78:7 80:7 83:9 84:11 91:6 cares [1] 67:16 caribbean [1] 49:13 carve [1] 5:5 case [48] 4:4,5 6:23 8:2 14:5 25:3 26:1,15,17 33:17 37:10 39:2 44:25 45:3,6 48:12 49:7 51:11 54:20 56:8,20,22 57:5 58:22 60:10 62:7 69:8 70:9 71:8,17,24 72:13,21 92:14 94:16 97:6 98:24 101:20 106:1 109:11,11 110:21,24 115:20 116:20 118:18 120:6 122:15 cases [13] 9:22,24,25 26:23,24 27:11 44:25 61:2 64:7,22 96:15 108:14 118:19</p>		

<p>1,9,16,21,23 47:2 50:1 52:20 53:2,4,6,12,24 55:10,17 56:16,19 58:1,4 59:17,23 62:25 63:19 65:22 67:5,11 72:15 73:21 78:7 79:17 82:10,15,17,18,22,23,24,25 83:2 89:8 90:7,10 91:1,4 92:3,11 93:1 109:17 112:10 114:2</p> <p>conferred [1] 120:3</p> <p>confers [1] 36:15</p> <p>confidence [1] 48:1</p> <p>confined [1] 90:17</p> <p>confirmatory [1] 70:20</p> <p>conflict [19] 52:10,11 56:10,11,13 65:23 66:7 67:6 74:11,14 76:5,8 82:2,9 89:4,7,11,13 94:1</p> <p>confusion [1] 95:11</p> <p>Congress [52] 6:24 7:3,11,15,22 8:13,16 10:24 11:5,11,19 12:11,15,19 15:13 16:7,17,24 20:12 21:5,13 22:17,19 23:14 41:22,24 47:9 50:8,13 54:9,23 55:4,13,20 61:7 65:3 67:15,19 68:3 90:16,18 91:5 99:5 104:8 114:13 116:10,15,17,22 117:7 119:19,20</p> <p>Congressional [1] 12:19</p> <p>Congress's [1] 10:14</p> <p>consecutive [1] 73:16</p> <p>consider [7] 5:20 47:19 53:4 82:12 89:3 113:10 119:3</p> <p>consideration [1] 52:9</p> <p>considerations [5] 52:5 60:3 70:5 105:24 116:12</p> <p>considered [8] 64:4,6,20 107:15 108:1,6 113:12 116:13</p> <p>considering [3] 45:7,8 64:19</p> <p>considers [2] 53:11 113:17</p> <p>consistent [3] 113:3,4 116:20</p> <p>consistently [1] 6:2</p> <p>consolidated [1] 4:5</p> <p>constitutes [1] 43:20</p> <p>constitution [1] 16:9</p> <p>constitutional [12] 6:3 7:5,9 9:21 10:5 26:7,14,25 27:2,6 61:24 97:7</p> <p>constrained [2] 54:4 55:1</p> <p>constrains [2] 118:6,8</p> <p>construed [2] 60:16 61:19</p> <p>construing [1] 62:21</p> <p>consult [14] 15:4 23:21 24:20,21 36:8,13 37:4 40:1,17 41:22 55:16 75:21 81:15 120:21</p> <p>consultation [61] 5:18 11:21 20:24 35:20 36:10,12 37:1,15,20 38:1 39:11,14 40:12,15,17 41:2,7,9,15,19 42:8,10,16,25 43:4,10,20 44:22 45:16,19 46:19 57:22,24 59:12 64:2 65:7,19 66:13,14 67:22 70:22 71:22,24 73:8,9 78:25 79:2,6,9,12,22,22 80:17 81:7 83:19 97:14 98:3 120:17,18,21,24</p> <p>consulted [6] 38:11,21 43:17 44:2 56:</p>	<p>10 83:8</p> <p>consulting [4] 20:25 35:22 42:19,23</p> <p>consults [1] 65:20</p> <p>contemporaneously [1] 60:18</p> <p>contest [1] 76:13</p> <p>context [14] 7:3 25:2 29:9 30:13,22 31:21 43:21 58:17 60:1,10 62:20 83:15 96:16 98:15</p> <p>contexts [4] 9:21 31:9 32:18 36:15</p> <p>continue [3] 21:25 42:15 65:25</p> <p>continues [2] 5:23 65:23</p> <p>contradistinction [1] 90:9</p> <p>contrary [1] 53:14</p> <p>contrast [2] 23:15 55:21</p> <p>contravenes [1] 56:5</p> <p>contravention [1] 19:16</p> <p>contributing [1] 49:20</p> <p>contrived [1] 69:15</p> <p>convincing [2] 95:20,25</p> <p>convoy [2] 78:15 120:4</p> <p>core [1] 9:8</p> <p>corner [1] 73:24</p> <p>corners [3] 55:20 76:15 78:18</p> <p>correct [17] 14:23 15:9 27:22 44:22 46:11 81:21,22 82:7 83:24 98:7 105:15 110:5,11 111:1 115:4 117:23 118:14</p> <p>correctly [5] 9:14,15 43:21 59:5 100:6</p> <p>corresponding [1] 55:4</p> <p>counsel [12] 8:18 17:1 27:7 62:5 65:17 76:19 98:21 109:7,16 112:20 113:5 119:13</p> <p>count [1] 22:6</p> <p>countries [19] 25:16 28:9 31:10,11 45:9 49:13 54:25 75:8 85:7 87:10 101:12,24 102:8 103:21 104:17,18 105:4 106:3 122:19</p> <p>countries' [1] 29:3</p> <p>country [68] 20:9,14,19,23 21:1 28:7 40:24,25 41:4 42:18,20 43:1,5,12,23 44:21 45:4,5,20,23,25 46:9,16,20 47:2 48:7 52:21 53:2,4,6,12,24 55:10,17 56:1 59:23 62:25 63:19 65:21 67:5,11 72:14 73:21 74:25 76:2 77:21 79:17 82:23 83:2 84:4,21,23 85:19 86:8,18,23 87:24 89:2,2 91:1,3 92:1,25 99:25 104:13 106:7 109:17 112:10</p> <p>country-specific [1] 102:23</p> <p>counts [1] 92:17</p> <p>couple [4] 47:18 65:4 82:17 96:3</p> <p>coupled [1] 70:20</p> <p>course [10] 27:1 38:12 61:17 68:18 70:4 75:2,25 77:24 95:3 115:3</p> <p>court [66] 4:10 9:3,6,14,19 10:5 12:16 13:5 14:5,9 16:3,18 18:17 20:10 21:17 24:4 25:22 26:16 28:1 31:20,25 32:3,17,19 33:6,15,19 34:8,15,25 35:18 36:5,7 44:25 49:2 54:22 61:25 63:</p>	<p>7 64:6 65:4 66:25 70:15,18 90:1 91:17 96:3,7,13 98:2,16 99:1,15 100:6,7 101:19 106:5,14 110:14,21 113:10,12,17 115:18 116:3 117:25 118:23</p> <p>courts [16] 20:14 23:2 25:24 31:4 34:22 37:3 41:12 48:14,15 51:3 56:5 58:23 73:18 79:21 91:18 120:20</p> <p>court's [10] 6:6 34:6 36:14 57:6 96:23 100:8 108:13,18 110:25 118:18</p> <p>cover [2] 62:2,3</p> <p>cox [1] 64:10</p> <p>crack [2] 35:17 36:2</p> <p>craft [1] 25:22</p> <p>crazy [2] 19:25 50:8</p> <p>create [1] 78:13</p> <p>created [2] 8:14 11:5</p> <p>creates [1] 120:12</p> <p>creating [2] 49:19,20</p> <p>crept [1] 37:9</p> <p>crime [3] 29:9 30:14,24</p> <p>criminal [1] 85:2</p> <p>crisis [1] 77:21</p> <p>criteria [24] 7:20 9:12 11:15 43:2,25 60:21 64:17 65:8 69:11 77:17 78:5 82:3,19 86:6 89:7,13,14 90:13 92:17 93:9 109:18 120:19 121:3,4</p> <p>cross [1] 72:10</p> <p>cross-cutting [1] 101:18</p> <p>crs [1] 76:10</p> <p>css [1] 65:5</p> <p>cut [1] 77:24</p> <p>cuts [1] 66:15</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d.c [2] 6:14 110:24</p> <p>date [1] 86:5</p> <p>daughter [2] 57:2 76:3</p> <p>day [5] 68:6 70:10 71:19 73:1 113:17</p> <p>daycare [1] 76:2</p> <p>days [4] 58:8 99:25 110:9 112:12</p> <p>days' [1] 15:3</p> <p>de [1] 33:14</p> <p>deal [2] 73:3 81:17</p> <p>debate [1] 75:17</p> <p>decades [1] 99:2</p> <p>decide [1] 36:16</p> <p>decided [4] 19:25 39:10,21 65:5</p> <p>decides [1] 20:24</p> <p>decision [33] 5:1 6:13 14:22 17:12 18:20,21 19:22 24:6,8,13,16 25:10 28:17 48:8 50:3 64:14 68:12 69:10,14,22 70:10 71:19 80:15 81:17 112:4,11 114:19,23 119:22 121:9,21 122:18,20</p> <p>decision-making [4] 58:21 60:21 68:11 94:15</p> <p>decisions [8] 4:12,22 5:12 21:5 55:16</p>
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<p>67:22 108:19 120:2 declared [3] 28:11,11 122:20 decline [1] 40:1 ded [2] 8:5,6 defeating [1] 51:21 defect [1] 113:18 defendants' [1] 110:22 deference [5] 34:16,19,20 53:17 97:4 define [2] 110:6 112:2 definitely [1] 72:16 definition [3] 36:7 89:25 108:8 degree [1] 5:18 deliberate [1] 74:4 deliberation [1] 79:16 demonstrate [2] 5:9 121:25 demonstrating [1] 5:25 demore [2] 26:11,21 denmark [6] 28:10 29:5,15 31:18 101:12,25 depart [1] 78:19 department [26] 15:4 37:6,18 38:3,6 44:20 45:13,22 46:14 56:11 65:20,21 66:23 68:21 69:7,12 70:4 72:4,25 73:3 79:10 80:6,14 83:10 93:6 106:24 department's [3] 56:12 75:24 76:9 dependence [1] 29:10 dependency [1] 30:24 depending [1] 60:5 deportation [1] 57:2 describe [1] 92:2 described [4] 57:23 90:8 101:11 103:20 describing [1] 46:15 designate [10] 5:2 54:25 56:1 59:8 77:13,16,22 86:2,2,4 designated [1] 78:2 designates [2] 76:23,24 designating [1] 89:10 designation [22] 4:16,17 5:24 21:4,14,24 42:13,15 43:25 52:8 56:9,15 58:9 59:18,19,25 77:9 82:2 86:9,10 89:11 114:2 designations [9] 5:21 51:10 72:6,8 81:4 82:8 86:14 99:4 122:7 designed [1] 101:8 despite [2] 57:9 84:25 detention [1] 57:2 determination [99] 4:15,20 5:4 11:24 12:3,8 13:8,12,21 15:16 17:20,21,25 21:14,19,22 22:3,6,10,11,12 23:13 24:4,12,19,22 25:2,9,18 37:25 39:24 42:20 43:24 46:21 47:13,14,20,24 49:17 50:4 52:25 54:11 55:9 57:12,23 58:18 59:7,20,22 60:13,17,19 61:3,12,17 62:8,22 63:4,25 64:24 81:20 88:18 89:17 90:25 91:1,13,24 94:17 95:8,12 102:11,14 109:9,14,16,22</p>	<p>110:3,6,13 111:5,11,12,13 112:3,9,11,17,22,24 113:21,23 114:9,14,20,21,25 115:6 116:9,24 determinations [13] 13:18 22:22 23:3,11,17 24:1 48:13 59:2 63:22 68:6 115:23,25 120:2 determine [14] 5:22 20:19 21:3,23 22:18 42:14 43:2 62:24 64:1,25 70:6 91:3 95:22 98:5 determined [2] 13:18 33:20 determines [5] 57:17,18 59:16,16 86:17 dhs [3] 68:18 72:3 99:13 dhs's [1] 96:4 diaspora [2] 49:10,12 diaz [1] 9:24 dictionary [1] 36:7 difference [2] 69:7 73:7 differences [2] 17:11,20 different [27] 9:21 15:16 17:25 20:17 21:2 22:7 29:23,25 32:18 45:2 53:5 60:13 62:15 63:5,20 80:13 83:12 84:12 94:18 99:8 100:12 102:25 111:21 113:11 120:10,10,10 differentiate [1] 15:22 differently [2] 69:24 88:22 differs [1] 17:10 difficult [3] 47:22 111:14,17 diminished [1] 21:12 directed [3] 19:8 23:14 122:6 direction [2] 70:11,11 directive [1] 122:4 directives [2] 122:3,10 directly [3] 64:25 104:22,25 directs [1] 22:20 dirty [1] 28:6 disagree [6] 27:9 30:4 36:20 45:24 76:14 100:16 disagrees [1] 16:3 discourage [1] 33:3 discretion [11] 6:2,22 7:2 8:12 10:13 11:4,14 22:18 36:16 54:25 68:5 discretionary [5] 7:10,24 11:15 38:22 53:16 discriminate [3] 28:2,4 118:14 discriminatory [6] 27:20 28:16 30:8 33:16 96:25 98:3 discuss [2] 44:21 121:15 discussed [5] 6:12 17:18 18:18 52:18 63:18 discusses [1] 9:4 discussion [3] 10:10 60:22 121:10 disgusting [1] 28:7 dislike [4] 99:22 108:20 118:25 119:5 disparaged [1] 99:23 dispute [7] 7:12,14,21 8:16 11:10 52:6 92:10</p>	<p>disputed [3] 26:12,15 27:4 disputing [2] 44:17 91:25 distinct [3] 59:7,22,25 distinction [3] 13:20 40:2 88:24 distinguish [3] 13:22 15:25 60:19 distinguishing [2] 106:11,13 district [21] 31:4 33:14 37:3 41:12 48:14,15 51:2,3 61:24 70:15,18 73:18 96:23 98:1,16 100:5 101:19 106:5,13 110:25 120:20 dividing [2] 106:7 108:10 dna [1] 74:13 documents [1] 99:14 dodgers [2] 41:5 43:19 doe [5] 4:5 26:11 56:23 100:12 109:7 doe's [2] 57:2 76:3 dogs [1] 100:1 doing [5] 23:18 67:7 81:8 83:24 91:21 done [7] 7:16 50:18,19 78:23 82:1 85:6 96:15 double [1] 97:3 double-edged [1] 55:25 doubt [2] 48:6 52:4 down [5] 41:12,17,19 101:20 112:2 d-plus [2] 41:15 120:23 drain [1] 49:23 drew [1] 13:20 drive [2] 78:14 115:13 driven [2] 25:23 99:10 driving [1] 116:6 drug [1] 29:10 drugs [1] 29:10 due [7] 16:10,15 27:15 52:11 81:18,20 117:22</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [3] 5:2 30:22 93:8 earlier [6] 60:23 93:3 101:5,14 118:17 120:18 early [1] 33:16 earthquake [3] 89:1,12,12 easier [2] 72:21,24 easily [1] 90:20 east [1] 75:1 eastern [1] 89:5 easy [2] 56:8 90:16 eating [3] 32:10 100:1,1 educated [1] 49:8 effect [11] 4:24 14:20 42:13,21 51:14,14,21 86:5 110:8,13 112:11 effective [4] 14:20 114:10,11,12 effectiveness [1] 112:16 eight [1] 62:24 either [6] 18:13 59:8 71:13 86:12 92:14 107:19 ekiu [1] 64:16 elaborate [1] 80:20</p>
---	--	---

<p>elevated [1] 7:19 eligibility [2] 22:9 86:6 email [7] 36:1 37:13 43:17 44:17 45:2 71:23 73:12 e-mail [3] 81:8 97:14 98:2 e-mails [1] 80:25 embedded [1] 61:3 emerged [1] 47:22 emma [1] 64:11 emphasize [4] 47:11 49:2 106:14 118:17 emphasized [1] 30:25 empirical [1] 99:18 en [1] 6:13 enacted [2] 116:13,17 enacting [2] 103:24 119:20 enamored [1] 34:23 encompasses [2] 24:5 72:14 encompassing [1] 116:23 encourage [2] 31:16 33:2 end [12] 38:2 58:9 68:5 75:21 78:8 84:11 92:23 99:11 102:22 113:16 122:14,15 ended [1] 76:1 ending [2] 72:6,8 endorses [1] 96:7 enforceable [1] 54:6 enforcement [2] 7:18 8:12 enforcing [1] 83:19 engaging [1] 49:12 enjoin [1] 110:14 enjoined [1] 51:18 enough [9] 26:22 33:16 37:7,8 39:2 41:14 57:8 95:23 120:22 ensure [5] 19:12 55:14 58:20 83:22 122:7 ensuring [1] 49:21 enter [1] 51:3 entered [1] 8:14 entire [3] 43:24 46:21 71:24 entirely [1] 66:11 entitled [2] 16:15 72:19 entitlement [1] 103:22 entrenching [1] 6:25 entrusted [3] 5:14 17:15 47:16 entry [1] 8:22 envision [1] 7:16 epa [2] 21:16 24:5 epithet [1] 31:7 equal [6] 100:22 102:18 117:14,14,18,21 erica [1] 14:6 erroneous [1] 119:22 error [18] 33:12 34:4,16 70:17 81:14 83:14 89:16,25 91:4,5 96:22 97:11,12,19,19,24,25 98:6 errors [2] 89:20,21</p>	<p>essentially [1] 6:16 european [1] 107:25 evade [1] 119:23 evd [5] 6:9 8:8 10:10,14,24 even [45] 5:16 14:25 21:1 32:12 35:14 36:23 37:9 38:7 39:8 51:1 56:12 60:25 63:25 64:14 65:13 68:11,14 77:20 79:20 80:17 81:1,6,14 82:11 83:6,14 85:3 90:24 92:9,17 93:5 94:8,8,17 108:13,22 109:13 115:22 117:1,9 118:18 120:18 121:1,5,13 everybody [3] 40:5 67:16 98:11 everyone [1] 24:25 everything [3] 57:16 62:21 66:15 evidence [13] 31:21 33:15 69:9,13 87:2 89:3 95:20 97:6,20 98:1,12,13 101:5 eviscerate [2] 5:6 120:13 evolves [1] 108:2 exact [5] 39:5 45:7 73:12 77:1 116:7 exactly [9] 34:7 100:3 105:6,13 108:25 113:14,22 117:13 118:15 example [23] 10:25 11:21 12:8 23:9,24 25:14 26:4,17 28:15,15 29:7,13,18 39:3 41:10 47:20,24 58:23 61:10 63:14 96:24 120:15 121:5 examples [2] 7:24 47:19 exception [7] 16:2 17:9 25:21 120:8,9,12 121:24 exceptions [2] 5:6 120:11 exchange [6] 35:25 36:1 37:6 38:12 43:11 44:17 exchanges [1] 45:2 exclude [1] 26:14 exclusion [1] 9:16 exclusively [1] 31:11 excuse [3] 17:2 108:19 115:19 execute [1] 74:13 executive [13] 6:22 7:9 8:12 9:9 11:4,7 12:17 18:6,9,14 19:9 83:23 122:6 executive's [2] 7:1,5 exempt [1] 17:13 exercise [2] 67:14 68:15 exercised [1] 6:1 exercises [1] 8:12 exercising [1] 11:4 exist [1] 103:5 existence [3] 109:25 113:25,25 exists [1] 105:22 exodus [1] 49:6 expansion [1] 8:25 expansive [1] 4:23 expectation [1] 49:22 expected [1] 55:11 expedited [3] 61:11,13,15 expel [2] 55:23 85:6 expert [1] 75:10</p>	<p>expertise [3] 55:12 68:19,22 explain [1] 47:8 explained [2] 28:1 96:5 explicitly [1] 56:3 express [3] 95:11,12,13 extend [4] 5:2 59:8 86:1,1 extended [2] 11:2 51:5 extends [1] 27:6 extension [4] 4:17 21:15 59:24 86:8 extensions [1] 87:10 extent [6] 14:4 44:22 45:11 68:7 84:4 121:22 extra [1] 26:13 extraordinary [3] 56:15 82:10,22 extreme [1] 22:11 extremely [2] 79:13 87:21 exudes [1] 53:17</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [3] 9:8 57:1 96:8 facially [1] 118:21 facially-legitimate [1] 105:19 facing [1] 104:12 fact [23] 6:1 10:15,25 34:15 50:15 55:7 58:3,4 61:21,22 73:9 80:12 86:16 87:17 91:8 93:7,22 96:24 98:6 102:17 104:18 116:25,25 factor [9] 27:23,25 30:3 64:19 66:6 70:6 71:20 87:3 102:18 factors [3] 88:11,12 105:18 facts [3] 33:20 90:12 118:20 factual [4] 70:17 89:20 91:4 97:10 fail [1] 33:8 faith [1] 67:21 fall [3] 40:11 79:24 91:14 fall-back [1] 63:24 falsely [1] 99:25 far [2] 5:25 116:6 fashion [1] 11:5 faults [1] 78:22 favor [3] 31:2 66:15 76:24 favors [1] 59:5 fda [1] 118:21 feasible [1] 21:4 features [2] 9:7 10:1 federal [7] 15:1 59:20 110:9 112:12 114:6 118:6,13 feed [1] 115:5 feel [2] 20:24 21:1 fell [1] 6:17 felony [2] 85:3 87:18 fewer [1] 101:10 fifth [6] 117:17,18,22 118:3,5,12 fighting [1] 26:23 figure [3] 25:13 43:9 95:8 figured [1] 71:15 filed [1] 25:4</p>
---	---	--

<p>filthy [1] 28:6 final [10] 25:1,9 64:14 81:19 94:18,19 109:21 112:19 114:4,23 finally [1] 56:20 find [6] 62:7 82:4 83:16 103:4 106:4 108:21 finding [3] 33:15 70:17 98:6 findings [7] 23:8,10,16 34:15 96:23, 23 97:10 fine [5] 41:1,1 65:24 72:11 76:14 first [21] 4:4 17:7,8 34:9 51:19 61:2 65:6 69:19 70:10 73:12 75:16 79:12 80:4,11,17 81:1,3,24 83:6 93:4 95:18 fit [1] 16:3 five [2] 22:7 73:1 fixed [1] 86:15 flag [1] 66:7 flawed [2] 10:15,17 fledgling [2] 47:23 48:2 flipped [1] 50:11 focused [1] 102:4 focusing [1] 25:8 folks [1] 104:12 follow [6] 24:8,17 55:20 68:25 76:16 105:14 followed [5] 16:9,21 23:20 35:15 103:12 following [7] 12:3 18:24 19:6 25:17 45:8 99:5 103:7 follows [1] 18:14 follow-up [1] 21:10 food [1] 118:23 footnote [2] 49:2,10 forbearance [2] 6:16 7:18 force [2] 37:17 38:3 forced [2] 96:19 99:16 foreign [33] 4:18 5:23 9:10 42:12 45:21 46:1,2 47:25 49:24 52:5 54:2 56:19 58:1,4 59:17 68:19,22 72:5,25 73:3,5,10,13,14,14,22 74:9 80:25 81:8 82:15,19 92:4,5 foreign-policy-freighted [2] 48:8 50:3 foreign-policy-laden [2] 5:13 120:1 form [2] 36:11 103:24 former [1] 80:9 formulation [1] 15:16 formulations [1] 120:11 forth [9] 11:14 12:18 16:8 26:12 43:2 67:3 99:6 120:8 121:12 forward [1] 33:17 found [3] 33:11 85:3 98:2 four [3] 45:8 84:7 121:8 fours [2] 26:19,21 fourteenth [1] 118:7 frame [1] 101:16 framework [3] 101:7 105:22 112:6 freighted [2] 9:10 49:25</p>	<p>frequent [1] 51:24 frequently [1] 12:16 friend [3] 82:20 86:25 100:15 front-line [1] 65:15 full [4] 63:13 91:12,15 98:14 full-bore [1] 91:12 function [1] 109:2 fundamental [1] 51:22 fundamentally [1] 24:24 further [8] 42:6 44:6 47:6 76:20 117:12 118:10 119:8 121:5</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>game [1] 38:17 gave [3] 19:18 99:12 109:8 gen [2] 4:7 119:15 generally [7] 8:2,3 71:8 91:18,18 100:15 102:1 general's [3] 86:22 115:12,12 genes [2] 30:16,16 geoffrey [1] 98:23 gets [3] 67:10 121:1,13 getting [2] 38:8 105:9 give [17] 19:14 32:21 34:16 40:7,19 41:14,25 42:3 47:18 48:24 50:13 62:16 65:17 68:8 85:20 109:6 120:22 given [10] 15:2 16:17 47:18 65:3 85:9,13 97:8 101:4 105:20 108:23 giving [3] 32:24 56:23 64:24 gonzales [1] 64:21 gorsuch [21] 47:6 92:20 109:15,21 110:2,7,12,19 111:3,8,17,23 112:5,21 113:1 114:7 115:2,5,9 119:9 122:13 gorsuch's [1] 115:21 gosh [1] 13:6 got [15] 18:3 37:22 44:14 58:5 64:18 76:3 77:7,10 98:18 101:5 104:19 110:17 113:2 120:23 121:10 gotten [1] 75:19 government [22] 41:20 42:11 48:2,4 55:22 58:21 61:5 63:13 66:24 67:21 72:18 80:9 83:17 86:11,17 96:9 105:18,21 106:25 107:1 118:6,13 governments [1] 47:23 governs [1] 96:4 graduate [1] 57:4 grammatically [1] 46:8 grant [1] 13:25 granted [2] 11:2 54:24 granting [1] 14:3 great [4] 38:18,18 41:5 69:6 greeks [1] 106:17 greek's [1] 107:17 ground [3] 7:14 66:22 84:22 grounds [2] 85:5 87:20 group [7] 76:25 102:7 104:2,17 108:21 118:25 119:1</p>	<p>groups [3] 84:7 106:9 108:11 guarantee [2] 117:18,23 guerrero-lasprilla [2] 89:24 95:3 guess [7] 8:9 20:4 41:17 52:23 63:11 103:1,15 guys [1] 85:22</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>haiti [21] 4:13 25:15 28:6 31:15 32:10 45:6 47:1,3 48:24 49:1,3,6,24 51:17 84:7 99:11 101:10,23 103:20 114:2 121:14 haitian [4] 49:12,15 51:17 99:23 haitians [4] 99:22 102:5,6 119:6 haiti's [3] 99:7 100:3 102:12 happen [2] 37:12,12 happened [3] 38:2 72:20 100:4 happening [3] 31:22 94:2 113:8 happens [1] 66:14 hard [1] 23:24 harder [2] 72:13 88:5 hardly [1] 4:20 hardship [2] 22:12 104:12 harmless [2] 81:14 83:14 hat [2] 25:14,15 haven [1] 11:1 hawaii [11] 8:20,25 9:20 10:3 27:8,10 32:1,4,9 34:25 44:19 head [1] 88:24 hear [2] 4:3 54:7 heard [5] 39:4 50:18 55:21 60:22 90:4 hears [1] 66:15 heartland [3] 6:17 47:15 48:9 heavily [1] 28:22 heckler [1] 6:17 heights [9] 9:6 27:10,19 30:6 33:5 101:7,15 105:16,21 held [5] 24:5 32:17 36:15 106:14 117:25 help [1] 22:14 helpful [1] 122:14 hereby [2] 14:19 110:23 herself [2] 19:5 103:20 high [2] 57:4 122:24 higher [1] 94:4 highest [1] 92:16 highly [1] 11:15 hills [1] 64:11 historical [2] 6:20 17:17 history [4] 10:16 64:12 74:25 85:2 hitched [1] 64:25 hold [2] 14:10 79:18 holders [5] 15:2 49:7 67:20 86:14 99:23 holding [1] 96:6 holds [2] 60:11 96:3 hole [2] 78:13 116:6</p>
--	---	--

<p>home ^[1] 104:13 homing ^[1] 42:7 honduras ^[1] 51:13 honestly ^[1] 107:14 honor ^[37] 57:14 58:17 59:3 60:9,25 62:11,19 63:24 68:14 69:4 71:11 74: 22 75:3,13 77:3,11 79:12,18 80:24 81:23 83:25 84:2,18 85:24 86:20,24 87:4,16 90:14,20 93:4 95:1,17 96:2 97:3,22 98:9 honor's ^[1] 80:1 hooking ^[1] 95:21 hope ^[1] 79:3 horribly ^[1] 77:21 hours ^[2] 40:22 41:11 house ^[1] 10:22 households ^[1] 118:22 however ^[4] 9:19 10:5 42:16 87:13 huge ^[1] 67:1 humanitarian ^[3] 52:7 103:24 104:9 hundred ^[2] 64:7 95:22 hundreds ^[1] 49:15 hurricane ^[1] 51:11 hurt ^[1] 22:13 hypo ^[1] 66:5 hypothetical ^[6] 19:18 25:11 39:6 59: 4 65:18 78:2 hypotheticals ^[2] 50:6 58:12</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>i.e ^[1] 114:2 idea ^[3] 32:7 96:7 102:3 ideas ^[2] 59:22 69:25 identifying ^[1] 116:2 ignore ^[1] 34:14 iirira ^[1] 116:17 illegal ^[2] 28:11,12 illegally ^[1] 56:25 illuminating ^[1] 33:12 illustrates ^[1] 120:7 imagine ^[3] 65:18 66:13 105:19 immediately ^[1] 58:13 immigrants ^[8] 28:12 31:10,12,13,17 32:12 33:3 99:21 immigration ^[12] 8:15 31:3 32:7,8 55: 8 56:3 60:17 61:4 64:15 78:3 96:14 107:25 impact ^[1] 84:12 impermissible ^[3] 69:10 71:20 105:23 impermissibly ^[1] 105:25 implied ^[1] 17:9 imply ^[1] 14:7 important ^[9] 51:16 58:19 67:1,5 68: 11 75:6 81:20 83:17 84:18 importantly ^[1] 47:13 importation ^[1] 29:11 imposing ^[1] 83:19</p>	<p>imposition ^[1] 7:6 inadmissible ^[1] 87:19 include ^[4] 11:21 31:9,25 99:17 included ^[1] 13:21 includes ^[4] 4:21 114:24,25 115:2 including ^[5] 24:7 51:8 55:15 61:23 80:10 incommensurables ^[1] 50:1 incorporated ^[1] 65:12 incorrect ^[1] 46:8 incursion ^[1] 76:6 indefinite ^[1] 49:22 indicate ^[1] 26:22 indicated ^[1] 13:10 indicative ^[1] 93:24 individual ^[1] 61:12 individually ^[1] 86:12 infer ^[1] 14:6 inference ^[3] 14:10 30:8 33:8 influence ^[2] 70:7 71:3 information ^[6] 39:4 43:11 45:12,22 67:10 68:22 inherently ^[2] 51:23 119:4 initial ^[3] 51:10 52:8 58:9 initially ^[1] 37:4 injunction ^[4] 50:24 51:4 96:10 110: 17 injunctions ^[1] 115:24 input ^[4] 36:10 38:21 41:9 44:2 inputs ^[2] 60:13 68:7 insistence ^[1] 31:9 instance ^[1] 61:2 instead ^[4] 28:9 29:4 72:4 99:9 intended ^[1] 116:11 intent ^[4] 10:12 33:16 96:25 98:4 intentions ^[1] 33:2 interest ^[18] 5:20 56:17 64:3 65:11,24 66:6 75:14 82:3,13 83:2 84:20 88:4, 21 90:4,5,8 93:8 121:3 interested ^[2] 75:17 94:14 interests ^[2] 46:10 53:15 interpret ^[3] 95:7,15 100:10 interpretation ^[2] 32:22,25 interpretive ^[1] 94:22 invalidation ^[1] 115:25 invasion ^[1] 19:9 invests ^[1] 18:21 inviting ^[1] 99:4 involve ^[1] 27:12 involved ^[2] 8:21 9:16 irrespective ^[2] 46:6 108:17 isn't ^[5] 9:1 67:25 81:24 83:16 106:1 israeli ^[1] 76:6 issue ^[9] 14:1 28:20 47:14 84:19 96: 17,21 108:18 109:10 114:4 issues ^[2] 46:2 98:7 italians ^[2] 107:21,25</p>	<p>items ^[1] 19:1 itself ^[2] 50:21 101:15</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jackson ^[51] 8:18 10:9,21 11:17,25 12: 6,10 13:3 22:13 24:7,14,16 25:5 26:2 30:10,15,18 31:5 32:6,24 33:10,22, 25 34:4,14 42:5 43:7 46:19 52:3,4 53: 8,18,22 54:12,15 67:24 68:3 69:1 94: 13,14 95:5 96:20 97:18,23 98:19 104: 22,25 105:8 113:5,16 119:12 jackson's ^[1] 114:8 jennings ^[1] 61:19 jettison ^[1] 97:25 john ^[2] 4:7 119:15 joint ^[1] 76:11 judge ^[4] 6:15 33:11,11 71:2 judgment ^[2] 59:1 60:4 judgments ^[3] 5:13 58:24 121:12 judicial ^[56] 4:11,15,25 6:22 7:3 12:23 13:2,14,25 14:3,8,18,22 17:13 19:21, 23 20:6 21:16 23:2,25 24:25 25:1,20 26:25 27:5 35:16 39:17,19 47:10 50: 21,22 51:20 54:10 55:5 57:11 75:20 78:14 88:16 109:13 111:4,11 112:25 113:6,8,9 114:18,19,20 115:14 119: 20,23,25 120:13 121:23,24 122:25 july ^[2] 44:18,18 junior ^[1] 48:16 junkies ^[1] 103:22 jurisdiction ^[2] 60:6 97:9 jurisdictional ^[1] 65:2 jurisdiction-stripping ^[4] 57:9 76:22 96:8 100:11 jurisprudence ^[1] 108:14 justice's ^[3] 18:18 29:17 32:20</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>kagan ^[40] 20:1,4 21:8,12,18,21 22:15 35:4,8,10 37:11,21 38:7,14 39:7,15, 18 40:4,14 41:16 43:8 47:5 68:23 72: 1,23 74:2 88:2,3 89:15 90:15,21,23 92:18 100:21,24 101:22 102:9,24 103:8 119:7 kagan's ^[1] 105:1 kaufman ^[1] 64:11 kavanaugh ^[16] 47:7,8 48:20,23 50:14, 17 51:25 52:18 74:17,23 75:5 76:17 92:21,22 94:10 119:10 keep ^[7] 16:1 32:2 36:12 42:7 51:6 57: 4 84:24 keeping ^[1] 66:16 kept ^[1] 82:20 killed ^[1] 84:9 killers ^[1] 103:22 kim ^[1] 26:11 kind ^[23] 5:13 7:17 8:7 9:18 11:13 12:</p>
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<p>24 21:2 22:23 24:2 31:20 32:2 34:24 41:11,14 47:13,15 49:23 50:21 57:7 67:13 88:13 102:25 121:17 kinds [16] 7:6 9:12 25:7,8 30:6 32:15 34:12,23 46:1 52:17 53:5,5 64:5 92: 11 105:10 121:12 kleindienst [1] 9:22 knowledgeable [1] 36:11 knows [2] 116:22 117:7 kurdistan [1] 76:7 kurds [1] 76:7</p>	<p>lines [1] 82:18 lineup [1] 106:19 list [1] 106:2 literally [1] 60:11 litigation [2] 50:25 99:4 little [4] 26:13 42:6,23 81:14 live [2] 67:20 106:18 lives [1] 16:11 living [4] 16:12 82:24 89:8 119:24 lock [1] 40:21 locking [1] 41:10 lodged [1] 99:14 logic [2] 34:9 58:25 long [7] 18:5 40:5,21 42:17 85:14 121: 9 122:9 longer [3] 59:17 109:17 112:10 look [25] 17:19 20:23 25:2 26:3 30:12, 22 31:8 48:18 49:2 51:17 57:18 63:3 64:9 74:3,7 78:5 80:12 82:20 98:1 108:14 111:9 120:5,15 121:5 122:15 looked [1] 88:25 looking [12] 23:12 33:14 34:6,8,17 47: 1 51:9 68:8 98:17 110:20 122:15,24 lose [1] 35:14 losing [1] 20:21 lot [2] 68:5,21 lots [1] 76:8 lower [5] 25:24 33:19 34:15,22 79:21</p>	<p>110:20 113:15 meaning [13] 4:24 24:22 40:12,15,16 61:4 62:17 63:8,20 70:13 78:20 109: 9 113:23 meaningful [2] 37:8 41:14 meaningfulness [2] 79:20 80:3 means [7] 4:19 14:24 20:6 24:14 40: 18 63:23 113:9 meant [1] 21:5 medicare [2] 13:13 14:1 mediterranean [1] 106:18 meet [2] 5:23 109:17 meets [1] 59:17 mention [1] 17:5 mentions [1] 28:23 meritless [3] 5:17 6:4 10:7 merits [3] 56:8 83:4 121:16 message [2] 48:1,6 met [8] 21:25 42:15 43:3,13 44:1 46: 24 77:18 112:10 method [1] 13:17 mexico [3] 78:3 96:17,19 micromanage [1] 5:18 micromanagement [1] 119:25 middle [1] 75:1 might [6] 19:23 61:1 72:13 90:1 93:16 119:21 migration [2] 49:5,18 millions [1] 67:19 mind [4] 16:1 32:2 36:12 51:6 minimal [1] 58:15 minority [1] 105:5 miot [3] 6:3 36:1 86:25 misdemeanor [1] 85:4 misfit [2] 12:24 50:22 mitch [1] 51:12 mix [1] 105:25 moment [1] 17:2 months [5] 13:1 50:20,23 84:25 85:1 moon [1] 41:3 moreno [2] 108:15 118:20 moreover [1] 5:10 morning [1] 4:4 morphs [1] 120:9 mortality [1] 94:4 most [12] 11:10 20:13 22:24,25 32:21, 25 47:12 49:8,8 53:11 61:6 107:10 motivated [5] 69:10 71:20 101:17 104: 7,8 motivating [3] 27:23,25 30:3 motivation [2] 105:9,17 mounted [1] 13:16 move [1] 7:15 moved [2] 7:17 11:11 movement [1] 93:23 moving [1] 6:25 much [16] 38:25 65:14 67:13,16 69:19,</p>
<p style="text-align: center;">L</p> <p>label [1] 82:21 laila [2] 57:2 76:2 language [10] 13:11,12 53:21 62:1 74: 4,6 116:18,23 117:2,8 large [4] 96:14 105:5,5 108:8 largely [1] 31:11 last [6] 38:18 41:5 60:24 91:18 98:9 107:24 later [4] 45:2 56:24 66:7 82:18 latter [1] 82:12 laughter [8] 21:11,20 44:12 71:14 100: 20 107:22 111:19,22 law [17] 55:7 56:6 60:9 61:4,21,22 64: 7,10 65:9 69:23 90:10 91:8,17,19 95: 23 116:4,25 law-abiding [1] 49:9 lawfully [2] 16:14 32:12 lawless [1] 50:8 leaches [1] 103:22 lead [1] 60:4 least [12] 7:4 11:13 16:13 18:17 43:11 58:8 65:6 68:16 69:2 75:9 92:6 104: 13 leave [3] 74:13 79:19 87:3 lebanon [2] 93:13,18 led [1] 83:12 left [3] 22:15 50:4 68:12 legal [7] 89:16,20,25 91:5,21 92:10,10 legislative [1] 10:16 legislators [1] 10:19 length [1] 69:6 less [2] 34:10 71:25 level [2] 92:16 122:24 levels [1] 79:14 liberty [1] 117:19 lies [2] 47:15 48:8 life [1] 117:19 lifesaving [1] 56:24 light [2] 33:4 101:18 likelihood [1] 21:9 likely [2] 96:25 113:18 limit [2] 7:11 87:9 limited [3] 6:21 92:3 122:8 line [3] 55:18 58:8 72:10</p>	<p>lock [1] 40:21 locking [1] 41:10 lodged [1] 99:14 logic [2] 34:9 58:25 long [7] 18:5 40:5,21 42:17 85:14 121: 9 122:9 longer [3] 59:17 109:17 112:10 look [25] 17:19 20:23 25:2 26:3 30:12, 22 31:8 48:18 49:2 51:17 57:18 63:3 64:9 74:3,7 78:5 80:12 82:20 98:1 108:14 111:9 120:5,15 121:5 122:15 looked [1] 88:25 looking [12] 23:12 33:14 34:6,8,17 47: 1 51:9 68:8 98:17 110:20 122:15,24 lose [1] 35:14 losing [1] 20:21 lot [2] 68:5,21 lots [1] 76:8 lower [5] 25:24 33:19 34:15,22 79:21</p>	<p>110:20 113:15 meaning [13] 4:24 24:22 40:12,15,16 61:4 62:17 63:8,20 70:13 78:20 109: 9 113:23 meaningful [2] 37:8 41:14 meaningfulness [2] 79:20 80:3 means [7] 4:19 14:24 20:6 24:14 40: 18 63:23 113:9 meant [1] 21:5 medicare [2] 13:13 14:1 mediterranean [1] 106:18 meet [2] 5:23 109:17 meets [1] 59:17 mention [1] 17:5 mentions [1] 28:23 meritless [3] 5:17 6:4 10:7 merits [3] 56:8 83:4 121:16 message [2] 48:1,6 met [8] 21:25 42:15 43:3,13 44:1 46: 24 77:18 112:10 method [1] 13:17 mexico [3] 78:3 96:17,19 micromanage [1] 5:18 micromanagement [1] 119:25 middle [1] 75:1 might [6] 19:23 61:1 72:13 90:1 93:16 119:21 migration [2] 49:5,18 millions [1] 67:19 mind [4] 16:1 32:2 36:12 51:6 minimal [1] 58:15 minority [1] 105:5 miot [3] 6:3 36:1 86:25 misdemeanor [1] 85:4 misfit [2] 12:24 50:22 mitch [1] 51:12 mix [1] 105:25 moment [1] 17:2 months [5] 13:1 50:20,23 84:25 85:1 moon [1] 41:3 moreno [2] 108:15 118:20 moreover [1] 5:10 morning [1] 4:4 morphs [1] 120:9 mortality [1] 94:4 most [12] 11:10 20:13 22:24,25 32:21, 25 47:12 49:8,8 53:11 61:6 107:10 motivated [5] 69:10 71:20 101:17 104: 7,8 motivating [3] 27:23,25 30:3 motivation [2] 105:9,17 mounted [1] 13:16 move [1] 7:15 moved [2] 7:17 11:11 movement [1] 93:23 moving [1] 6:25 much [16] 38:25 65:14 67:13,16 69:19,</p>
	<p style="text-align: center;">M</p> <p>made [18] 5:21 12:2 25:18 32:18 37: 25 38:15 46:7 47:20 49:1 78:12 88:9 91:4,5 98:6 113:11 114:14 115:24 121:11 mandate [2] 86:7,9 mandates [1] 86:7 mandatory [2] 55:3 99:9 mandel [1] 9:23 many [6] 31:2 57:19 63:5 92:22 93:13 105:17 marker [1] 75:6 mass [3] 56:3 85:6 93:23 mathews [1] 9:23 matter [15] 17:12 33:24 34:11,19 40: 10 41:23 47:4 53:1 66:10 69:18 71:3 96:13 99:11 101:1 102:11 mattered [1] 39:22 matters [1] 56:20 mcnary [20] 15:18,23,25 16:2 17:8,10, 20 60:15 61:9 65:5 95:2 109:11 113: 4,24 115:16,19,20 116:19,21 117:10 mean [45] 8:1 16:25 20:5 21:21 22:2,5, 14 26:3 36:1 39:5 40:14,22 41:17 42: 7,18 47:4 62:20,25 65:9 66:10,12 67: 13,14,25 68:24 70:22,25 71:9 72:12, 18,24,24 74:18 75:2 81:18 83:21 88: 7 89:23 90:21 93:2 94:18 97:22,23</p>	<p>110:20 113:15 meaning [13] 4:24 24:22 40:12,15,16 61:4 62:17 63:8,20 70:13 78:20 109: 9 113:23 meaningful [2] 37:8 41:14 meaningfulness [2] 79:20 80:3 means [7] 4:19 14:24 20:6 24:14 40: 18 63:23 113:9 meant [1] 21:5 medicare [2] 13:13 14:1 mediterranean [1] 106:18 meet [2] 5:23 109:17 meets [1] 59:17 mention [1] 17:5 mentions [1] 28:23 meritless [3] 5:17 6:4 10:7 merits [3] 56:8 83:4 121:16 message [2] 48:1,6 met [8] 21:25 42:15 43:3,13 44:1 46: 24 77:18 112:10 method [1] 13:17 mexico [3] 78:3 96:17,19 micromanage [1] 5:18 micromanagement [1] 119:25 middle [1] 75:1 might [6] 19:23 61:1 72:13 90:1 93:16 119:21 migration [2] 49:5,18 millions [1] 67:19 mind [4] 16:1 32:2 36:12 51:6 minimal [1] 58:15 minority [1] 105:5 miot [3] 6:3 36:1 86:25 misdemeanor [1] 85:4 misfit [2] 12:24 50:22 mitch [1] 51:12 mix [1] 105:25 moment [1] 17:2 months [5] 13:1 50:20,23 84:25 85:1 moon [1] 41:3 moreno [2] 108:15 118:20 moreover [1] 5:10 morning [1] 4:4 morphs [1] 120:9 mortality [1] 94:4 most [12] 11:10 20:13 22:24,25 32:21, 25 47:12 49:8,8 53:11 61:6 107:10 motivated [5] 69:10 71:20 101:17 104: 7,8 motivating [3] 27:23,25 30:3 motivation [2] 105:9,17 mounted [1] 13:16 move [1] 7:15 moved [2] 7:17 11:11 movement [1] 93:23 moving [1] 6:25 much [16] 38:25 65:14 67:13,16 69:19,</p>

<p>25,25 70:7,7 71:2,3,4,7 72:13,21,23 mullin [1] 4:5 must [3] 23:5 55:19 56:18</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name [1] 82:21 names [2] 31:14 32:11 narrow [2] 79:13 87:21 narrower [3] 61:4 65:14 91:10 narrowly [1] 95:16 national [23] 5:20 9:11 46:10 53:14 56:17 64:3 65:11,24 66:6 71:18 75:14 82:3,13 83:2 84:20 88:4,21 90:3,5,8 93:8 100:25 121:3 nationals [2] 49:15 52:12 nations [1] 47:22 naturally [2] 50:4 120:2 nature [1] 29:24 necessarily [4] 29:15 64:23 92:14 93:24 necessary [6] 62:7,15 78:17 80:20 108:15 122:9 need [6] 10:17 38:25 68:7 87:7 90:11 105:17 needed [1] 95:24 needs [1] 27:20 negative [3] 14:10 32:22,25 negotiate [1] 96:19 neighboring [2] 49:13 55:8 neutral [1] 9:7 never [4] 56:10 80:16 81:5,19 new [8] 47:23 85:14,20 86:6,9,14 87:8,14 newspaper [1] 93:15 next [2] 59:11 76:4 nicaragua [1] 51:13 night [2] 38:18 41:5 nine [1] 29:20 nishimura [1] 64:16 noem [2] 18:24 99:12 non-citizens [1] 55:24 none [4] 15:6 28:22 39:24 106:6 nonetheless [2] 69:14 118:23 non-existence [1] 110:1 non-legal [1] 90:17 non-reviewable [1] 60:5 non-white [8] 29:4 99:21 101:21 102:8 103:21 104:17 106:10,21 nordic [1] 106:6 normally [1] 60:2 north [1] 76:8 norway [5] 28:10 29:5,14 31:17 101:12 nothing [7] 20:10 43:16 56:5 83:7 85:6 87:23 90:23 notice [5] 14:19 15:3 23:23 59:19 68:9 notion [1] 49:17</p>	<p>novo [1] 33:14 nugatory [1] 28:3</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objected [3] 6:24 7:13 10:12 objecting [1] 11:8 objection [4] 7:5 35:13 77:1 103:14 objections [4] 73:14,15 78:23 79:7 obligated [1] 53:4 obligation [4] 55:16 57:21 58:1 77:22 obligations [1] 109:12 obtained [1] 115:24 obvious [2] 22:25 73:20 obviously [10] 7:13 9:14 28:20 44:25 45:25 69:13 74:4 89:25 91:17 97:19 off-base [1] 119:23 offering [1] 77:1 office [1] 68:20 officer [1] 18:6 officers [1] 18:9 officials' [1] 80:9 okay [12] 16:19 22:1 26:2 36:21 40:4 66:9,9 75:5 79:20 81:15 110:12 115:7 old [1] 69:20 older [2] 69:20,25 once [6] 55:2 79:4 92:9 110:8 112:7 114:14 one [42] 6:19 13:7 20:6 22:7 28:5,14,21,22 30:22 44:25 45:3,5 48:21 51:15 56:9 59:11,11,22 64:20 66:25 67:4 71:25 77:17 78:11 79:3 80:7 82:9,12 83:5,6,17 85:4,12 91:9 94:16 96:16 97:16 102:9 103:23 105:17 116:3 120:11 ones [2] 25:16 65:4 ongoing [6] 12:19 49:5,6,18 51:1 52:10 only [19] 23:25 27:21 46:25 47:1 58:16,25 63:21 65:12 71:5 77:16 80:1 81:7 84:21,22 89:14 90:5 103:25 105:17 122:8 open [2] 78:18 83:23 opening [3] 14:16 58:8 78:1 operates [2] 97:12 103:15 opinion [5] 6:16 18:18 24:6 29:18 32:20 opinions [2] 4:22 39:22 opposed [5] 9:5,17 39:25 45:20 101:24 opposite [2] 60:11 95:10 oppression [1] 74:20 options [1] 85:25 oral [3] 4:7 54:19 98:23 order [12] 11:6 19:9 20:19 22:22 56:21 59:8,24,24,25 62:6 90:12 122:6 orders [3] 18:14 47:21 61:25</p>	<p>ordinary [3] 62:17 63:8 78:20 origin [1] 100:25 original [1] 37:13 other [42] 5:19 9:23,24 10:6 13:9 35:21 36:15 37:17 42:17 45:5,12 53:23 54:1 55:14 56:14 57:20 58:7 61:1,12 62:17 64:22 69:25 75:8 77:25 79:21,23,23 81:3 82:10 85:4 93:8 95:10 103:21 105:8 106:18 109:2 113:7 116:22 117:1 118:16 119:4 120:20 others [3] 31:2 33:4 76:25 otherwise [1] 102:21 ouija [1] 25:11 out [19] 5:5 9:15 25:11,13,16 32:14 37:5,13 43:9,21 49:5,23 69:2 87:1 95:8 101:8 105:23 111:15 120:18 outcome [1] 116:3 outlier [1] 71:17 output [1] 60:14 outset [2] 54:25 90:5 outside [3] 63:15,17 93:15 over [9] 44:13 48:5 57:24 58:3,14 67:6 74:11 108:2 116:5 oversight [1] 12:20 own [5] 5:9 74:12 75:24 121:25 122:1</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>package [1] 48:18 page [5] 71:25,25 97:16 106:4 121:17 pages [1] 121:15 panoply [1] 121:20 paper [1] 25:15 paragraph [3] 5:19,24 9:3 paraphrasing [1] 42:9 parole [1] 96:4 part [13] 14:1,8 28:17 42:10 53:19 74:15,15 76:2 88:13 89:4,5 104:3 105:24 partially [1] 7:4 particular [19] 7:7,19 8:2,15 9:3 10:1 12:24 17:24 41:23 64:2 70:25 76:25 99:22 102:4 106:4 118:25 119:1,6 121:21 particularly [6] 65:3 72:2 82:1 96:16 101:18,23 parties [1] 99:3 parts [3] 22:19 53:23 54:1 party's [1] 44:13 passed [3] 7:3 116:15,16 paths [1] 62:13 pausing [1] 70:12 pediatrician [1] 56:23 people [43] 9:17 16:12,13 28:9,10 29:2,5,14,14 49:23 52:22 55:2 56:22 67:5,6,20 68:15,20 84:5,6,8,23 85:6,13 86:6,15 87:8,11,12 93:12,13,17,23 94:3 101:10,24 103:20 105:11 106:8,</p>
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<p>18,20 107:7 108:10 perception [1] 11:13 perhaps [2] 47:12 83:12 period [2] 58:9 85:14 periodic [5] 51:24 82:13 85:24 90:6,7 permissible [6] 70:5 73:8,9 79:5 82:12 83:15 permission [2] 16:15 85:21 permit [1] 67:15 permitted [1] 30:2 person [5] 12:1 39:21 40:21 56:2 72:16 personal [1] 52:13 petitioners [2] 4:8 119:16 pets [1] 32:10 phase [1] 64:5 phrase [1] 36:25 pick [4] 22:14 78:21 79:7 93:18 picking [1] 53:18 pipoly [48] 98:22,23,25 100:12,17,23 101:2 102:2,19 103:6,17 104:23 105:6,12 106:12,22 107:9,12,14,18,23 108:4,12 109:6,19,24 110:5,11,16 111:1,6,13,20 112:1,18,23 113:3,14,22 114:22 115:4,8,15 117:16,21,25 118:5,15 place [1] 23:22 places [5] 18:20 31:17 57:19 93:19 101:10 plain [5] 24:22 40:12,15,16 56:17 plainly [1] 5:10 plaintiffs [7] 25:3 72:18 87:1 100:13 102:6 109:7 115:20 plausible [3] 30:8 33:8 118:21 play [1] 118:24 played [1] 28:17 please [3] 4:10 54:22 99:1 plurality [1] 61:19 plus [3] 94:19 110:9 112:12 point [28] 9:2,15,15 12:11 15:25 18:16 20:16,25 24:9 28:6 45:11 51:16 60:24 66:5,10 69:5 80:24 87:1 103:18 105:1 111:9 113:6 115:12,12,22 116:8,8 122:23 pointed [4] 9:7 43:21 45:14 120:17 pointing [1] 111:15 points [7] 6:19 17:3,7 24:3 49:1 78:11 114:8 poisoning [2] 28:13 30:11 pole [3] 107:3,6,6 police [2] 68:7 79:20 policies [4] 15:21 55:6 61:15 117:5 policy [37] 6:16 7:18 8:6 18:25 19:5,16 31:3,16 32:7,8 45:21 46:1,2 47:25 49:25 52:5 54:2 68:19,22 72:5,25 73:3,5,10,13,14,15,22 74:9 86:23 96:4 97:1 103:24 104:7,8,20 105:18</p>	<p>political [10] 5:15 17:16 47:16 48:9 50:5 70:5,7 71:3 78:8 120:3 pools [1] 85:12 poor [2] 28:2 29:13 population [2] 86:15,19 portion [2] 89:1,2 pose [1] 52:13 position [11] 14:15 15:8 16:1 31:3,6 46:6 63:24 82:11 86:12,22 102:19 positions [1] 18:11 positive [1] 77:8 possibility [1] 19:22 possible [4] 32:22 74:9 78:21 79:7 post [1] 15:1 posted [1] 14:18 postponed [5] 100:6 110:23,25 112:20 122:22 postponement [1] 110:19 postpones [1] 113:19 postponing [2] 111:12 114:18 posture [1] 75:8 potential [1] 63:13 poverty [3] 29:10 30:17,24 power [4] 13:25 55:24 85:5,10 practice [2] 6:7,10 prayer [1] 122:16 pre [1] 102:21 precedents [3] 13:4 95:15 108:20 precisely [2] 75:19 105:22 preclude [1] 117:2 precludes [1] 24:1 preliminary [5] 50:24 56:21 70:16 97:5 98:16 preordained [1] 99:10 present [3] 8:24,24 9:13 presented [2] 30:21 46:15 preserved [2] 55:13 56:22 president [26] 6:23 7:8,13 8:21 9:16 10:11 11:8,10 16:20,21 18:7 19:4,8,10 28:5,20 31:1 48:2 70:12 84:4 85:17 98:4 99:23 102:4 105:2 122:6 presidential [2] 122:3,4 president's [12] 18:8,14,19,25 31:9 33:2 34:10 99:10,20 103:18 104:15 119:2 presume [1] 12:15 presumed [1] 12:17 presumption [3] 94:21 95:18 96:14 pretend [1] 75:9 pretense [1] 121:18 pretext [6] 5:25 69:16,23 98:10 121:6,7 pretextual [2] 99:13 121:9 pretty [3] 32:13 57:10 102:14 prevail [1] 63:10 previously [1] 87:13 prime [1] 28:15</p>	<p>principle [2] 60:8 71:1 prior [2] 14:5 23:16 probably [2] 72:25 111:20 problem [7] 49:5,20 67:1 80:25 85:18 87:7,14 problems [4] 29:9 30:14,23,25 procedural [18] 5:8 15:6,11,21 16:8 19:17 35:13,23 53:1 58:16,19 60:20 67:15 68:10 78:22,22 88:5 121:19 procedurally [1] 109:12 procedure [3] 113:18 115:23 117:3 procedures [4] 55:3,6 61:15 117:5 proceeds [2] 56:22 57:5 process [23] 14:17 16:10,16,18,18,19,22 27:15,15,17 35:14 64:13 80:20 81:18,20 83:7 85:24 99:5,9 111:9 116:2 117:3,23 proclamation [1] 19:10 proffered [1] 38:16 program [14] 8:9 10:14 14:20 29:3 70:12,13 84:11 85:19 87:9 104:4,4,11 105:4 118:21 programs [5] 103:16 104:9 105:3,10 107:1 project [1] 48:1 prompt [1] 38:13 proper [1] 10:3 properly [1] 6:15 property [1] 117:20 prophecy [1] 49:21 protected [5] 4:13,18 51:7 86:20 87:25 protection [8] 85:9 87:22 100:22 102:18 117:14,15,18,22 provide [4] 38:3,4 56:3 122:4 provided [6] 12:19 32:23 45:13 80:6 122:5,5 provides [2] 4:14 10:3 provision [16] 4:19,24 13:15 26:8 57:10 59:10 61:14 62:16 76:22 88:16 89:19 90:16 91:6,8 92:3 100:11 provisions [5] 61:7,10,11 63:6 79:22 public [2] 68:9 107:3 published [3] 110:8 112:11 114:5 publishing [1] 59:19 pull [5] 25:11,16 86:22,23 87:2 pure [2] 65:9 90:10 purported [1] 99:15 purpose [9] 16:8 27:20 28:2,3,16 51:22 52:19 83:22 105:22 purposes [2] 106:23 112:6 purview [1] 89:6 put [10] 23:22 24:17 25:14 50:23 51:3 62:14 73:10 101:20 106:17 120:8 putting [1] 12:11</p>
--	---	---

Q

<p>question ^[35] 8:6 17:4 20:5 23:19 26:6 27:8 29:25 35:7 38:15,16 39:9,10 40:5,19,23 45:18 46:15 65:9 71:22 72:3 77:3 81:13 90:10,13 91:2,11 92:7 94:7 95:20 111:15,18 112:2,7 120:5 122:14</p> <p>questioning ^[1] 101:5</p> <p>questions ^[12] 6:6 55:7 57:6 60:20 61:21,22 90:17,22 91:19,22 100:8 116:25</p> <p>quick ^[1] 66:5</p> <p>quite ^[6] 18:4 37:7 102:24,24 103:15 106:2</p> <p>quoting ^[2] 10:15 28:7</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>race ^[8] 28:23,23 33:3 34:13 100:25 107:2,4 118:14</p> <p>race-based ^[5] 30:1 101:3,16 102:21 103:7</p> <p>racial ^[11] 31:7 99:21 101:6 103:2,14 105:5,17,23 106:9 107:15 119:4</p> <p>racially ^[2] 30:19 101:17</p> <p>raise ^[7] 30:8 33:8 40:3 78:22 79:7 120:16,17</p> <p>raised ^[1] 5:11</p> <p>raises ^[1] 46:1</p> <p>raising ^[3] 121:7,18,19</p> <p>ramos ^[1] 50:24</p> <p>rare ^[1] 71:17</p> <p>rarely ^[1] 4:20</p> <p>rate ^[1] 94:4</p> <p>rather ^[1] 13:18</p> <p>rational ^[3] 9:4 10:4 108:22</p> <p>rationales ^[1] 99:17</p> <p>rationality ^[2] 108:14 118:19</p> <p>reaches ^[1] 96:6</p> <p>read ^[16] 42:8,18 53:22,23 64:17 65:10,11 69:2 90:24 91:8,16 94:17 95:22 97:16 116:19 121:14</p> <p>reading ^[3] 65:1 89:19 93:14</p> <p>reads ^[1] 55:22</p> <p>really ^[22] 7:17 11:12 19:25 21:4,8 39:5 40:14 43:16 51:21 63:9 66:10 67:16,24 69:22 70:1 73:6,6 97:15 107:11,12 108:7,8</p> <p>reason ^[14] 10:22 11:7 27:21,21 37:19 69:15,16 77:22 84:16 99:19 102:20 105:2,19 121:9</p> <p>reasonable ^[2] 96:5 116:19</p> <p>reasonably ^[1] 96:5</p> <p>reasons ^[8] 10:2 38:23 47:9 50:13 93:17 99:12 111:21 121:8</p> <p>rebuttal ^[2] 119:14,15</p> <p>recast ^[1] 5:8</p> <p>receive ^[1] 118:22</p> <p>recent ^[2] 32:8,14</p>	<p>recently ^[1] 60:10</p> <p>recognize ^[1] 75:25</p> <p>recognized ^[1] 48:3</p> <p>recognizing ^[1] 100:5</p> <p>reconsider ^[2] 13:1,1</p> <p>record ^[12] 44:24 45:1,15 65:19 69:8,13 73:15 81:25 83:7 93:16 102:3 121:11</p> <p>recourse ^[1] 56:25</p> <p>recover ^[1] 35:11</p> <p>recovery ^[2] 89:1,12</p> <p>refer ^[4] 21:22 29:9 34:12 65:16</p> <p>reference ^[2] 62:23 122:2</p> <p>referencing ^[1] 23:4</p> <p>referring ^[2] 5:11 82:18</p> <p>refers ^[3] 29:18 63:23 117:4</p> <p>reflect ^[1] 119:5</p> <p>reform ^[1] 10:17</p> <p>refugee ^[4] 68:20 85:9 104:4,11</p> <p>refugees ^[2] 48:4 65:25</p> <p>regard ^[2] 33:18 104:23</p> <p>regardless ^[4] 42:4 46:6,8 119:3</p> <p>regents ^[12] 18:18 29:18,22,23 30:5 32:1,5,17,20,21 34:9 35:1</p> <p>regime ^[7] 7:18 23:16 48:21 74:18,19,24 92:24</p> <p>register ^[5] 15:2 59:20 110:9 112:12 114:6</p> <p>regular ^[1] 62:18</p> <p>regulates ^[1] 38:5</p> <p>regulating ^[1] 7:20</p> <p>regulation ^[1] 11:3</p> <p>regulations ^[1] 7:7</p> <p>rejected ^[5] 32:4,4 34:25 35:1,1</p> <p>relate ^[2] 43:4,8</p> <p>related ^[4] 33:1 61:13,15 98:7</p> <p>relates ^[3] 28:23 46:20 105:4</p> <p>relations ^[1] 9:11</p> <p>relevance ^[2] 92:24 93:5</p> <p>relevant ^[8] 34:10 42:9 43:6 53:11 97:16 98:15 102:6,7</p> <p>relied ^[2] 49:11 60:21</p> <p>relief ^[9] 56:4,21 70:16 78:3 97:5 98:16 103:25 110:18 122:16</p> <p>rely ^[3] 8:20 55:2 86:16</p> <p>relying ^[1] 5:11</p> <p>remain ^[3] 65:22 85:7 87:25</p> <p>remains ^[1] 56:13</p> <p>remember ^[5] 45:7 61:20 84:19 96:11 118:20</p> <p>remind ^[1] 115:18</p> <p>remote ^[1] 32:18</p> <p>removal ^[4] 61:11,13,16,25</p> <p>remove ^[1] 18:19</p> <p>removed ^[1] 27:16</p> <p>render ^[1] 28:3</p> <p>reno ^[2] 17:21 60:15</p>	<p>renounced ^[1] 102:17</p> <p>repeat ^[1] 101:11</p> <p>repeatedly ^[2] 78:16 118:1</p> <p>report ^[3] 10:22 50:10 76:10</p> <p>reporting ^[1] 12:20</p> <p>reports ^[4] 50:10,14 75:24 80:6</p> <p>report's ^[1] 50:12</p> <p>reprinted ^[1] 71:24</p> <p>request ^[1] 122:24</p> <p>require ^[1] 53:24</p> <p>required ^[7] 11:19 14:25 15:7 26:14 46:10 54:5 82:14</p> <p>requirement ^[3] 12:21 45:16 83:20</p> <p>requirements ^[5] 12:12 14:25 55:14 68:10 103:12</p> <p>requires ^[11] 5:19,22 15:2,3 27:15 43:10,11 45:19 53:2 87:17,24</p> <p>re-review ^[1] 51:2</p> <p>re-reviewing ^[1] 45:4</p> <p>rescinded ^[1] 87:18</p> <p>resist ^[1] 62:11</p> <p>resolve ^[1] 99:11</p> <p>respect ^[2] 4:16,23 11:24 12:8 18:1 21:14 22:21 24:12 32:11 33:19 41:10 44:18,19 45:4,20,23 54:13 76:22 90:25 97:1 109:3</p> <p>respected ^[1] 19:11</p> <p>respond ^[1] 37:18</p> <p>respondents ^[5] 4:11 54:20 98:24 120:16 121:6</p> <p>respondents' ^[3] 5:5 6:3 121:14</p> <p>response ^[10] 17:3 37:14,22 38:4,9,13,17 39:1 43:15 46:18</p> <p>responsibility ^[1] 9:9</p> <p>responsive ^[2] 8:5 115:21</p> <p>rest ^[1] 70:22</p> <p>restrict ^[2] 11:6 109:4</p> <p>restrictions ^[2] 8:22 10:12</p> <p>resubmitting ^[2] 85:1,2</p> <p>result ^[3] 97:20 99:8,10</p> <p>retained ^[1] 116:18</p> <p>return ^[1] 52:22</p> <p>returned ^[1] 92:23</p> <p>returning ^[2] 48:4 52:11</p> <p>reviewability ^[3] 36:19 92:8 94:21</p> <p>reviewable ^[28] 11:18,22,23 12:1,1 15:7 19:19 35:23,24 53:9,10 54:1 57:8 60:5 64:13,15 65:13 66:3,20 67:8,9 69:17,22 78:4 88:4 90:2 92:9 93:10</p> <p>reviewed ^[2] 50:20 97:10</p> <p>reviewing ^[6] 5:21 19:1 21:1 35:19 47:2 113:21</p> <p>revisit ^[1] 26:16</p> <p>reyes ^[1] 33:11</p> <p>rich ^[1] 29:15</p> <p>rick ^[1] 64:10</p> <p>rid ^[2] 103:11 105:9</p>
---	--	--

<p>risk ^[4] 54:10 119:19,21,24 road ^[3] 41:11,17,18 roberts ^[27] 4:3 8:19 17:1,23 18:2 44:4,13 47:5 52:1 54:16 70:3,24 71:6,12 76:18 78:10 81:10 88:2 92:19 94:11 98:20 100:14,19 108:23 117:11 118:9 119:7 robust ^[2] 65:19 66:14 rodriguez ^[1] 61:20 room ^[2] 40:22 41:11 row ^[1] 70:14 rule ^[2] 58:10 59:12 rules ^[6] 55:3,20 58:16,19 68:10 95:14 ruling ^[1] 69:2 run ^[1] 37:22 runs ^[1] 113:6</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safe ^[11] 11:1 52:21 74:15 75:18 76:14 84:5,6,13 85:19 93:24 114:3 safety ^[1] 52:14 same ^[29] 26:8 29:19 31:15 34:7 40:20 46:22 58:25 61:18 62:25 72:3 73:12,19 76:5 77:1,5 81:16 82:1 93:3,20 104:7,8 108:4,25 109:7,9 113:20,23 116:8 118:7 sample ^[1] 74:13 sanctions ^[1] 48:3 sara ^[1] 56:23 satisfied ^[2] 14:13 108:22 satisfy ^[1] 45:16 sauer ^[91] 4:6,7,9 6:9,12 7:12 8:1,4 9:2 10:18 11:9,23 12:5,7,15 13:23 14:13,23 15:9,24 16:23 17:6,24 18:12,16 19:2,7,20 21:7,13 22:2 24:3,10,15,18 25:21 26:3,10,20 27:23 28:18 29:8,17 30:4,12,17,20 31:23 32:16 33:6,21,23 34:2,6,18 35:21 36:3,6,23 37:16 38:1,10,19 39:12,16,23 40:11 41:8 42:1,22 43:14 44:11,15,23 45:14,24 46:12,17 47:11 48:22,25 50:16,19 53:3,10,20 54:9,13 78:12 119:15,17 saw ^[3] 50:24 109:10 115:23 saying ^[35] 13:8 14:19 16:7,20 19:19 25:4,6 28:5 29:1 37:7 41:13 48:16 53:25 61:10 66:13 71:7 72:15 74:10,12 79:19 82:20 84:12 87:8 90:25 91:14,25 92:25 93:20 97:24 98:1 103:22 104:11 105:2 120:20 122:19 says ^[50] 4:19 16:24 19:5 20:18,22 22:17 23:2,10,20 24:10,12 25:12 27:24 32:21 34:9 36:13,25 41:22 42:9,24 43:18 45:3,6 47:25 56:12 57:11 59:13,15 60:11 65:21 66:1,16 67:4 72:25 76:14 77:12 78:19 82:24 83:10 84:4 88:17 89:9 95:6 110:4 112:7,16 113:9 114:9 118:13 122:17</p>	<p>scandinavia ^[1] 102:1 scandinavian ^[1] 101:25 scheme ^[1] 10:24 scholars ^[1] 64:10 school ^[1] 57:4 scope ^[5] 91:23 95:12 96:9 97:15 122:8 score ^[1] 109:15 scrutiny ^[1] 108:16 sec ^[1] 69:21 second ^[8] 75:23 80:5 83:5 93:12 96:1,21,21 121:16 second-guess ^[1] 48:17 second-guessed ^[1] 48:13 secretaries ^[1] 48:16 secretary ^[74] 4:16 5:20 6:1 8:23 11:20 12:2,12,25 14:18 16:23 18:9,21,22,23 20:18 21:23 22:18,20 23:3,5,9,15,20 24:1 25:12 28:19 31:2 35:15 36:16 37:2,17,24 38:5,8,24 39:9 42:11 44:20 47:25 50:7 52:16,25 53:3,20 54:4,24 55:11,19,25 56:10 57:17,21,25 65:20 66:1 67:3 70:9 71:18 76:13,23 77:13 78:1,2,17 83:9 85:10 89:9 93:5 99:12 103:20 112:9 121:10 122:7,11 secretary's ^[14] 4:12,21 5:1 10:13 12:14 25:10 34:11 88:17 89:17 99:15 103:19 109:19,24 111:4 section ^[6] 4:14 22:7 82:6 111:2 117:4 122:22 sections ^[1] 117:1 security ^[1] 9:11 see ^[20] 13:2,11 15:22 18:10 21:19 23:10 25:5,24,25 28:14 36:8 37:8 44:3 48:12 54:1 61:6 63:15 78:6 103:15 112:4 seek ^[3] 4:11 41:8 55:24 seeking ^[3] 36:9,10 44:2 seem ^[3] 26:6 41:6 106:3 seems ^[14] 14:16 15:18 22:24 29:6 40:17 41:23 52:15 57:10 78:18,18 88:4 91:6 102:13 103:3 seen ^[1] 101:19 self-fulfilling ^[1] 49:21 send ^[1] 48:6 sending ^[1] 45:25 sends ^[1] 43:17 senior ^[1] 80:9 sense ^[9] 12:23 17:22 22:4 51:15 54:6 56:7 68:18 79:13 80:4 senses ^[1] 22:8 sent ^[2] 37:13 84:8 sentence ^[2] 42:19 46:22 sentences ^[1] 63:17 sentiments ^[1] 104:20 separate ^[1] 32:14</p>	<p>september ^[1] 44:19 serious ^[1] 52:13 seriously ^[2] 10:15,16 services ^[3] 60:16 61:8 95:2 set ^[8] 11:14 12:18 16:8 43:2 55:20 87:19 99:5 122:21 sets ^[1] 25:3 seven ^[2] 73:16 74:5 several ^[2] 47:12 116:16 shall ^[5] 20:23 42:11,14 43:1 59:18 sham ^[1] 99:16 she's ^[6] 19:5 25:18 42:19,22 44:1 50:10 shift ^[1] 75:7 shithole ^[1] 99:24 s-hole ^[1] 28:7 short ^[1] 42:17 show ^[2] 95:19 99:15 showing ^[1] 28:16 shows ^[1] 84:7 significant ^[2] 8:25 74:24 signing ^[1] 6:24 silberman ^[1] 6:15 similar ^[6] 13:11 48:24,25 49:1 59:15 116:8 simple ^[1] 76:12 simply ^[1] 13:15 simultaneously ^[1] 103:23 since ^[2] 92:23 97:13 single ^[2] 28:22 85:3 situation ^[3] 12:22 51:9 94:23 situations ^[1] 8:11 sky ^[1] 79:24 slip ^[1] 25:15 small ^[1] 96:14 smith ^[2] 6:13,13 social ^[3] 60:15 61:8 95:2 sold ^[1] 29:21 solely ^[1] 56:19 solicitor ^[1] 115:12 solve ^[1] 87:7 somalia ^[1] 51:11 somebody ^[7] 40:18 41:25 42:2 68:16,17 73:4 80:10 someone ^[2] 23:19 36:11 sometimes ^[3] 41:19,20 73:13 sorry ^[7] 20:21 21:8 35:8 44:11,15 103:6 109:23 sort ^[22] 7:6 11:14 14:7 17:12,14 34:21 38:22 47:14 48:7,11 49:9,24 50:2 51:5 68:4 69:20 80:19 81:13 93:15 95:7 104:19 107:15 sorts ^[3] 31:14 48:12 120:1 sotomayor ^[39] 14:12,15,24 15:12 16:5,25 18:4,13,23 19:3,13 27:7,25 28:25 29:12,22 44:8,9,16 45:10,17 46:4,13,25 71:23 81:11,12 82:5 83:21 84:</p>
--	---	--

<p>3,15 85:11 86:21 87:5,12 88:1 101:13 118:11,12 sotomayor's [1] 23:23 sought [1] 38:21 sound [2] 59:14 89:16 sounded [1] 81:14 south [8] 31:18,18 32:7 39:2 103:25 104:5,5,23 southern [5] 76:4 89:4 93:17 107:20,25 spaniards [1] 108:3 speaking [2] 67:4 80:7 speaks [1] 23:25 special [1] 104:10 specialized [2] 17:22 22:4 specific [4] 22:16 42:23 45:19 116:24 specifically [6] 13:10 19:11 22:20 51:17 99:24 101:8 speech [1] 62:18 square [4] 55:20 73:24 76:15 78:17 staff [1] 99:16 stage [1] 82:13 stamps [1] 118:23 stand [1] 46:18 standard [9] 6:4 10:4,8 29:23 33:13 34:2 88:13 96:22 97:25 standards [4] 35:18 36:5 94:15 96:21 started [3] 19:15 81:1,5 starting [2] 34:21 120:19 stat [1] 14:2 state [46] 4:18 5:23 37:6,18 38:3,3,6,19,21 42:12 43:18 44:20 45:12,23 46:14 48:16 52:11,12 56:11,12,19 58:2,5 59:17 65:20,21 66:23 68:21 72:3,5,7,24 73:2 75:24 76:9 79:9 80:6,13 82:1,15,19 83:10 92:4,5 93:6 106:24 stated [1] 104:13 statement [4] 6:24 26:13 28:14 70:19 statements [22] 18:8 28:18 29:8,19,20 30:7,13,23 31:24,25 32:10,17 33:7 34:7,10,11,12 101:9 103:19,19 104:16 119:2 states [12] 16:11 27:12,13 28:8 31:6,16 32:13 49:14 56:3 104:11 117:15 118:8 states' [1] 53:14 state's [1] 47:3 status [16] 4:13,18 7:19,21 8:15 9:18 15:14 51:7 57:5 65:25 66:16 85:13 102:12,14,16 110:23 statute [80] 5:17 6:8,20,21 11:6,19 12:11,24 13:14,24 14:2 15:7 16:7 17:9,11,25 18:20 20:18,22 22:4,17,19 23:1,6,10,13,15 24:17 38:5,23 42:2,6,9 43:10,22 45:18 51:8,22 52:7,8,15,20 53:2,19,23 54:1,24 55:15,22 56:4 59:6 60:17 61:18 63:14 64:18 65:1,10</p>	<p>66:24 73:17 77:12 80:8,22 82:6 84:1 85:9 86:7 87:17,24 90:24 93:10 99:6 109:10,10 110:4,14 112:15 114:9,13 116:14 122:10 statutes [6] 55:8 62:22 64:15 79:21,23 104:6 statutory [11] 11:20 12:3 14:25 22:7 25:18 61:23 63:6 65:8 89:7 103:12 120:13 stay [4] 44:14 53:13 85:21 86:18 step [3] 5:3 14:17 19:17 steps [12] 11:20 12:4 15:6 16:8 22:21 23:21 24:8,17 25:18 62:4 76:16 94:20 still [29] 10:23 20:14 42:21 43:3,13,17 44:1 51:13,14 68:7,12 73:23 76:8,15 79:4 84:11,21,23 85:19 86:19,20 87:24 89:6 93:25 94:9 97:23 114:3 115:24 118:19 straight [1] 21:22 straightforward [1] 22:25 strangest [1] 20:13 strict [1] 108:16 striking [2] 121:1,13 stringent [1] 9:5 stripped [1] 56:25 strong [1] 26:22 strongly [2] 30:4 36:20 struck [2] 54:23 55:4 structure [1] 50:21 struggling [4] 22:24 52:24 111:25 114:15 subject [16] 14:17 17:12 19:23 21:15 35:16 39:17,19 41:23 43:12 60:25 79:16,16 88:17 96:2 109:13 112:24 subsection [13] 43:3 44:1 46:23 55:9,15 57:17,19 61:18 62:25 63:16,17,22 83:1 subsidiary [1] 60:3 substance [2] 37:9 67:17 substantial [2] 54:24 61:23 substantially [1] 114:24 substantive [12] 5:7 15:20 23:4 58:18 59:1 109:14,20,25 113:25 120:19 121:4,20 substantively [1] 114:1 successfully [1] 99:3 successor [1] 8:8 sudan [1] 39:3 sudden [1] 51:4 sufficiency [1] 35:19 sufficient [1] 108:21 suggested [2] 58:12 101:13 suggesting [1] 74:5 suggests [1] 101:6 support [3] 69:13 78:19 99:18 supporting [1] 27:11</p>	<p>supports [2] 69:9 102:3 suppose [4] 37:21 38:14 72:2,6 supposed [9] 20:19 21:23 51:1 52:9 64:20 70:6 94:21 95:15 122:3 surely [1] 42:16 survive [2] 97:7,8 suss [1] 101:8 sussing [1] 105:23 sweden [4] 28:10 29:5,14 101:13 sword [1] 55:25 syria [27] 4:13 25:14 36:9 44:18 45:3 47:24 48:2,20 56:13 65:22 74:11,13,15 75:7,9,18 76:5,14 82:9 92:23 93:14,18,21 94:2 110:21 120:16 121:6 syrian [2] 65:25 107:4 syrians [5] 92:22 106:17,22 107:8 110:23 syria's [3] 14:19 56:9,15</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table [1] 116:10 talent [1] 49:23 talked [2] 21:17 68:16 talks [4] 22:8 49:4,12 64:11 tax [1] 60:10 television [1] 71:19 tells [2] 114:11,12 temporary [9] 4:13,18 51:6,7,23 56:16 82:10,22 89:8 tension [1] 116:1 term [8] 24:4,23 62:9,11,16 63:9 65:16 112:4 terminate [16] 4:12 5:2 14:19 35:15 48:6 55:1,19 59:9,18 66:2 76:24 84:20 85:18,25 100:2 120:24 terminated [4] 11:2 56:16 99:3 106:2 terminating [2] 66:17 89:10 termination [36] 4:17 5:12 12:9 15:3,14,17 16:14 19:16 21:15 24:13 46:10 47:21 49:3 51:18 54:14 56:18 59:10,24 64:5 99:7,13,17,19,20 100:6 105:20 110:22,25 112:23 113:19 114:5,19,23 122:17,19,25 terminations [5] 70:14,21 73:16 81:4 101:19 terms [4] 23:22 45:19 98:3,4 terrible [1] 65:22 texas [1] 96:2 text [5] 17:10 49:4 56:6,17 65:16 textual [4] 17:10,19 91:15 122:10 textually [1] 22:5 themselves [3] 13:19 20:20 48:15 theory [2] 65:14,15 therefore [3] 24:21 113:19 120:22 there's [52] 12:20 14:21 17:10,11,16 20:8,10 22:11 26:24 28:20 33:25 38:12 39:23 43:15 45:2 48:4 49:6,18,22,</p>
--	--	--

<p>23 50:9 51:1,15,23 57:11,24 58:10, 13,17 60:8 61:14 62:12 75:14 76:6,8 77:21 82:8 83:7 85:25 87:1,14 88:23 89:11,16 94:1 95:11 102:15,16,16 103:9 113:9 122:2</p> <p>they've ^[3] 7:16,19 121:17</p> <p>thinking ^[2] 13:5,6</p> <p>thinks ^[2] 102:10 113:18</p> <p>third ^[4] 32:2 34:21,24 121:17</p> <p>thomas ^[27] 6:7,11 7:8,23 8:3 10:11 17:18 44:6 57:7,15 58:22 60:2 76:20, 21 77:4,8,15,19 78:9 95:6 100:9,13 117:12,13,19,24 118:2</p> <p>thorough ^[3] 41:20,21 120:22</p> <p>though ^[12] 11:3 14:25 32:12 38:7 41: 24 51:1 60:2 71:22 74:18 79:20 94:8 115:22</p> <p>thoughts ^[2] 75:13 79:11</p> <p>thousands ^[1] 49:15</p> <p>threat ^[1] 52:13</p> <p>three ^[11] 15:25 17:3,7 36:25 40:22 41: 11 57:3 61:8 77:17 85:25 106:8</p> <p>threshold ^[1] 92:6</p> <p>thrust ^[2] 52:6 68:1</p> <p>tied ^[1] 64:1</p> <p>tightly ^[1] 64:1</p> <p>timely ^[2] 38:4,9</p> <p>time's ^[1] 44:3</p> <p>timing ^[2] 58:10,14</p> <p>title ^[3] 51:9 117:1,4</p> <p>today ^[3] 55:21,23 56:12</p> <p>together ^[1] 40:22</p> <p>tomorrow ^[2] 14:21 103:5</p> <p>tonight ^[1] 38:18</p> <p>took ^[2] 88:10 91:11</p> <p>tools ^[1] 50:9</p> <p>topic ^[4] 40:9,18,20 80:2</p> <p>totally ^[1] 19:24</p> <p>tough ^[1] 31:2</p> <p>towards ^[2] 75:8 99:21</p> <p>tps ^[55] 8:13 10:23 14:20,20 15:2,14 19:11 25:17 28:13 29:3 48:6 49:7 54: 23 55:1,19 56:22 59:9 65:25 66:16 67:20 70:10,13,21 72:6,8 73:16 81:3 83:22 84:24 85:13 86:14 87:11,18 99: 3,6,7,11,23 100:3 102:8,12,14,16,22 103:4,11 104:6,10 105:3,4 106:2 109: 9 110:23 116:13 122:7</p> <p>traditional ^[1] 14:14</p> <p>traditionally ^[4] 5:14 7:1 17:15 47:16</p> <p>transcript ^[1] 106:4</p> <p>transparency ^[1] 84:1</p> <p>traps ^[1] 37:23</p> <p>treat ^[1] 88:20</p> <p>treatment ^[1] 74:21</p> <p>trial ^[1] 98:14</p> <p>tries ^[1] 66:24</p>	<p>truck ^[2] 25:23 115:13</p> <p>trucks ^[2] 78:15 120:5</p> <p>true ^[14] 20:1 50:16 72:14 79:1 90:19 93:12 95:10 96:12 97:3,11 99:19 104: 3 114:16,17</p> <p>trump ^[12] 8:20,25 9:20 10:2 31:1 32: 1,4,9 51:19 80:11,18 81:1</p> <p>trying ^[4] 43:9 78:8 95:7 118:17</p> <p>tuesday ^[1] 37:25</p> <p>turkey ^[1] 76:7</p> <p>turks ^[3] 106:17 107:13,16</p> <p>turn ^[5] 55:19 61:9 73:23 76:15 78:17</p> <p>turning ^[1] 120:4</p> <p>turns ^[1] 37:5</p> <p>twice ^[1] 51:18</p> <p>two ^[26] 17:6 24:3,11 45:2 47:12 59: 21 61:9 62:12 63:15,16,16 64:1 65:7 66:4 69:19 73:11 75:12 79:11 81:23 82:8 85:12 93:4,19 95:18 122:18,18</p> <p>type ^[1] 119:4</p> <p>types ^[1] 31:14</p> <hr/> <p>U</p> <hr/> <p>u.s ^[1] 96:18</p> <p>ultimate ^[6] 5:1 23:8 59:8 64:14 68:12 113:21</p> <p>ultimately ^[3] 67:3 94:8 113:12</p> <p>uncertainty ^[1] 50:2</p> <p>under ^[55] 5:21,24 6:4 9:6,17,18 10:7 11:1 13:13 23:5 26:10,22 34:2 44:1 46:23 50:1,23 52:8 53:4,6,10 56:4 57: 8 65:14 73:16 80:8,17,22 82:5,8,9,9, 10,11 89:14 93:10 95:14 101:6 104:4 105:16 106:25,25 108:13,18,18,19 109:22 110:10,10 113:20 117:17 118: 18 122:1,21,22</p> <p>underlying ^[4] 15:21 59:1,2 115:25</p> <p>understand ^[11] 8:7 23:1 48:21 54:3 59:4 63:10 77:3 106:22 108:12 111:8 112:1</p> <p>understanding ^[4] 20:9 23:14 75:10 108:24</p> <p>understood ^[3] 62:23 68:4 69:24</p> <p>undesirables ^[1] 99:24</p> <p>undocumented ^[1] 56:2</p> <p>unfettered ^[1] 11:13</p> <p>unilluminating ^[3] 30:7 32:19 33:7</p> <p>united ^[11] 16:11 27:12,13 28:8 31:6, 16 32:13 49:14 53:14 56:2 104:11</p> <p>unlawful ^[2] 122:20,21</p> <p>unlawfully ^[1] 16:13</p> <p>unlikely ^[1] 85:8</p> <p>unmarried ^[1] 118:22</p> <p>unpopular ^[1] 108:20</p> <p>unquestionably ^[1] 121:4</p> <p>unregulated ^[2] 10:24 11:5</p> <p>unregulation ^[1] 11:14</p>	<p>unrelated ^[1] 40:9</p> <p>unresponsive ^[1] 38:20</p> <p>unreviewable ^[9] 7:2 15:15 16:20 20: 20 21:6 77:23 78:4 109:18,23</p> <p>unsafe ^[7] 84:21,23 85:7 86:8,18 87: 10,24</p> <p>unsurprising ^[1] 7:2</p> <p>until ^[3] 16:14 51:14 80:25</p> <p>unusual ^[1] 67:25</p> <p>unwilling ^[1] 84:6</p> <p>up ^[7] 22:14 44:3 46:7 60:12 68:25 101:20 106:7</p> <p>updates ^[1] 86:4</p> <p>urgent ^[1] 10:17</p> <p>uses ^[1] 59:6</p> <p>using ^[2] 58:25 59:21</p> <hr/> <p>V</p> <hr/> <p>various ^[1] 53:5</p> <p>varsity ^[1] 48:16</p> <p>venture ^[1] 15:10</p> <p>version ^[1] 88:8</p> <p>versus ^[7] 4:5 8:20,25 9:20 94:19 104: 17,18</p> <p>vests ^[1] 38:24</p> <p>vet ^[1] 85:21</p> <p>vetted ^[2] 84:25 87:13</p> <p>vetting ^[1] 87:14</p> <p>vice ^[1] 6:3</p> <p>victory ^[1] 62:13</p> <p>view ^[17] 10:14 11:18,22 25:19 31:19, 23 56:4 68:14 69:6 75:21 77:25 78:4 83:13 85:8 91:16,19 105:1</p> <p>viewed ^[1] 7:1</p> <p>views ^[2] 10:19 47:3</p> <p>viii ^[2] 117:1,4</p> <p>violence ^[2] 74:16 76:1</p> <p>virtually ^[2] 5:7 29:16</p> <p>virtue ^[1] 6:2</p> <p>vividly ^[1] 120:6</p> <p>voice ^[5] 20:21 66:25 67:4 80:8 83:18</p> <p>voted ^[1] 61:1</p> <p>vowed ^[1] 100:2</p> <hr/> <p>W</p> <hr/> <p>wait ^[1] 40:6</p> <p>wanted ^[1] 35:12</p> <p>wants ^[2] 54:7 117:8</p> <p>war ^[1] 76:6</p> <p>wave ^[1] 107:25</p> <p>way ^[19] 5:3 7:10 10:6 22:25,25 28:24 38:8 50:8 61:1,7 62:13,15 77:5,25 86: 23 89:19 91:9 109:4 118:7</p> <p>weak ^[1] 36:24</p> <p>website ^[2] 56:12 74:12</p> <p>webster ^[4] 26:11,16,18,21</p> <p>wednesday ^[1] 37:24</p>
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<p>weigh ^[1] 28:21 weighing ^[1] 49:25 weight ^[2] 100:9 122:1 weirdest ^[1] 20:12 welcome ^[4] 6:6 31:17 57:6 100:8 welfare ^[2] 29:10 30:24 whatever ^[6] 40:8 54:7 100:19 102:1, 20 103:4 whereas ^[1] 90:8 wherever ^[1] 103:3 whether ^[40] 5:1,22 16:21 21:3,24 22:11 30:1 40:6,6,8 42:14,20 43:2,9,12, 24 46:9,23 52:9,21 53:12 58:3 64:4, 18 67:9 68:8 69:8,9 75:17 78:6 84:19 91:4,5,23 93:24 96:17,24 98:5 105:23 119:3 white ^[15] 29:16 31:18 32:7 103:25,25 104:5,17,18 106:23 107:5,8 108:1,6, 9,9 whites ^[1] 28:3 whole ^[6] 42:19 48:18 68:1 74:19 83:22 121:19 who's ^[2] 108:9,9 wilkinson ^[2] 89:24 95:4 will ^[8] 4:3 48:6 67:22 68:16 70:19 74:13 78:13 87:1 williams ^[1] 64:21 willing ^[1] 63:25 win ^[5] 62:7 72:16 94:9 108:16 118:19 within ^[12] 6:17 9:8 12:18 16:3 24:22 36:19 40:11 52:10 89:6 91:23 112:6 117:9 without ^[6] 5:11 12:3 34:19 52:25 99:4 111:15 won ^[1] 115:20 wonder ^[1] 72:24 wondering ^[1] 103:1 word ^[22] 4:20 13:21 23:12 36:14 40:12,15,16 42:7 46:8 51:7 57:18 59:6 60:16 61:2 62:8 63:4 71:10 82:16,21, 25 92:2 101:11 worded ^[1] 73:12 words ^[15] 13:9 35:21 37:17 45:8 57:20 59:14 65:11 73:10 79:9 95:10 105:8 109:2 113:7 116:22 120:20 work ^[5] 28:16 57:1 117:14,24 118:3 working ^[1] 112:6 world ^[4] 48:5 91:2 106:8 108:10 worse ^[1] 94:3 wow ^[1] 83:11 wracked ^[1] 74:15 wrenched ^[1] 30:21 write ^[5] 73:22 90:16 116:23,24 117:7 writes ^[1] 117:2 written ^[1] 73:21 wrongly ^[1] 19:24 wrote ^[4] 16:7 61:7,10 65:3</p>	<hr/> Y <hr/> years ^[14] 29:21 51:12 61:8,9 64:8 65:4 74:20 80:8 95:23 96:3 107:24 108:5 116:5,16 <hr/> Z <hr/> zuch ^[1] 60:10
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