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IN THE SUPREME COURT OF THE UNITED STATES

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CAROL ANNE BOND, :

Petitioner :

v. : No. 09-1227

UNITED STATES :

- - - - - x

Washington, D.C.

Tuesday, February 22, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:19 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent, in support of the Petitioner.

STEPHEN R. McALLISTER, ESQ., Lawrence, Kansas; for amicus curiae in support of the judgment below; appointed by this Court.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MICHAEL R. DREEBEN, ESQ.	
7	On behalf of the Respondent, in support	
8	of the Petitioner	17
9	ORAL ARGUMENT OF	
10	STEPHEN R. McALLISTER, ESQ.	
11	For amicus curiae in support of the	
12	judgment below	34
13	REBUTTAL ARGUMENT OF	
14	PAUL D. CLEMENT, ESQ.	
15	On behalf of the Petitioner	52
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:19 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in No. 09-1227, Bond v. United States.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF PETITIONER

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

The standing of Petitioner to challenge the constitutionality of the Federal statute under which her liberty is being deprived should not be open to serious question. She clearly satisfies this Court's modern tripartite test for standing. Indeed, it is hard to imagine an injury more particularized or concrete than six years in Federal prison, and the liberty interest she seeks to vindicate is her own, not some third party's.

In many ways, I think "standing" is a bit of a misnomer here. Plaintiff is not a plaintiff who seeks to invoke the jurisdiction of a Federal court. She is a defendant who has been hailed into court by a Federal prosecutor. There is no logical reason she should not be able to mount a constitutional attack on the statute

1 that is the basis for the prosecution.

2 JUSTICE KENNEDY: Do our -- any of our
3 opinions talk about the standing of the defendant? I
4 can't think of one at the moment.

5 MR. CLEMENT: Well, I think it was in the
6 habeas context, but the Spencer decision does talk about
7 how, when you have a criminal defendant or somebody who
8 is serving a sentence, their standing to challenge the
9 conviction is essentially one of the easiest standing
10 cases you can imagine. And I think in a sense, the same
11 principles would apply here.

12 But as I said, I think standing is normally
13 something you think about as applying to the plaintiff,
14 who is invoking the jurisdiction of the court. So
15 what's really at issue here is something -- almost more
16 of a bar on somebody's ability to make an argument that
17 would vindicate their liberty, and I see no reason why,
18 in logic, that should be the case.

19 Now, the court of appeals essentially didn't
20 apply ordinary --

21 JUSTICE SCALIA: Well, it seems to me there
22 are certainly some arguments you could make as a
23 defendant for which you have no standing. You're saying
24 there's no argument you can make as a defendant for
25 which you have no standing?

1 MR. CLEMENT: Well, I'm not sure you would
2 call it normal standing principles, Your Honor. There
3 are certainly arguments you could make that you -- would
4 have no business having anything to do with your case.
5 There's arguments you could make that would have nothing
6 to do with -- would be non-justiciable --

7 JUSTICE SCALIA: Suppose I raise an
8 Establishment Clause objection in a matter that -- that
9 does not involve legislation and which our recent
10 opinions say therefore does not violate the
11 Establishment Clause?

12 MR. CLEMENT: Well, I guess I would have to
13 know why you were a defendant in that case and how it
14 had anything to do with the price of tea in that
15 particular case. But --

16 JUSTICE SCALIA: No, you wouldn't. All
17 you -- all you would have to know is that the claim is
18 based upon a statute -- is not based upon a statute and
19 that our Establishment Clause jurisprudence says if it's
20 not based upon a statute, it doesn't violate the
21 Establishment Clause.

22 MR. CLEMENT: With respect, I don't think
23 that follows. I mean, I think if -- if the Federal
24 executive tried to imprison you based on your religion,
25 you could take issue with that and say that's an

1 Establishment Clause violation. The problem in your
2 recent case, the Hein case, is the only --

3 JUSTICE SCALIA: I'd say it's a Free
4 Exercise Clause violation. I don't think you need the
5 Establishment Clause for that.

6 MR. CLEMENT: Well, if they said, well,
7 we're hereby establishing a religion and you're not part
8 of our religion and we're therefore imprisoning you, I
9 would think you could bring that claim.

10 But in all events, bringing it back to the
11 case before you, I think there is no reason to think
12 that ordinary principles of standing wouldn't give my
13 client every ability to challenge the constitutionality
14 of the statute under which she's being held.

15 JUSTICE KAGAN: Mr. Clement, in the case
16 before us, are you making any claims other than that
17 Congress was acting outside its enumerated powers in
18 enacting this statute? Are there any peculiarly Tenth
19 Amendment claims that you're making?

20 In other words, you admit that Congress is
21 acting within its enumerated powers and yet the action
22 violates the Tenth Amendment. Are you making any claims
23 of that sort, or are all your claims that the statute
24 here goes beyond Congress's ability to enact it under
25 Article I?

1 MR. CLEMENT: Well, Justice Kagan,
2 principally our argument here is an enumerated powers
3 argument. My problem, though, is I'm not sure I
4 understand some clearly defined set of Tenth Amendment
5 claims that are uniquely only Tenth Amendment claims and
6 not enumerated power claims.

7 JUSTICE KAGAN: Well, let's just use the
8 Printz case and say, even though Congress might have the
9 ability to enact a statute under Article I, there's an
10 independent Tenth Amendment limitation. Do you have any
11 claims of that kind in this case?

12 MR. CLEMENT: Well, I don't think so, but
13 let me just say that my problem is -- take the Printz
14 case. The Printz case itself went out of its way to say
15 that it was an enumerated power case. In answering an
16 argument in the dissent, the majority opinion says, this
17 is not separate from enumerated powers. If you --

18 JUSTICE KAGAN: Well, let's assume,
19 Mr. Clement, that there is such a thing as a claim in
20 which you're saying, I can see that this is within
21 Congress's Article I powers, but there is an independent
22 Tenth Amendment limitation on this. Do you have any
23 claims like that?

24 MR. CLEMENT: I don't think so, Justice
25 Kagan, but I'd hate to sort of bet my case that on

1 remand, I'm not going to say something in making an
2 argument that the government or somebody else thinks is
3 too much of a commandeering claim and too much -- not
4 enough of an enumerated power claim.

5 JUSTICE GINSBURG: The government agrees
6 that it's an enumerated power claim in this case.

7 MR. CLEMENT: Again, Justice Ginsburg, that
8 is the basis of our claim. But just to give you a --

9 JUSTICE GINSBURG: You are -- you are at no
10 risk if the Court were just limited to what both of you
11 agree is involved -- Article I, Section 8 -- and if
12 there is a difference for commandeering claims, when the
13 case arises, we can deal with it.

14 MR. CLEMENT: Well, Justice Ginsburg, you
15 could certainly do that, and as long as it is crystal
16 clear that there will be no obstacle to my client making
17 a constitutional attack on section 229 on remand, I
18 suppose that's fair enough for my client.

19 But one of the arguments we've preserved,
20 for example, is the argument that Missouri vs. Holland
21 is not a blank check for the government, that it
22 requires a balancing of the State's interests against
23 the Federal interests. And if on remand, I wax eloquent
24 about the State's interest in criminal prosecution and
25 law enforcement, I would hate for a trap door to open up

1 at that point and I be told that, wait, wait, that's too
2 much of the State's interest and not enough of your own
3 interest.

4 JUSTICE KENNEDY: So you want us to say that
5 when there is a specific injury, specific to your
6 client, that your client has the right to make any
7 argument to show that the government has exceeded its
8 powers under the Constitution, because those powers are
9 limited to protect the liberties of the individual?

10 MR. CLEMENT: Exactly right, Justice
11 Kennedy, and that's the fundamental worry I have here,
12 is that this Court's cases have not drawn a distinction
13 between commandeering claims and enumerated powers
14 claims. The two cases the government points to, New
15 York and Printz, both go out of their way to say that
16 they are mirror images or, in fact, enumerated power
17 claims, because a law that commandeers is not necessary
18 and proper.

19 And I do also think that a part of the
20 problem with the suggestion that somehow Tennessee
21 Electric should be reimagined as a third party standing
22 claim is it fundamentally miscomprehends for whom the
23 structural provisions of the Constitution are there for.
24 Those provisions are there to protect the liberty of
25 citizens.

1 The United -- this Court made that point in
2 the Free Enterprise Fund just last term. There was a
3 case where it wasn't the executive complaining about the
4 infringement on executive power. The Executive Branch
5 ably defended the statute in this Court. It was a
6 disgruntled accounting firm that was allowed to
7 vindicate the separation of powers.

8 JUSTICE ALITO: Can't there be some Tenth
9 Amendment claims that go just to State prerogatives and
10 not to the rights of individuals? Let's say there's a
11 Federal statute that purports to regulate where a State
12 locates its capital, or the -- the contents of a State
13 flag, something like that. Wouldn't that go just to
14 State prerogatives and not to individual rights?

15 MR. CLEMENT: I think it would, Justice
16 Alito. My point is not that there's some special rule
17 for the Tenth Amendment that plaintiffs will always have
18 standing. My point is that you should just apply the
19 normal rules. And what I don't think is sustainable is
20 the proposition that in commandeering claims an
21 individual never has standing.

22 I mean, imagine a Federal statute that
23 purported to save Federal money by commandeering local
24 prosecutors to prosecute Federal crimes. Well, I would
25 hope that a defendant in that kind of case would be able

1 to raise a commandeering argument as a defense. I don't
2 think it would be any different if Congress tried to
3 commandeer the Comptroller General to start bringing
4 criminal prosecutions. In that case --

5 JUSTICE KAGAN: Mr. Clement, if you are not
6 making a commandeering claim, then we would be going out
7 of our way to decide that question. And so, you know,
8 are you making a commandeering claim?

9 MR. CLEMENT: I don't -- I don't
10 self-identify as having made a commandeering claim. But
11 what I would say is -- we're not asking you to do
12 anything special. I just think it's the government
13 that's asking you to go out of your way to
14 reconceptualize Tennessee Electric as a different kind
15 of case and preserve it.

16 JUSTICE ALITO: Well, the problem is if
17 you're just making a treaty power claim, then how are
18 you going to possibly win on remand in the Third Circuit
19 if we reverse and say that your -- your client has
20 standing? Do you think it falls within the prerogatives
21 of the court of appeals to say that Missouri v. Holland
22 was wrong?

23 MR. CLEMENT: Well two things, Justice
24 Alito. First, this is a technical matter. We could go
25 back to the Third Circuit on our way back to coming here

1 and we would still have standing to make an argument
2 that it's foreclosed by precedent.

3 But I think it's a mistake to think that
4 Missouri v. Holland is some bright-line rule that
5 forever answers this question. As I read Missouri v.
6 Holland and as we clearly argued before the Third
7 Circuit, it's not a blank check. It's really is more of
8 a balancing test that looks at the State's interest and
9 the Federal interest in assessing whether or not the
10 statute that implements the treaty is necessary and
11 proper. And I think this case compares pretty favorably
12 with Missouri against Holland because there the state's
13 interests was very weak because these birds were just
14 flying through on their way and there was no real State
15 interest, or so this Court held, whereas in this case
16 the State has a real legitimate interest in law
17 enforcement. I also think we ought to be able to make
18 --

19 JUSTICE ALITO: Does that depend on the
20 nature of the chemical that's involved? Suppose the
21 chemical was -- was something that people would normally
22 understand as the kind of chemical that would be used in
23 a chemical weapon? Let's say it's Sarin does it matter
24 that this case doesn't involve something like that?

25 MR. CLEMENT: I think it does, Justice

1 Alito. I think it would matter in part for a
2 constitutional avoidance statutory construction
3 argument, which I think also ought to be open to us. I
4 sort of think by analogy to the Jones case, where this
5 Court said that a Federal statute about arson doesn't
6 apply when a cousin throws a Molotov cocktail at a
7 residence.

8 JUSTICE SCALIA: But that's a merits
9 question rather than a standing question. I assume
10 we're not getting into those merits questions here.

11 MR. CLEMENT: No, I was trying to respond to
12 the question of whether we would be foreclosed.

13 JUSTICE SCALIA: All right. But you're
14 confusing me. I thought we were just doing standing.

15 MR. CLEMENT: No, we're not asking you to do
16 more than do standing. But I do think it's important to
17 understand that we don't think we would be limited to
18 just losing on Missouri v. Holland below and coming back
19 up. We think we have a very good argument about
20 Missouri v. Holland as applied.

21 We also think that there is sort of a
22 statutory construction argument. And this isn't sarin.
23 There is something sort of odd about the government's
24 theory that says that I can buy a chemical weapon at
25 Amazon.com. That strikes me as odd, and that seems to

1 me the kind of thing where you could make a statutory
2 construction to say, well, maybe sarin or maybe actual
3 chemical weapons, that's one thing, but with respect to
4 this kind of commonly available chemical, to say without
5 any jurisdictional element or anything like that, that
6 it's a Federal crime seems like an argument we at least
7 ought to have standing to make.

8 JUSTICE BREYER: What do you say about the
9 one thing -- the strongest point against you, I think,
10 is a single sentence in that TVA case. It's only one
11 sentence, but it's there in the opinion, and I think
12 what it's saying, Justice Roberts says, well, he already
13 finished, he just finished saying nobody -- Congress
14 hasn't violated some rule against creating a system of
15 regulation in this statute because it isn't regulation.
16 But then he said, but even if it were, even if it were,
17 and if your complaint was that Congress has acted
18 outside its authority, which they might have thought at
19 that time, in creating a system, TVA, that competes with
20 local systems, even if that were so, the appellants,
21 absent the State or their officers, would have no
22 standing in this suit to raise the question.

23 Okay, now, that -- they put quite a lot on
24 to that. That is what it says. So are we supposed to
25 say, well, that was an ill-considered dicta? Or are we

1 supposed to say it was just wrong? Are we supposed to
2 say the law has changed? What in your view are we
3 supposed to -- or is different. What in your view are
4 we supposed to say?

5 MR. CLEMENT: Could I say two things about
6 that sentence, and then explain what I really think you
7 should say? First of all, the first thing I would say
8 about that sentence is that I don't think, read in the
9 context of the entire opinion, it actually means that
10 the Court is trying to impose a special disability on
11 Tenth Amendment claims, because remember, they have
12 already rejected the plaintiff's basis for having
13 standing.

14 JUSTICE BREYER: So it comes out of left
15 field, and it's an overall "any, even, if." So that
16 suggests it's just dicta and doesn't count.

17 MR. CLEMENT: And it's dictum in another
18 way. But what I think it stands for is the proposition
19 -- it rejects the argument that if you don't otherwise
20 have standing under the governing standing rule of the
21 day that you somehow have a license to bring a Tenth
22 Amendment claim. And if that's what it stands, well, it
23 was right then and it continues to be right.

24 A second point to make about it is it is
25 dictum, and if you read the sentence, what it says is

1 the following: It makes a reference to what it's
2 already established a couple of paragraphs earlier,
3 which is the states at issue here have passed laws to
4 accommodate TVA's sale of power, and then it goes on to
5 say, if this were not so. What does that -- that is a
6 counterfactual hypothetical. It's the worst kind of
7 dictum. It says if this were not so. If it were not
8 the fact that the States had already taken these actions
9 to affirmatively accommodate then we would have a
10 different question and then there wouldn't be standing.
11 So it is dictum I think and can be disregarded as such.

12 But really if you ask me what you should do
13 with it, you should do what you did in Twombly, with
14 some language in an opinion that had continued to cause
15 trouble in the 50 years since. You should just say
16 that's no longer good law because it's not. The central
17 holding of Tennessee Electric was overruled 40 years ago
18 in the Camp case, and I think this language is of a
19 piece from that legal interest test, the legal wrong
20 test of standing, and I think this Court should make
21 clear that it doesn't apply any longer, and the virtue
22 of that would be that it would free up the lower courts
23 to decide these Tenth Amendment standing claims based on
24 an application of normal standing principles, because
25 that's not happening in the lower court right now. In

1 the lower court right now what happens is somebody comes
2 in with a Tenth Amendment claim of whatever stripe,
3 maybe it's a commandeering claim, maybe it's not, and
4 what they're confronted with, especially if it's a
5 commandeering claim, is a quick citation of Tennessee
6 Electric, an equally quick citation of Shearson which
7 says only this Court can overturn its decisions, and
8 that's it. No standing analysis, nothing subtle about
9 the particular claim. And that's not a sustainable
10 situation.

11 If I could reserve the remainder of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Clement.

14 Mr. Dreeben.

15 ORAL ARGUMENT OF MICHAEL R. DREEBEN,

16 FOR RESPONDENT, IN SUPPORT OF PETITIONER

17 MR. DREEBEN: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 As Petitioner confirmed this morning, the
20 central claim that he is making about the
21 unconstitutionality of section 229 is that it exceeds
22 Congress's enumerated powers. He may wish to raise as
23 part of that claim a argument that it invades the
24 province that belongs to the States concerning criminal
25 law. He can do that. He has the authority to make such

1 a challenge. The Third Circuit erred in holding to the
2 contrary.

3 Now, the Third Circuit in reaching the
4 contrary conclusion relied on this Court's decision in
5 Tennessee Electric v. TVA, and we think that the court
6 of appeals misread that case in concluding that it
7 barred standing, not because it lacks a holding that
8 does bar standing of certain types of claims that allege
9 an invasion of State sovereignty, but because the kind
10 of claim that Petitioner is making is not a Tenth
11 Amendment reserved rights claim, but instead an
12 enumerated powers claim.

13 CHIEF JUSTICE ROBERTS: It's kind of hard
14 under our precedents to draw that precise line between
15 enumerated powers and the Tenth Amendment, and it seems
16 a bit much to put defendant to the trouble of trying to
17 do that under the theory from TVA that they have no
18 standing to make a particular type of Tenth Amendment
19 claim.

20 MR. DREEBEN: Mr. Chief Justice, I don't
21 think that the defendant needs to be put in any trouble
22 in this case because the kind of claim that counsel is
23 making on her behalf does assert her right not to be
24 subject to criminal punishment under a law that he says,
25 counsel says, Congress lacks the authority to enact.

1 JUSTICE ALITO: Well, what if they argue --
2 what if she argues on remand, if there is a remand,
3 that, assuming for the sake of argument Congress can
4 enact any law that is necessary and proper to implement
5 a treaty? The Tenth Amendment prohibits certain laws
6 that intrude too heavily on State law enforcement
7 prerogatives, State police power. If she makes that
8 argument, which category does that fall into?

9 MR. DREEBEN: It falls into the enumerated
10 powers category, Justice Alito, just as last term in
11 United States v. Comstock one of the elements that this
12 Court looked at when it decided whether the law
13 authorizing civil commitment in that case was within
14 Congress's enumerated authority plus the Necessary and
15 Proper Clause, the Court looked at the extent to which
16 the law accommodated State interests or, alternatively,
17 invaded them in an unlawful manner, which is what Mr.
18 Comstock had alleged in that case.

19 JUSTICE KENNEDY: But you're -- you want us
20 to say that, even if the defendant in some case might
21 show that a constitutional violation is causing that
22 defendant specific injury, the defendant may not be able
23 to raise the claim of its, what you call sovereignty
24 claim? In Thornton v. Arkansas, the term limits case,
25 we allowed a citizen of a State to bring a challenge to

1 a statute that the State had enacted inconsistent with
2 its Federal powers. Now, that's the flip side. That
3 was a State statute, not a Federal statute, but it seems
4 to me that is inconsistent with the position you're
5 taking. And it seems to me also consistent --
6 inconsistent with the rule that separation of powers
7 claims can be presented by defendants, in *Chadha v.*
8 *INS*, *Clinton v. New York*, a line-item veto case.

9 The whole point of separation of powers, the
10 whole point of federalism, is that it inheres to the
11 individual and his or her right to liberty; and if that
12 is infringed by a criminal conviction or in any other
13 way that causes specific injury, why can't it be raised?
14 I just don't understand your point.

15 MR. DREEBEN: Well, Justice Kennedy, I -- I
16 don't take issue with almost everything that you said.
17 The structural protections of the Constitution can be
18 enforced by individuals under the cases that you have
19 cited.

20 What we are dealing with here is two things.
21 First of all, a statement that this Court made in *TVA*
22 that was part of its holding, addressed to what the
23 Court perceived as an attack based on a specific aspect
24 of State sovereignty that belonged to the States. Now,
25 today, we might not understand the claim that was made

1 in that case as implicating a specific sovereign right
2 that's protected under the Tenth Amendment. Today we
3 might look at it and say this is nothing other than a
4 conventional preemption claim.

5 JUSTICE ALITO: I don't know whether that's
6 a correct characterization of the argument that was made
7 in -- in the Tennessee Electric case. I -- I'm looking
8 at the brief in the case, and the discussion of the
9 Tenth Amendment generally follows a caption that says
10 the power to dispose of Federal property does not
11 include any power to regulate local activities.

12 I don't understand why that isn't the same
13 kind of delegated powers argument that you say the
14 Petitioner here is raising.

15 MR. DREEBEN: That may be, Justice Alito. I
16 think that it's a little bit difficult to parse
17 precisely what the Petitioner in Tennessee Electric was
18 arguing, but this Court understood the claim as one that
19 -- that bore on Federal regulation of purely local
20 matters in a matter that regulated the internal affairs
21 of the State; and I agree with you that today we might
22 not view that as a Tenth Amendment-specific claim, but
23 this Court did in 1939.

24 JUSTICE BREYER: Why didn't it just consider
25 it as outside the Commerce Clause? I mean, they had a

1 whole lot of law, but what is the distinction between
2 saying, as they said then, "Court, the TVA regulates
3 electricity rates in Memphis and that's beyond the power
4 of Congress to enact"?

5 MR. DREEBEN: Justice Breyer --

6 JUSTICE BREYER: In this case, which --
7 because of the Tenth Amendment and a lot of other
8 things.

9 MR. DREEBEN: I understand that, Justice
10 Breyer.

11 JUSTICE BREYER: And this case seems the
12 same, saying it's beyond the power of Congress to enact
13 because of the treaty.

14 MR. DREEBEN: Well I think if you intrude
15 today's analytical model --

16 JUSTICE BREYER: Yes.

17 MR. DREEBEN: -- under today's
18 jurisprudence, that is how the case would be viewed.
19 But it was not how it was viewed at the time of TVA.

20 JUSTICE BREYER: How do we know that? I'm
21 not doubting you; I just want to know.

22 MR. DREEBEN: The language from the
23 sentence, Justice Breyer, that you in fact read --

24 JUSTICE BREYER: Yes.

25 MR. DREEBEN: -- discussing whether the

1 presence or absence of a State objection mattered, the
2 Court said: As we've seen there's no objection from the
3 State, and if this were not so the appellants, absent
4 the States or their officers, have no standing to raise
5 any objection under the amendment.

6 JUSTICE SOTOMAYOR: Let's assume in this
7 hypothetical -- just that case, TVA. State -- the
8 Federal Government sets the price, and someone's accused
9 of violating that price. Can that defendant come in and
10 say, just as in TVA, that's unconstitutional because
11 prices have to be set by the State? Can the defendant
12 say that, or is that an anti- commandeering claim that
13 you say they're barred from raising?

14 MR. DREEBEN: That is not an anti-
15 commandeering claim. That is the kind of claim that
16 today we would conceptualize as an enumerated powers
17 claim.

18 JUSTICE SOTOMAYOR: So my question goes back
19 to one that's been asked before, which is, give me a
20 hypothetical of a defendant who has been convicted where
21 it would be a pure anti- commandeering claim that you
22 say they have no standing for.

23 MR. DREEBEN: This will take me back to --
24 to Justice Kennedy's question, because I wanted to
25 answer the part that I thought distinguished a

1 commandeering case from what Justice Kennedy was talking
2 about. And the point is best made in the context of an
3 example. Under the Sex Offender Registration Act,
4 defendants have challenged the law on numerous grounds,
5 including, number one, Congress lacks its constitutional
6 authority under the Commerce Clause and the Necessary
7 and Proper Clause to criminalize the individual
8 registration requirement imposed on them. All courts
9 that have addressed that have said that's a claim that's
10 within the cognizance of a defendant to bring.

11 Defendants have also said the SORNA statute
12 violates Federal law because it requires States to
13 accept sex offender registrations. It commandeers the
14 States into requiring them to set up a sex offender
15 database.

16 JUSTICE KAGAN: Well, Mr. Dreeben, why
17 shouldn't the defendant be able to raise that argument?
18 If the defendant prevails on that argument, presumably
19 the statute is invalidated and the conviction is
20 overthrown. So why doesn't the defendant have the
21 appropriate interest to raise that argument?

22 MR. DREEBEN: Well, Justice Kagan, this is
23 the absolutely crucial point that distinguishes
24 commandeering from most of the structural constitutional
25 provisions that we've been discussing this morning. A

1 State can choose to establish a sex offender database
2 and to receive registrations from people who are
3 required to register under Federal law; and invalidating
4 a Federal law that commanded them to do that does not
5 deprive the State of its ability to say, we want to
6 have, in our autonomous sovereign interest, a sex
7 offender database that will receive these applications,
8 and as a result --

9 JUSTICE KENNEDY: Well, all you're saying is
10 that there's -- in that hypothetical is that there's no
11 violation?

12 MR. DREEBEN: That's correct.

13 JUSTICE KENNEDY: Everybody goes home.

14 MR. DREEBEN: There -- the reason why in
15 that hypothetical the defendant should not raise the
16 issue is because there will be no violation --

17 JUSTICE KAGAN: But that's a merits
18 question. That's not a standing question. Why don't we
19 just say the defendant has standing to raise it, and
20 then he'll lose?

21 MR. DREEBEN: You could say that, Justice
22 Kagan, but I think that part of the enduring force of
23 TVA is that it adopted a third-party standing rule that
24 is still part of this Court's jurisprudence.

25 JUSTICE SCALIA: Well, why couldn't you have

1 said the same thing in TVA, that, while companies are --
2 are -- not -- yes, the Federal -- the Federal statute
3 requires the companies to charge this price, but they
4 might have decided to charge it on their own anyway, and
5 therefore you have no standing?

6 MR. DREEBEN: Well, the Court did say that
7 there was no standing on the grounds that when the
8 specific argument was made, this takes away the right of
9 the State to regulate because the Federal Government is
10 regulating.

11 JUSTICE GINSBURG: Mr. Dreeben, is your
12 concern that there would be a clash in these cases?
13 You've given the example of the State wants to have this
14 registration system. Suppose the -- the defendant can
15 raise that and would prevail? Well, the State's not
16 party to that suit, its interests have not been
17 represented. Is that -- is that your concern?

18 MR. DREEBEN: That is a major factor in
19 third-party standing generally, Justice Ginsburg.

20 JUSTICE KENNEDY: Suppose a State wanted to
21 be commandeered in Printz? Suppose they said, we really
22 like having sheriffs take the Federal gun registration
23 law?

24 MR. DREEBEN: They can do that. Justice
25 Kennedy, there's nothing --

1 JUSTICE KENNEDY: I -- I have -- I have -- I
2 have serious trouble with that. A State can surrender
3 its -- its -- a State can confer more authority on the
4 Federal Government than the Constitution does?

5 MR. DREEBEN: No, Justice Kennedy. But a
6 State in its sovereign decisionmaking process can elect
7 to participate in a Federal program. At least, that was
8 what Justice O'Connor said in her concurrence in Printz.

9 JUSTICE SCALIA: Why isn't standard standing
10 doctrine able to give you the protection that you're
11 looking after? If indeed you can't tell whether the
12 State did it because it was compelled to or because it
13 wanted to, there was no causation and you don't have
14 standing.

15 MR. DREEBEN: That is a perfectly acceptable
16 route of analysis.

17 JUSTICE SCALIA: I would rather use that
18 route of analysis than inventing the new one that you're
19 -- that you're urging upon us.

20 MR. DREEBEN: Well, I don't think they're
21 different, Justice Scalia. They both concern who holds
22 the right and whether there's any redressability --

23 JUSTICE SCALIA: Well, then let's use the
24 one we already have and -- and not -- not have to get
25 into developing one that I've never heard of before.

1 MR. DREEBEN: I think, Justice Scalia, that
2 all the Government is doing in this case is applying
3 conventional standing principles of redressability and
4 third-party standing in a specific context, which as Mr.
5 Clement has made clear, is not before the Court today.
6 This is not a commandeering case. That happens to be
7 the only specific aspect of a State sovereignty claim
8 that is distinct from an enumerated powers claim that
9 the Court has recognized in recent decades. Whether
10 some other sort of claim of State sovereignty might some
11 day be recognized and require its own analysis is well
12 beyond the scope of this case. Our point is a much more
13 basic one. We agree with Petitioner's counsel that he
14 can raise the claim that he has tried to raise. We
15 think that the Third Circuit misunderstood what the TVA
16 decision purported to say when it rejected standing for
17 a type of State sovereignty claim. And we think that
18 the currently recognized State sovereignty claim of
19 commandeering fits into the description of the
20 analytical category that was addressed in TVA.

21 JUSTICE SOTOMAYOR: Does that analysis
22 differ in any way because this is a treaty power claim
23 versus a Commerce Clause claim? Your briefs go back and
24 forth on which one it is. Your reply brief now
25 emphasizes Commerce Clause power, but your main brief

1 was saying this is a treaty provision challenge. Do
2 they differ?

3 MR. DREEBEN: Well, Justice Sotomayor, I
4 believe that the statute is valid under either the
5 Treaty Clause plus the Necessary and Proper Clause
6 analysis under Missouri v. Holland. It also can be
7 sustained in our view under the Commerce Clause, which
8 follows directly from what this Court said in Raich when
9 the Court said that the intrastate regulation of a
10 commodity that's used in commerce is a customary,
11 typical method that Congress utilizes. It gave as
12 examples of that the nuclear, biological, and plastic
13 explosives statutes which were enacted to implement
14 treaty obligations of the United States.

15 JUSTICE ALITO: Given the breadth of this
16 statute, that would be a very far-reaching decision,
17 wouldn't it? Suppose that the Petitioner in this case
18 decided to retaliate against her former friend by
19 pouring a bottle of vinegar in the friend's goldfish
20 bowl. As I read this statute, that would be a violation
21 of this statute, potentially punishable by life
22 imprisonment, wouldn't it?

23 MR. DREEBEN: I'm not sure, Justice Alito.
24 I will assume with you that it is. The statute --

25 JUSTICE ALITO: If she possesses a chemical

1 weapon.

2 MR. DREEBEN: I'm not sure that vinegar is a
3 chemical weapon.

4 JUSTICE ALITO: Well, a chemical weapon is a
5 weapon that includes toxic chemicals. And a toxic
6 chemical is a chemical that can cause death to animals.
7 And pouring vinegar in a goldfish bowl, I believe, will
8 cause death to the goldfish, so that's -- that's a
9 chemical weapon.

10 MR. DREEBEN: I'm willing to make the
11 assumption with you and accept that it is a
12 broad-reaching statute, but it was adopted as a
13 broad-reaching statute because this is an area, like the
14 medical marijuana instance in Raich, where effective
15 control of the interstate market requires control of an
16 intrastate market. The statute exempts peaceful uses
17 for agricultural and pharmaceutical purposes of these
18 chemicals, it has other exemptions as well. It was
19 intended to be a comprehensive ban that implemented the
20 United States treaty obligations to eliminate the use of
21 chemical weapons both in military instances and in
22 terrorism, and --

23 JUSTICE ALITO: The difference is that Raich
24 involved one commodity, right? Marijuana. This
25 involves potentially thousands and thousands of

1 chemicals. And you would have -- you would make the
2 same argument with respect to every one of those
3 chemicals if you take together all of the people who are
4 -- who would use vinegar to kill goldfish or all the
5 people who might use antifreeze to kill dogs, you put
6 all of that together, that has a substantial effect on
7 the interstate, the interstate market for antifreeze or
8 for vinegar? That would be the argument?

9 MR. DREEBEN: Well, I think it's pretty well
10 recognized, Justice Alito, that when Congress seeks to
11 regulate an interstate market as to which there cannot
12 be any question under the Commerce Clause Congress could
13 do, it can control the interstate market as necessary in
14 order to assure that its prohibition is effective.

15 JUSTICE SCALIA: You're trying to drive
16 vinegar out of the interstate market? Do the people
17 know you're trying to do this? Can you really argue
18 that this statute is designed to drive vinegar out of
19 the interstate market?

20 MR. DREEBEN: No, of course not.

21 JUSTICE GINSBURG: Mr. Dreeben, are we
22 getting to the merits of the case?

23 MR. DREEBEN: A lot further than I had
24 intended, Justice Ginsburg. The merits of the case,
25 though, involve both a Commerce Clause argument, a

1 treaty-based argument. As far as the standing
2 principles go, I don't think that there is any
3 difference between them. Missouri v. Holland was a case
4 in which this Court adjudicated whether a law exceeded
5 Congress's enumerated authority. It did that at the
6 behest of a State, but there is no reason why under
7 cases like Lopez and Sabri and Perez that an enumerated
8 powers argument is in any way off limits to a criminal
9 defendant. It's not.

10 If this case does go back down to the Third
11 Circuit, a petitioner can make the argument that this
12 law exceeds the enumerated powers. We can rely on the
13 Treaty Clause. It doesn't affect standing in any way.
14 I think that the amicus in support of the judgment makes
15 the assumption that because Missouri v. Holland is good
16 law, there's no possible claim that Petitioner can make
17 that the law would exceed Congress's enumerated
18 authority. Therefore, the amicus says this must be some
19 sort of a special State sovereignty claim of a genre
20 that looks like commandeering, perhaps not articulated
21 quite light that.

22 We don't understand Petitioner to be making
23 that argument. I think Petitioner confirmed today
24 that's not what she's trying to do, and there is no
25 Tenth Amendment claim based on a specific aspect of

1 State sovereignty that Petitioner has ever made. In
2 fact, if you look at Petitioner's brief in support of
3 the rehearing petition, Petitioner said the Tenth
4 Amendment argument raised by Bond was not critical to
5 Bond's other constitutional challenges. It is ancillary
6 to Bond's main argument that Congress acted outside of
7 its enumerated powers. I think that's a correct
8 understanding of what Petitioner has sought to argue in
9 the court below. In our view, she is entitled to make
10 that argument. That argument should also fail on the
11 merits, but that is not an issue that this Court granted
12 certiorari to decide.

13 JUSTICE GINSBURG: In the category that you
14 would like to have saved, you said commandeering, but
15 you said there conceivably could be others. Is there
16 anything concrete, anything other than commandeering,
17 that might fall under this State sovereignty side of the
18 line?

19 MR. DREEBEN: Well, as Justice Alito pointed
20 out, the Court has indicated that moving a State
21 capital, a direction to move the State capital, might be
22 an intrusion on sovereignty.

23 JUSTICE GINSBURG: Unlikely to come up as a
24 defense in a criminal case.

25 MR. DREEBEN: Highly unlikely.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Dreeben.

3 MR. DREEBEN: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. McAllister.

5 ORAL ARGUMENT OF STEPHEN R. McALLISTER,
6 AS AMICUS CURIAE, IN SUPPORT OF
7 JUDGEMENT BELOW

8 MR. McALLISTER: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 The relevant standing doctrine in this case
11 is the prudential rule against third-party standing. No
12 one disputes here that the Petitioner has Article III
13 standing. One of the difficulties in the case is that
14 the only case that mentions specifically standing in
15 this context is the Tennessee Valley Authority case and
16 it clearly says if it is in fact a Tenth Amendment
17 claim, unless you have a State official or the State,
18 there is no standing.

19 CHIEF JUSTICE ROBERTS: Pretty harsh, if
20 we're talking about prudential standing, to deny that to
21 a criminal defendant, isn't it?

22 MR. McALLISTER: It's potentially harsh,
23 Your Honor, but there are lower court cases that have
24 certainly done it. There is some circuit cases where a
25 criminal defendant has tried to make a Tenth Amendment

1 claim and the court has said no. She still has several
2 other claims here. We all agree, I think, to the extent
3 you could really characterize her claim as an Article I
4 enumerated powers claim, this Court has assumed many
5 times that defendants have the standing. This Court
6 generally has not discussed it, but it has assumed it,
7 and so there are cases that say no standing for a
8 criminal defendant. She did make a Fifth Amendment due
9 process vagueness challenge. If she had other Bill of
10 Rights type claims. Even the treaty power cases like
11 Reid v. Covert recognize you could raise that kind of
12 claim, but the Court's cases do distinguish between
13 Tenth Amendment and other claims. And a lot of the
14 argument here is about what is on the Tenth Amendment
15 side of the line, what is a lack of power, for a better
16 word, whether it's -- there's an Article I, power
17 doesn't reach it. And in particular I would point to
18 the Heller case, which Petitioner mentions in her reply
19 brief, but frankly is off by one page in the citation
20 that the Court should focus on, pages 579 to '80. The
21 Court says "there are three times in the Constitution
22 where the word "the people" is not talking about
23 individual rights. And the three examples the Court
24 gives are the Preamble, Article 1, Section 2, and the
25 Tenth Amendment. And the Court says these provisions

1 are about reservations of power, not rights. And also
2 the Printz and the New York v. United States cases say
3 there is something substantive about the Tenth Amendment
4 that is a limit separate and apart from Article ,
5 Section 8.

6 JUSTICE SOTOMAYOR: Excuse me. What do you
7 see specifically? Because there's a lot of discussion
8 about labels and what the labels mean in this case. But
9 tell me specifically what -- not the word she uses, but
10 the specific ways in which prudential considerations bar
11 her standing; meaning: What about the nature of her
12 claim prudentially should counsel us against giving her
13 standing?

14 MR. McALLISTER: Well, I would say at least
15 a couple things, Your Honor. One is, the usual rule of
16 prudential third-party standing considers the alignment
17 or lack of alignment between the interests of the third
18 party making the claim and the party who is not present
19 whose claim it really is. And in this case, there's
20 really no argument that her interests align with those
21 of the Commonwealth of Pennsylvania. The Commonwealth
22 in fact prosecuted her and it did not stop her. It was
23 unsuccessful as a deterrent. And later, when local
24 police wouldn't be involved, the Federal Government got
25 involved. And --

1 JUSTICE SOTOMAYOR: Do you think
2 Pennsylvania would be upset that the Federal Government
3 got her when they couldn't?

4 MR. McALLISTER: No, that's my point. And
5 so my point is that her interests are directly contrary
6 to Pennsylvania's interests. So she's not stepping in
7 saying: I share the interests of the State; therefore,
8 let me articulate and argue the interests of the State.

9 JUSTICE SCALIA: Well, in a -- in another
10 case, conceivably, the State Attorney General can
11 exercise his or her prosecutorial discretion not to --
12 not to prosecute this woman, or at least not to
13 prosecute her under the antiterrorism law that gives her
14 8 years. Isn't that something for the State to be
15 concerned about? We want to have the discretion of
16 whether to prosecute or not for standard crimes that
17 have no relation to interstate commerce or any other
18 Federal power.

19 MR. McALLISTER: Well, it's standard that
20 both sovereigns have the ability often to prosecute if
21 the definitions of crimes overlap, and there's nothing
22 that prevents Pennsylvania from prosecuting her again
23 here.

24 JUSTICE SCALIA: She wants to make the
25 argument that the definitions don't overlap. She wants

1 to make the argument that this is a strictly State,
2 local crime, and that any -- any attempt by the Federal
3 Government to convert it into a treaty-based terrorism
4 crime is -- is erroneous.

5 MR. McALLISTER: Well, in --

6 JUSTICE SCALIA: That's what she's trying to
7 do. Why doesn't she have standing to make that
8 argument?

9 MR. McALLISTER: Because the lower courts,
10 at least, in their defense, understood this to be a
11 Tenth Amendment claim, and there are reasons for that.
12 Now, in this Court neither the Petitioner nor the
13 government really wants to talk about that or argue
14 about that. Instead, they talk about the petition for
15 rehearing en banc after the Third Circuit has decided
16 the case.

17 But if you look in the Joint Appendix, pages
18 26 to 32 is the supplemental brief that her lawyer filed
19 when the Third Circuit said, post-argument: Now, wait a
20 minute, maybe this is a Tenth Amendment case and we have
21 a standing issue. The government, at that point, said:
22 Hey, good idea; we don't think she does have standing.

23 And she did not come back and answer: I'm
24 not making a Tenth Amendment claim. Her answer is: I'm
25 making a Tenth Amendment claim, but I have standing to

1 make it.

2 JUSTICE BREYER: That single sentence
3 doesn't seem -- I'm trying to figure it out. It doesn't
4 seem to refer to just all Tenth Amendment claims.
5 There's a footnote and it talks about no standing in
6 this suit.

7 Then if you look back at the lower court
8 case, it seemed to be referring to a particular argument
9 where the challengers had said the Property Clause
10 doesn't give authority to the government to pass this.
11 The reply was, that was true in Alabama, and the Court
12 said it was okay. Then the challengers say: Oh, but
13 Alabama agreed. And then Georgia doesn't agree. And it
14 was in that context that Georgia says it doesn't make
15 any difference.

16 But if Georgia was going to disagree or
17 agree, if that's what it turned on, we better have
18 Georgia say whether they agree or disagree, and not have
19 people who aren't Georgia. That's what he seems to be
20 saying to me at the moment.

21 If I'm right, what's comparable to that in
22 this case? Is there some claim that she's making that
23 it would be constitutional if they agreed in the State
24 and it wouldn't be if not? I don't think so. I think
25 she means it's constitutional irrespective.

1 MR. McALLISTER: As a -- I mean, she's
2 arguing a lack of power. So --

3 JUSTICE BREYER: Yes. Yes. So if that's
4 so, then how can we take this sentence as barred?

5 MR. McALLISTER: Well, I think, again, the
6 sentence -- I mean, if we're talking about the sentence
7 in TVA barring standing in Tenth Amendment claims --

8 JUSTICE BREYER: Yes. It just says "in this
9 case."

10 MR. McALLISTER: It says "in this case," but
11 there's no suggestion that it will -- frankly, it's hard
12 for us to even tell exactly what this case was in terms
13 of the facts. It's a rather confusing case.

14 JUSTICE BREYER: No, he cites. He gives a
15 footnote and you read the page and you get an idea.

16 MR. McALLISTER: For that particular
17 instance -- and that's certainly an example the Court
18 had in mind. The language of TVA, though, is in no way
19 limited to that particular instance. It just says here,
20 there's -- if this is a Tenth Amendment claim, there is
21 no standing. And that's why, I think, for 70 years the
22 lower courts have wrestled with, what is a Tenth
23 Amendment claim? Because TVA is there, this Court has
24 announced it, and if it is a Tenth Amendment claim,
25 there is no standing.

1 Sort of back to Justice Sotomayor's
2 question, though, in terms of the third-party prudential
3 aspect of it, again, the issue is: Is this person a
4 good person to assert someone else's interests? Yes,
5 she has Article III standing, but not necessarily to
6 make every constitutional claim one might think of. In
7 the Tenth Amendment context, those claims belong to the
8 States. They don't create individual rights. And in
9 fact, there's good reason to think the States do get
10 involved when they perceive actual Tenth Amendment
11 violations.

12 JUSTICE SOTOMAYOR: Could you just
13 articulate for me -- we're speaking in generalities --
14 what in the nature of her claim, taking the labels away,
15 do you think is a pure Tenth Amendment challenge?

16 MR. McALLISTER: Well, that's --

17 JUSTICE SOTOMAYOR: As I read her complaint,
18 and it's always that it's a Tenth Amendment claim
19 because Congress and the president have exceeded their
20 powers in some --

21 MR. McALLISTER: As I understand her
22 complaint, basically her argument is that unless this
23 statute is authorized by something in Article I,
24 section 8, the first 17 clauses, there's no power to
25 enact it. And that's why this case is, frankly, not

1 clearly governed by Lopez or Raich or Morrison. Those
2 were straight commerce power cases under section 3.
3 This is a treaty power case under Article II, and she
4 only wants to read the first half of the Necessary and
5 Proper Clause, which refers to all the foregoing powers.
6 But it also says necessary and proper for all other
7 powers.

8 JUSTICE SOTOMAYOR: That's -- you haven't
9 answered my -- my question. Why isn't that a merits
10 decision as to whether or not the President and Congress
11 have the power to enact this legislation?

12 MR. McALLISTER: Well, Your Honor, in
13 essence, at the end of the day, it will be a merits
14 question, but from a standing argument, trying to define
15 what is a Tenth Amendment claim -- and the point I was
16 trying to make, perhaps not successfully, is that she's
17 not saying -- well, she is sort of saying the Article I,
18 section 8 enumerated powers are the limits. But
19 frankly, they can't be the limits.

20 In light of the plain language of the
21 Necessary and Proper Clause and Missouri v. Holland and
22 90 years of this Court's precedent under the treaty
23 power, those powers are not limits. So she's asserting
24 they're limits and saying, I'm really making an Article
25 I claim, but that simply lets her always have standing,

1 because, even in the commandeering cases, the plaintiff
2 can say, this is about Article I, this is not about the
3 Tenth Amendment. And so at some point the Court has to
4 drill down and characterize what the nature of the claim
5 actually is.

6 CHIEF JUSTICE ROBERTS: Well, why do we have
7 to do that? It -- it seems to me we've had a lot of
8 discussion this morning about whether this is an
9 enumerated powers claim or a Tenth Amendment claim.
10 They really do kind of blend together, and it seems to
11 me awfully difficult to put on a criminal defendant the
12 responsibility to decide whether this is going to be an
13 enumerated powers claim or this is going to be a Tenth
14 Amendment claim. The basic principles do kind of merge
15 together, and why does it make -- again, why does it
16 make that much of a difference and why do you put the
17 burden on the defendant to parse the claim one way or
18 another, since I assume they can make pretty much all
19 the same arguments under an enumerated powers -- under
20 the enumerated powers clause --

21 MR. McALLISTER: Well --

22 CHIEF JUSTICE ROBERTS: In an enumerated
23 powers argument.

24 MR. McALLISTER: In an enumerated powers
25 case, yes. The problem -- I think the difficulty with

1 this case is it's unusual and that there -- until its
2 reply brief in this Court, the government had not relied
3 on the commerce power. In fact, the government had said
4 throughout: This is a treaty power case, treaty power
5 case. Even at the oral argument in the Third Circuit,
6 the judge said, couldn't we decide this on the basis of
7 the treaty power? Wouldn't -- or the commerce power --
8 would not that be the easy route? And the government
9 lawyer said, no, that would be the hard route; you need
10 to decide it on the basis of the treaty power.

11 So I agree in a Lopez kind of case that,
12 really, that's where the Court has often said it's just
13 mirror image. If the commerce power doesn't go that
14 far, then by definition it's reserved under the Tenth
15 Amendment. But here, it's a treaty power case. It's
16 not an Article I, section 8 --

17 JUSTICE KAGAN: Mr. McAllister, I guess I
18 don't understand why that makes a difference. The
19 Necessary and Proper Clause says "foregoing powers" and
20 it says "other powers." This happens to be a case where
21 Congress is acting under the other powers part of the
22 Necessary and Proper Clause, but the question in either
23 event is the extent of the Necessary and Proper Clause
24 and what it allows Congress to do.

25 So in -- in that sense, whether it's a

1 treaty power case or not a treaty power case just
2 doesn't matter. It's all a question of what Congress's
3 scope of authority is under the Necessary and Proper
4 Clause.

5 MR. McALLISTER: Well, I would disagree
6 somewhat, Your Honor, respectfully, that -- her argument
7 about the Necessary and Proper Clause I don't think is
8 that this -- this -- she's not arguing the statute is an
9 irrational or unreasonable way to implement the treaty
10 obligations of the United States. What she's arguing is
11 that the treaty power itself does not give Congress the
12 power to enact section 229 unless, in essence, you don't
13 need the treaty, because you already have the power, the
14 government does, under the first 17 clauses of Article
15 I, Section 8.

16 So, yes, the Necessary and Proper Clause is
17 the connection here to Article I, Section 8, but it's a
18 minimal connection, and -- and she's not arguing sort of
19 the -- - the -- I don't think, the Comstock kind of
20 argument that this isn't tied to, rationally, to some
21 sort of articulated power.

22 The government clearly has power to enter
23 treaties under Article II, section 2, and so that to me
24 is the distinguishing feature from all those other
25 Article I, section 8, cases. This -- I agree; I don't

1 think I could stand up here and -- and try to argue to
2 you this is a true Tenth Amendment case if, in fact,
3 this had been litigated as a commerce power case all
4 along.

5 JUSTICE ALITO: I'm not sure I -- I'm not
6 sure I understood what you just said. Are you saying
7 that -- that she is arguing that Congress does not have
8 the power to enact legislation that's necessary and
9 proper for the implementation of treaties, but only for
10 the making of treaties; that she's making that argument
11 that's been made by some academic writers?

12 MR. McALLISTER: No, I'm not sure that's
13 what I meant to say, Justice Alito. What -- what I was
14 trying to say is her argument is not -- well, I think
15 her argument is in essence a challenge to the treaty
16 power. It's one step removed, but it is a challenge to
17 the treaty power, because she says the statute has to be
18 based on something in Article I, section 8, first 17
19 clauses; and if it's based on something there, then the
20 treaty power adds nothing to Congress's ability to enact
21 legislation; and that's inconsistent with the plain
22 language of the Necessary and Proper Clause, the fact
23 that the treaty power is in Article II, not in Article
24 I, section 8.

25 And so under her view of the world -- as I

1 understand it; I'm sure Mr. Clement will correct me if
2 I'm wrong about my understanding -- is that really you
3 don't need a treaty, the treaty doesn't add anything. I
4 mean, it may be the reason that Congress decides at this
5 point in time to enact section 229. But I believe, as I
6 understood her argument, if it has the commerce power to
7 do it, United States never entered -- needed to enter a
8 treaty in order for Congress to enact section 229. So
9 in other words, as I understand her argument, the treaty
10 power adds nothing to the domestic legislative authority
11 of Congress.

12 JUSTICE GINSBURG: Mr. McAllister, have you
13 found any case other than this one where a criminal
14 defendant was held to have lacked standing to challenge
15 a statute under which the defendant was prosecuted?

16 MR. McALLISTER: Not in this Court, Justice
17 Ginsburg, but there are examples in the circuits, a few.
18 There are examples from the Eighth Circuit, from the
19 Tenth Circuit involving criminal prosecutions where the
20 Court characterized the claim as a Tenth Amendment claim
21 and said, in light of TVA, the criminal defendant does
22 not have standing to make that claim. So there are
23 examples in the lower courts. I'm not aware of an
24 example in this Court.

25 And I would say this, too, about the --

1 there's some argument about the separation of powers
2 cases in which the Court has typically allowed
3 individuals to make that claim. Again, because we're
4 talking about prudential rules and third-party standing,
5 or at least I'm talking about that, one prudential
6 consideration is in those cases, whether it's Chadha,
7 whether it's Clinton v. New York, the recent Free
8 Enterprise case, the Federal Government is always very
9 much present. It may be representing the defendant in
10 those cases, it may simply intervene or come in as an
11 amicus, it gets notice if the Federal statute is
12 challenged as being unconstitutional.

13 The difference in the Tenth Amendment
14 setting is there's no mechanism, practically, to notify
15 the States or solicit the States for their interests.
16 Someone's raising this claim that says the government is
17 intruding on your sovereign interests; there's no
18 mechanism to allow the States. Now, if -- if States are
19 aware of it and come and ask to file an amicus, perhaps
20 they would be allowed to, but there's no mechanism that
21 ensures --

22 JUSTICE SOTOMAYOR: Isn't that an issue for
23 a civil lawsuit as opposed to a criminal one? Because
24 all that would happen in a criminal suit is that the
25 defendant's conviction would be undone, but that doesn't

1 mean that the State is bound in some way. The State
2 wasn't a party to the criminal action.

3 MR. McALLISTER: Well, the State isn't a
4 party, but what gets said in those cases about the scope
5 of the State's prerogatives vis-à-vis the Federal
6 Government could well be brought to bear in other cases
7 in other settings, commandeering cases.

8 Again, the concern in the third-party
9 standing case is that you're not actually a party, but
10 someone else is making arguments in a sense on your
11 behalf. They lose, because perhaps they don't know all
12 of the arguments they should be making or they don't
13 articulate them the way the State does -- there's still
14 stare decisis effect of those decisions on the States.

15 JUSTICE SOTOMAYOR: Well, there's two things
16 that could happen. One is that if the State loses, then
17 -- and it doesn't want to lose -- it passes its own law.
18 Or if it wins, if the case is as stated below, it just
19 lets the status quo go. I still don't understand what
20 the long-term injury to the State is or could be.

21 MR. McALLISTER: Well, I guess again, and
22 maybe I'm misapprehending, but the long-term interest is
23 a -- is a decision, say in the criminal case, that says,
24 no, this doesn't intrude on the State's sovereignty, is
25 there as a matter of stare decisis. So if in a later

1 case the State wants to in fact assert that this
2 particular statute does intrude on our sovereignty, it's
3 not that they can't necessarily raise the claim, but
4 they will confront contrary precedent that the State
5 never had a chance to -- to voice its opinion or its
6 views at the time the issue was being adjudicated.

7 JUSTICE KENNEDY: Your underlying premise is
8 that the individual has no interest in whether or not
9 the State has surrendered its powers to the Federal
10 Government, and I just don't think the Constitution was
11 framed on that theory.

12 MR. McALLISTER: Well, Justice Kennedy, I
13 don't know that I would say they have no interest, but I
14 am -- I guess the premise I'm asserting is they do not
15 necessarily get to assert the Tenth Amendment claim of
16 the States. New York v. United States, for example, was
17 a case where the State initially said we're not
18 concerned about this regulation, and then changed its
19 mind; and the Court in New York said States don't waive
20 those Tenth Amendment rights; States can then -- can
21 change its mind and bring a suit, and there's no
22 indication --

23 JUSTICE SCALIA: But it does -- it does
24 assume, as Justice Kennedy said, that the reason that is
25 there in the Constitution is only for the benefits of

1 the States, and not for the benefit of the people in the
2 States. So if a State chooses to give it away, the --
3 the individual has -- has no standing. You say it's
4 third party, we're raising the States' rights. I think
5 what the other sides is arguing; this is not a right of
6 the States, it's a right of the individual to have the
7 State take charge of certain matters and the Federal
8 Government take charge of other matters. I don't see
9 why that's any different from an Article I, section 8
10 claim.

11 MR. McALLISTER: Well, and that's a
12 conclusion the Court can reach. But what -- what the
13 Petitioner's position essentially holds is that there's
14 never a question of third-party standing for any claim
15 under the Constitution, basically, not the kind I'm
16 talking about; and that no claims are limited to certain
17 categories of litigants.

18 JUSTICE SCALIA: There -- there's a question
19 of causality, so some of them will -- will not be valid
20 because you can't show that the -- that the State was
21 coerced into doing something and therefore you can't
22 show that the violation of the Constitution caused your
23 injury.

24 MR. McALLISTER: And that's -- but you're
25 talking now really the causality; that's an Article III

1 inquiry. And again, what I'm trying to talk about is
2 separate, the next step, the prudential third-party
3 standing. And I think Petitioner's view is third-party
4 standing is just out the window, whether it's separation
5 of powers, Tenth Amendment, anything.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 McAllister.

8 MR. McALLISTER: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Clement, you
10 have four minutes remaining.

11 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF PETITIONER

13 MR. CLEMENT: Thank you, Mr. Chief Justice.

14 Just a few points in rebuttal. First of
15 all, one reason not to carve out a special rule for
16 commandeering claims is that not all commandeering
17 claims are created equal. Mr. Dreeben raises the
18 commandeering claim that has been litigated in the
19 context of SORNA, the sex registration act. I don't
20 know the details of that enough to know whether that's a
21 valid commandeering claim or not, or whether there's a
22 redressability problem in that particular case. But I
23 can certainly imagine a commandeering case, a Federal
24 statute that purports to commandeer local prosecutors to
25 prosecute Federal crimes, where there would be no

1 standing obstacle; and the problem is right now the
2 lower courts aren't resolving the standing issue in the
3 SORNA challenges based on a careful analysis of Article
4 III standing, redressability or prudential standing, for
5 that matter. They're resolving those challenges with a
6 simple citation to Tennessee Electric and let's move on,
7 and that's really what should stop.

8 A second reason that you should not try to
9 carve out commandeering cases as being somehow the
10 residuum of the Tennessee Electric dictum is because
11 Tennessee Electric says nothing about commandeering
12 cases. It just talks broadly about Tenth Amendment
13 cases. You know, we can disagree or agree; it's kind of
14 hard to figure out what the nature of the claim was in
15 Tennessee Electric.

16 I don't think it was really much different
17 from the claim that we're raising here, which is in
18 Tennessee Electric they said, well, if the Federal
19 Government gets to regulate power, what's left of
20 State's traditional prerogative to regulate the price
21 for power.

22 Here is if the Federal Government can go in
23 and prosecute you for putting vinegar in your neighbor's
24 goldfish bowl, what's left of local law enforcement. I
25 think they're very similar arguments. But whatever else

1 is true, I just don't think Tennessee Electric limited
2 itself to commandeering claims in any way that would
3 allow you to say that Mr. Dreeben refers to the enduring
4 force of Tennessee Electric. With all due respect, I
5 don't think Tennessee Electric has any enduring force.

6 The central holding of this decision was
7 overruled. The further you go in the decision the less
8 satisfying it is. If you go all the way to reading the
9 Georgia Power case cited in footnote 27 as Justice
10 Breyer has done, and you look at the role of consent of
11 the States, it turns out in the district court opinion,
12 that's in the merits section of the opinion.

13 The Court's already held contrary, actually,
14 to the holding of Tennessee Electric that the utility
15 companies there had standing. So what you see is, you
16 know what happens if you apply the legal interest test,
17 you hopelessly conflate the merits and the standing
18 question. That's kind of happened today in oral
19 argument. That's a bad approach. The Court was right
20 to get rid of it in camp, and it should perfect the camp
21 decision by saying this sentence no longer survives.

22 Two other minor points. One is on the
23 Commerce Clause, I think Justice Alito shows why the
24 Government was right never to make that argument below,
25 but I do think it's important that if this Court says

1 anything about the Commerce Clause issue, it doesn't
2 somehow reinject it in the case in a way that would not
3 allow us to argue that it has been clearly waived in the
4 Third Circuit. The Government gets to confess air, it
5 doesn't get to confess, oh, actually, we have a better
6 argument to defend the statute that we've never raised
7 before. Plain error should be a two-way street, and
8 they should not be allowed to sneak the Commerce Clause
9 back into the case at this late stage.

10 Finally, there is no difference between the
11 separation of powers case and the Federalism case. The
12 best example of that is this Court's Free Enterprise
13 Fund case. When it wants a case to cite for the
14 proposition that the Executive Branch cannot waive or
15 acquiesce in a separation of powers violation, because
16 the separation of powers is there to protect the
17 individual, what does it cite? New York against United
18 States. Please reverse the decision below.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 Clement.

21 Mr. McAllister, this Court appointed you to
22 brief and argue the case in support of the judgment
23 below, you have ably discharged that responsibility for
24 which we are grateful.

25 The case is submitted.

1 (Whereupon, at 11:19 a.m., the case in the
2 above-entitled matter was submitted.)
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21
22
23
24
25

A				
ability 4:16 6:13 6:24 7:9 25:5 37:20 46:20	affirmatively 16:9	21:9 22:7 23:5 32:25 33:4	23:3	54:19,24 55:6
able 3:25 10:25 12:17 19:22 24:17 27:10	ago 16:17	34:16,25 35:8 35:13,14,25	Appendix 38:17	arguments 4:22 5:3,5 8:19 43:19 49:10,12 53:25
ably 10:5 55:23	agree 8:11 21:21 28:13 35:2 39:13,17,18 44:11 45:25 53:13	36:3 38:11,20 38:24,25 39:4 40:7,20,23,24 41:7,10,15,18 42:15 43:3,9,14 44:15 46:2 47:20 48:13 50:15,20 52:5 53:12	application 16:24 applications 25:7 applied 13:20 apply 4:11,20 10:18 13:6 16:21 54:16 applying 4:13 28:2	arises 8:13 Arkansas 19:24 arson 13:5 Article 6:25 7:9 7:21 8:11 34:12 35:3,16,24 36:4 41:5,23 42:3,17 42:24 43:2 44:16 45:14,17 45:23,25 46:18 46:23,23 51:9 51:25 53:3
above-entitled 1:11 56:2	agreed 39:13,23	Amendment-s... 21:22	approach 54:19	articulate 37:8 41:13 49:13
absence 23:1	agrees 8:5	amicus 1:22 2:11 32:14,18 34:6 48:11,19	appropriate 24:21	articulated 32:20 45:21
absent 14:21 23:3	agricultural 30:17	analysis 17:8 27:16,18 28:11 28:21 29:6 53:3	area 30:13	asked 23:19
absolutely 24:23	air 55:4	analytical 22:15 28:20	argue 19:1 31:17 33:8 37:8 38:13 46:1 55:3,22	asking 11:11,13 13:15
academic 46:11	Alabama 39:11 39:13	analogy 13:4	argued 12:6	aspect 20:23 28:7 32:25 41:3
accept 24:13 30:11	align 36:20	animals 30:6	argues 19:2	assert 18:23 41:4 50:1,15
acceptable 27:15	alignment 36:16 36:17	ANNOUNCED 40:24	arguing 21:18 40:2 45:8,10,18 46:7-51:5	asserting 42:23 50:14
accommodate 16:4,9	Alito 10:8,16 11:16,24 12:19 13:1 19:1,10 21:5,15 29:15 29:23,25 30:4 30:23 31:10 33:19 46:5,13 54:23	answer 23:25 38:23,24	argument 1:12 2:2,5,9,13 3:4,7 4:16,24 7:2,3 7:16 8:2,20 9:7 11:1 12:1 13:3 13:19,22 14:6 15:19 17:15,23 19:3,8 21:6,13 24:17,18,21 26:8 31:2,8,25 32:1,8,11,23 33:4,6,10,10 34:5 35:14 36:20 37:25 38:1,8 39:8 41:22 42:14 43:23 44:5 45:6 45:20 46:10,14 46:15 47:6,9 48:1 52:11	assessing 12:9
accommodated 19:16	allege 18:8	answered 42:9	argued 12:6	assume 7:18 13:9 23:6 29:24 43:18 50:24
accounting 10:6	alleged 19:18	answers 12:5	argues 19:2	assumed 35:4,6
accused 23:8	allow 48:18 54:3 55:3	anti 23:12,14,21	arguing 21:18 40:2 45:8,10,18 46:7-51:5	assuming 19:3
acquiesce 55:15	allowed 10:6 19:25 48:2,20 55:8	antifreeze 31:5,7	argument 1:12 2:2,5,9,13 3:4,7 4:16,24 7:2,3 7:16 8:2,20 9:7 11:1 12:1 13:3 13:19,22 14:6 15:19 17:15,23 19:3,8 21:6,13 24:17,18,21 26:8 31:2,8,25 32:1,8,11,23 33:4,6,10,10 34:5 35:14 36:20 37:25 38:1,8 39:8 41:22 42:14 43:23 44:5 45:6 45:20 46:10,14 46:15 47:6,9 48:1 52:11	assumption 30:11 32:15
act 24:3 52:19	allows 44:24	antiterrorism 37:13	argued 12:6	assure 31:14
acted 14:17 33:6	alternatively 19:16	anyway 26:4	argues 19:2	attack 3:25 8:17 20:23
acting 6:17,21 44:21	Amazon.com 13:25	apart 36:4	arguing 21:18 40:2 45:8,10,18 46:7-51:5	attempt 38:2
action 6:21 49:2	amendment 6:19 6:22 7:4,5,10 7:22 10:9,17 15:11,22 16:23 17:2 18:11,15 18:18 19:5 21:2	appeals 4:19 11:21 18:6	argument 1:12 2:2,5,9,13 3:4,7 4:16,24 7:2,3 7:16 8:2,20 9:7 11:1 12:1 13:3 13:19,22 14:6 15:19 17:15,23 19:3,8 21:6,13 24:17,18,21 26:8 31:2,8,25 32:1,8,11,23 33:4,6,10,10 34:5 35:14 36:20 37:25 38:1,8 39:8 41:22 42:14 43:23 44:5 45:6 45:20 46:10,14 46:15 47:6,9 48:1 52:11	Attorney 37:10
actions 16:8		APPEARANC... 1:14	argued 12:6	authority 14:18
activities 21:11		appellants 14:20	argues 19:2	
actual 14:2 41:10			arguing 21:18 40:2 45:8,10,18 46:7-51:5	
add 47:3			argument 1:12 2:2,5,9,13 3:4,7 4:16,24 7:2,3 7:16 8:2,20 9:7 11:1 12:1 13:3 13:19,22 14:6 15:19 17:15,23 19:3,8 21:6,13 24:17,18,21 26:8 31:2,8,25 32:1,8,11,23 33:4,6,10,10 34:5 35:14 36:20 37:25 38:1,8 39:8 41:22 42:14 43:23 44:5 45:6 45:20 46:10,14 46:15 47:6,9 48:1 52:11	
addressed 20:22 24:9 28:20			argued 12:6	
adds 46:20 47:10			argues 19:2	
adjudicated 32:4 50:6			arguing 21:18 40:2 45:8,10,18 46:7-51:5	
admit 6:20			argument 1:12 2:2,5,9,13 3:4,7 4:16,24 7:2,3 7:16 8:2,20 9:7 11:1 12:1 13:3 13:19,22 14:6 15:19 17:15,23 19:3,8 21:6,13 24:17,18,21 26:8 31:2,8,25 32:1,8,11,23 33:4,6,10,10 34:5 35:14 36:20 37:25 38:1,8 39:8 41:22 42:14 43:23 44:5 45:6 45:20 46:10,14 46:15 47:6,9 48:1 52:11	
adopted 25:23 30:12			argued 12:6	
affairs 21:20			argues 19:2	
affect 32:13			arguing 21:18 40:2 45:8,10,18 46:7-51:5	

17:25 18:25 19:14 24:6 27:3 32:5,18 34:15 39:10 45:3 47:10 authorized 41:23 authorizing 19:13 autonomous 25:6 available 14:4 avoidance 13:2 aware 47:23 48:19 awfully 43:11 a.m 1:13 3:2 56:1	18:23 49:11 52:12 behest 32:6 believe 29:4 30:7 47:5 belong 41:7 belonged 20:24 belongs 17:24 benefit 51:1 benefits 50:25 best 24:2 55:12 bet 7:25 better 35:15 39:17 55:5 beyond 6:24 22:3 22:12 28:12	briefs 28:23 bright-line 12:4 bring 6:9 15:21 19:25 24:10 50:21 bringing 6:10 11:3 broadly 53:12 broad-reaching 30:12,13 brought 49:6 burden 43:17 business 5:4 buy 13:24	40:12,13 41:25 42:3 43:25 44:1 44:4,5,11,15 44:20 45:1,1 46:2,3 47:13 48:8 49:9,18,23 50:1,17 52:22 52:23 54:9 55:2 55:9,11,11,13 55:13,22,25 56:1 cases 4:10 9:12 9:14 20:18 26:12 32:7 34:23,24 35:7 35:10,12 36:2 42:2 43:1 45:25 48:2,6,10 49:4 49:6,7 53:9,12 53:13 categories 51:17 category 19:8,10 28:20 33:13 causality 51:19 51:25 causation 27:13 cause 16:14 30:6 30:8 caused 51:22 causes 20:13 causing 19:21 central 16:16 17:20 54:6 certain 18:8 19:5 51:7,16 certainly 4:22 5:3 8:15 34:24 40:17 52:23 certiorari 33:12 Chadha 20:7 48:6 challenge 3:11 4:8 6:13 18:1 19:25 29:1 35:9	41:15 46:15,16 47:14 challenged 24:4 48:12 challengers 39:9 39:12 challenges 33:5 53:3,5 chance 50:5 change 50:21 changed 15:2 50:18 characterization 21:6 characterize 35:3 43:4 characterized 47:20 charge 26:3,4 51:7,8 check 8:21 12:7 chemical 12:20 12:21,22,23 13:24 14:3,4 29:25 30:3,4,6 30:6,9,21 chemicals 30:5 30:18 31:1,3 Chief 3:3,9 17:12 17:17 18:13,20 34:1,4,8,19 43:6,22 52:6,9 52:13 55:19 choose 25:1 chooses 51:2 circuit 11:18,25 12:7 18:1,3 28:15 32:11 34:24 38:15,19 44:5 47:18,19 55:4 circuits 47:17 citation 17:5,6 35:19 53:6
B		C		
back 6:10 11:25 11:25 13:18 23:18,23 28:23 32:10 38:23 39:7 41:1 55:9 bad 54:19 balancing 8:22 12:8 ban 30:19 banc 38:15 bar 4:16 18:8 36:10 barred 18:7 23:13 40:4 barring 40:7 based 5:18,18,20 5:24 16:23 20:23 32:25 46:18,19 53:3 basic 28:13 43:14 basically 41:22 51:15 basis 4:1 8:8 15:12 44:6,10 bear 49:6 behalf 1:15,19 2:4,7,15 3:8	Bill 35:9 biological 29:12 birds 12:13 bit 3:20 18:16 21:16 blank 8:21 12:7 blend 43:10 Bond 1:3 3:4 33:4 Bond's 33:5,6 bore 21:19 bottle 29:19 bound 49:1 bowl 29:20 30:7 53:24 Branch 10:4 55:14 breadth 29:15 Breyer 14:8 15:14 21:24 22:5,6,10,11 22:16,20,23,24 39:2 40:3,8,14 54:10 brief 21:8 28:24 28:25 33:2 35:19 38:18 44:2 55:22	C 2:1 3:1 call 5:2 19:23 camp 16:18 54:20,20 capital 10:12 33:21,21 caption 21:9 careful 53:3 CAROL 1:3 carve 52:15 53:9 case 4:18 5:4,13 5:15 6:2,2,11 6:15 7:8,11,14 7:14,15,25 8:6 8:13 10:3,25 11:4,15 12:11 12:15,24 13:4 14:10 16:18 18:6,22 19:13 19:18,20,24 20:8 21:1,7,8 22:6,11,18 23:7 24:1 28:2,6,12 29:17 31:22,24 32:3,10 33:24 34:10,13,14,15 35:18 36:8,19 37:10 38:16,20 39:8,22 40:9,10		

<p>cite 55:13,17 cited 20:19 54:9 cites 40:14 citizen 19:25 citizens 9:25 civil 19:13 48:23 claim 5:17 6:9 7:19 8:3,4,6,8 9:22 11:6,8,10 11:17 15:22 17:2,3,5,9,20 17:23 18:10,11 18:12,19,22 19:23,24 20:25 21:4,18,22 23:12,15,15,17 23:21 24:9 28:7 28:8,10,14,17 28:18,22,23 32:16,19,25 34:17 35:1,3,4 35:12 36:12,18 36:19 38:11,24 38:25 39:22 40:20,23,24 41:6,14,18 42:15,25 43:4,9 43:9,13,14,17 47:20,20,22 48:3,16 50:3,15 51:10,14 52:18 52:21 53:14,17 claims 6:16,19 6:22,23 7:5,5,6 7:11,23 8:12 9:13,14,17 10:9 10:20 15:11 16:23 18:8 20:7 35:2,10,13 39:4 40:7 41:7 51:16 52:16,17 54:2 clash 26:12 clause 5:8,11,19 5:21 6:1,4,5</p>	<p>19:15 21:25 24:6,7 28:23,25 29:5,5,7 31:12 31:25 32:13 39:9 42:5,21 43:20 44:19,22 44:23 45:4,7,16 46:22 54:23 55:1,8 clauses 41:24 45:14 46:19 clear 8:16 16:21 28:5 clearly 3:14 7:4 12:6 34:16 42:1 45:22 55:3 Clement 1:15 2:3 2:14 3:6,7,9 4:5 5:1,12,22 6:6 6:15 7:1,12,19 7:24 8:7,14 9:10 10:15 11:5 11:9,23 12:25 13:11,15 15:5 15:17 17:13 28:5 47:1 52:9 52:11,13 55:20 client 6:13 8:16 8:18 9:6,6 11:19 Clinton 20:8 48:7 cocktail 13:6 coerced 51:21 cognizance 24:10 come 23:9 33:23 38:23 48:10,19 comes 15:14 17:1 coming 11:25 13:18 commanded 25:4 commandeer 11:3 52:24 commandeered</p>	<p>26:21 commandeering 8:3,12 9:13 10:20,23 11:1,6 11:8,10 17:3,5 23:12,15,21 24:1,24 28:6,19 32:20 33:14,16 43:1 49:7 52:16 52:16,18,21,23 53:9,11 54:2 commandeers 9:17 24:13 commerce 21:25 24:6 28:23,25 29:7,10 31:12 31:25 37:17 42:2 44:3,7,13 46:3 47:6 54:23 55:1,8 commitment 19:13 commodity 29:10 30:24 commonly 14:4 Commonwealth 36:21,21 companies 26:1 26:3 54:15 comparable 39:21 compares 12:11 compelled 27:12 competes 14:19 complaining 10:3 complaint 14:17 41:17,22 comprehensive 30:19 Comptroller 11:3 Comstock 19:11 19:18 45:19 conceivably 33:15 37:10</p>	<p>conceptualize 23:16 concern 26:12,17 27:21 49:8 concerned 37:15 50:18 concerning 17:24 concluding 18:6 conclusion 18:4 51:12 concrete 3:16 33:16 concurrence 27:8 confer 27:3 confess 55:4,5 confirmed 17:19 32:23 conflate 54:17 confront 50:4 confronted 17:4 confusing 13:14 40:13 Congress 6:17 6:20 7:8 11:2 14:13,17 18:25 19:3 22:4,12 24:5 29:11 31:10,12 33:6 41:19 42:10 44:21,24 45:11 46:7 47:4,8,11 Congress's 6:24 7:21 17:22 19:14 32:5,17 45:2 46:20 connection 45:17 45:18 consent 54:10 consider 21:24 consideration 48:6 considerations 36:10</p>	<p>considers 36:16 consistent 20:5 Constitution 9:8 9:23 20:17 27:4 35:21 50:10,25 51:15,22 constitutional 3:25 8:17 13:2 19:21 24:5,24 33:5 39:23,25 41:6 constitutionality 3:12 6:13 construction 13:2,22 14:2 contents 10:12 context 4:6 15:9 24:2 28:4 34:15 39:14 41:7 52:19 continued 16:14 continues 15:23 contrary 18:2,4 37:5 50:4 54:13 control 30:15,15 31:13 conventional 21:4 28:3 convert 38:3 convicted 23:20 conviction 4:9 20:12 24:19 48:25 correct 21:6 25:12 33:7 47:1 counsel 18:22,25 28:13 36:12 count 15:16 counterfactual 16:6 couple 16:2 36:15 course 31:20 court 1:1,12,23</p>
---	---	---	--	--

<p>3:10,22,23 4:14 4:19 8:10 10:1 10:5 11:21 12:15 13:5 15:10 16:20,25 17:1,7,18 18:5 19:12,15 20:21 20:23 21:18,23 22:2 23:2 26:6 28:5,9 29:8,9 32:4 33:9,11,20 34:9,23 35:1,4 35:5,20,21,23 35:25 38:12 39:7,11 40:17 40:23 43:3 44:2 44:12 47:16,20 47:24 48:2 50:19 51:12 54:11,19,25 55:21 courts 16:22 24:8 38:9 40:22 47:23 53:2 Court's 3:14 9:12 18:4 25:24 35:12 42:22 54:13 55:12 cousin 13:6 Covert 35:11 create 41:8 created 52:17 creating 14:14 14:19 crime 14:6 38:2,4 crimes 10:24 37:16,21 52:25 criminal 4:7 8:24 11:4 17:24 18:24 20:12 32:8 33:24 34:21,25 35:8 43:11 47:13,19 47:21 48:23,24</p>	<p>49:2,23 criminalize 24:7 critical 33:4 crucial 24:23 crystal 8:15 curiae 1:22 2:11 34:6 currently 28:18 customary 29:10</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 1:15 2:3,14 3:1 3:7 52:11 database 24:15 25:1,7 day 15:21 28:11 42:13 deal 8:13 dealing 20:20 death 30:6,8 decades 28:9 decide 11:7 16:23 33:12 43:12 44:6,10 decided 19:12 26:4 29:18 38:15 decides 47:4 decision 4:6 18:4 28:16 29:16 42:10 49:23 54:6,7,21 55:18 decisionmaking 27:6 decisions 17:7 49:14 decisis 49:14,25 defend 55:6 defendant 3:23 4:3,7,23,24 5:13 10:25 18:16,21 19:20 19:22,22 23:9 23:11,20 24:10 24:17,18,20</p>	<p>25:15,19 26:14 32:9 34:21,25 35:8 43:11,17 47:14,15,21 48:9 defendants 20:7 24:4,11 35:5 defendant's 48:25 defended 10:5 defense 11:1 33:24 38:10 define 42:14 defined 7:4 definition 44:14 definitions 37:21 37:25 delegated 21:13 deny 34:20 Department 1:18 depend 12:19 deprive 25:5 deprived 3:13 Deputy 1:17 description 28:19 designed 31:18 details 52:20 deterrent 36:23 developing 27:25 dicta 14:25 15:16 dictum 15:17,25 16:7,11 53:10 differ 28:22 29:2 difference 8:12 30:23 32:3 39:15 43:16 44:18 48:13 55:10 different 11:2,14 15:3 16:10 27:21 51:9 53:16 difficult 21:16</p>	<p>43:11 difficulties 34:13 difficulty 43:25 direction 33:21 directly 29:8 37:5 disability 15:10 disagree 39:16 39:18 45:5 53:13 discharged 55:23 discretion 37:11 37:15 discussed 35:6 discussing 22:25 24:25 discussion 21:8 36:7 43:8 disgruntled 10:6 dispose 21:10 disputes 34:12 disregarded 16:11 dissent 7:16 distinct 28:8 distinction 9:12 22:1 distinguish 35:12 distinguished 23:25 distinguishes 24:23 distinguishing 45:24 district 54:11 doctrine 27:10 34:10 dogs 31:5 doing 13:14 28:2 51:21 domestic 47:10 door 8:25 doubting 22:21 draw 18:14</p>	<p>drawn 9:12 Dreeben 1:17 2:6 17:14,15,17 18:20 19:9 20:15 21:15 22:5,9,14,17 22:22,25 23:14 23:23 24:16,22 25:12,14,21 26:6,11,18,24 27:5,15,20 28:1 29:3,23 30:2,10 31:9,20,21,23 33:19,25 34:2,3 52:17 54:3 drill 43:4 drive 31:15,18 due 35:8 54:4 D.C 1:8,15,18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 16:2 easiest 4:9 easy 44:8 effect 31:6 49:14 effective 30:14 31:14 Eighth 47:18 either 29:4 44:22 elect 27:6 Electric 9:21 11:14 16:17 17:6 18:5 21:7 21:17 53:6,10 53:11,15,18 54:1,4,5,14 electricity 22:3 element 14:5 elements 19:11 eliminate 30:20 eloquent 8:23 else's 41:4 emphasizes 28:25</p>
--	--	--	--	---

en 38:15	establish 25:1	fair 8:18	follows 5:23 21:9	31:22
enact 6:24 7:9	established 16:2	fall 19:8 33:17	29:8	Ginsburg 8:5,7,9
18:25 19:4 22:4	establishing 6:7	falls 11:20 19:9	footnote 39:5	8:14 26:11,19
22:12 41:25	Establishment	far 32:1 44:14	40:15 54:9	31:21,24 33:13
42:11 45:12	5:8,11,19,21	far-reaching	force 25:22 54:4	33:23 47:12,17
46:8,20 47:5,8	6:1,5	29:16	54:5	give 6:12 8:8
enacted 20:1	event 44:23	favorably 12:11	foreclosed 12:2	23:19 27:10
29:13	events 6:10	feature 45:24	13:12	39:10 45:11
enacting 6:18	Everybody 25:13	February 1:9	foregoing 42:5	51:2
enduring 25:22	exactly 9:10	Federal 3:12,17	44:19	given 26:13
54:3,5	40:12	3:22,23 5:23	forever 12:5	29:15
enforced 20:18	example 8:20	8:23 10:11,22	former 29:18	gives 35:24
enforcement	24:3 26:13	10:23,24 12:9	forth 28:24	37:13 40:14
8:25 12:17 19:6	40:17 47:24	13:5 14:6 20:2	found 47:13	giving 36:12
53:24	50:16 55:12	20:3 21:10,19	four 52:10	go 9:15 10:9,13
ensures 48:21	examples 29:12	23:8 24:12 25:3	framed 50:11	11:13,24 28:23
enter 45:22 47:7	35:23 47:17,18	25:4 26:2,2,9	frankly 35:19	32:2,10 44:13
entered 47:7	47:23	26:22 27:4,7	40:11 41:25	49:19 53:22
Enterprise 10:2	exceed 32:17	36:24 37:2,18	42:19	54:7,8
48:8 55:12	exceeded 9:7	38:2 48:8,11	free 6:3 10:2	goes 6:24 16:4
entire 15:9	32:4 41:19	49:5 50:9 51:7	16:22 48:7	23:18 25:13
entitled 33:9	exceeds 17:21	52:23,25 53:18	55:12	going 8:1 11:6,18
enumerated 6:17	32:12	53:22	friend 29:18	39:16 43:12,13
6:21 7:2,6,15	Excuse 36:6	federalism 20:10	friend's 29:19	goldfish 29:19
7:17 8:4,6 9:13	executive 5:24	55:11	Fund 10:2 55:13	30:7,8 31:4
9:16 17:22	10:3,4,4 55:14	field 15:15	fundamental	53:24
18:12,15 19:9	exemptions	Fifth 35:8	9:11	good 13:19 16:16
19:14 23:16	30:18	figure 39:3 53:14	fundamentally	32:15 38:22
28:8 32:5,7,12	exempts 30:16	file 48:19	9:22	41:4,9
32:17 33:7 35:4	exercise 6:4	filed 38:18	further 31:23	governed 42:1
42:18 43:9,13	37:11	Finally 55:10	54:7	governing 15:20
43:19,20,22,24	explain 15:6	finished 14:13,13	<hr/>	government 8:2
equal 52:17	explosives 29:13	firm 10:6	G	8:5,21 9:7,14
equally 17:6	extent 19:15	first 3:4 11:24	G 3:1	11:12 23:8 26:9
erred 18:1	35:2 44:23	15:7,7 20:21	General 1:17	27:4 28:2 36:24
erroneous 38:4	<hr/>	41:24 42:4	11:3 37:10	37:2 38:3,13,21
error 55:7	F	45:14 46:18	generalities	39:10 44:2,3,8
especially 17:4	fact 9:16 16:8	52:14	41:13	45:14,22 48:8
ESQ 1:15,17,21	22:23 33:2	fits 28:19	generally 21:9	48:16 49:6
2:3,6,10,14	34:16 36:22	flag 10:13	26:19 35:6	50:10 51:8
essence 42:13	41:9 44:3 46:2	flip 20:2	genre 32:19	53:19,22 54:24
45:12 46:15	46:22 50:1	flying 12:14	Georgia 39:13	55:4
essentially 4:9	factor 26:18	focus 35:20	39:14,16,18,19	government's
4:19 51:13	facts 40:13	following 16:1	54:9	13:23
	fail 33:10		getting 13:10	

granted 33:11	36:15 42:12	indicated 33:20	50:2	Justice 1:18 3:3
grateful 55:24	45:6	indication 50:22	intruding 48:17	3:9 4:2,21 5:7
grounds 24:4	hope 10:25	individual 9:9	intrusion 33:22	5:16 6:3,15 7:1
26:7	hopelessly 54:17	10:14,21 20:11	invaded 19:17	7:7,18,24 8:5,7
guess 5:12 44:17	hypothetical	24:7 35:23 41:8	invades 17:23	8:9,14 9:4,10
49:21 50:14	16:6 23:7,20	50:8 51:3,6	invalidated	10:8,15 11:5,16
gun 26:22	25:10,15	55:17	24:19	11:23 12:19,25
H	I	individuals 10:10	invalidating 25:3	13:8,13 14:8,12
habeas 4:6	idea 38:22 40:15	20:18 48:3	invasion 18:9	15:14 17:12,17
hailed 3:23	II 42:3 45:23	infringed 20:12	inventing 27:18	18:13,20 19:1
half 42:4	46:23	infringement	invoke 3:22	19:10,19 20:15
happen 48:24	III 34:12 41:5	10:4	invoking 4:14	21:5,15,24 22:5
49:16	51:25 53:4	inheres 20:10	involve 5:9 12:24	22:6,9,11,16
happened 54:18	ill-considered	initially 50:17	31:25	22:20,23,24
happening 16:25	14:25	injury 3:16 9:5	involved 8:11	23:6,18,24 24:1
happens 17:1	image 44:13	19:22 20:13	12:20 30:24	24:16,22 25:9
28:6 44:20	images 9:16	49:20 51:23	36:24,25 41:10	25:13,17,21,25
54:16	imagine 3:16	inquiry 52:1	involves 30:25	26:11,19,20,24
hard 3:15 18:13	4:10 10:22	INS 20:8	involving 47:19	27:1,5,8,9,17
40:11 44:9	52:23	instance 30:14	irrational 45:9	27:21,23 28:1
53:14	implement 19:4	40:17,19	irrespective	28:21 29:3,15
harsh 34:19,22	29:13 45:9	instances 30:21	39:25	29:23,25 30:4
hate 7:25 8:25	implementation	intended 30:19	issue 4:15 5:25	30:23 31:10,15
hear 3:3	46:9	31:24	16:3 20:16	31:21,24 33:13
heard 27:25	implemented	interest 3:17	25:16 33:11	33:19,23 34:1,4
heavily 19:6	30:19	8:24 9:2,3 12:8	38:21 41:3	34:9,19 36:6
Hein 6:2	implements	12:9,15,16	48:22 50:6 53:2	37:1,9,24 38:6
held 6:14 12:15	12:10	16:19 24:21	55:1	39:2 40:3,8,14
47:14 54:13	implicating 21:1	25:6 49:22 50:8	J	41:1,12,17 42:8
Heller 35:18	important 13:16	50:13 54:16	Joint 38:17	43:6,22 44:17
Hey 38:22	54:25	interests 8:22,23	Jones 13:4	46:5,13 47:12
he'll 25:20	impose 15:10	12:13 19:16	judge 44:6	47:16 48:22
Highly 33:25	imposed 24:8	26:16 36:17,20	JUDGEMENT	49:15 50:7,12
holding 16:17	imprison 5:24	37:5,6,7,8 41:4	34:7	50:23,24 51:18
18:1,7 20:22	imprisoning 6:8	48:15,17	judgment 1:22	52:6,9,13 54:9
54:6,14	imprisonment	internal 21:20	2:12 32:14	54:23 55:19
holds 27:21	29:22	interstate 30:15	55:22	K
51:13	include 21:11	31:7,7,11,13	jurisdiction 3:22	Kagan 6:15 7:1,7
Holland 8:20	includes 30:5	31:16,19 37:17	4:14	7:18,25 11:5
11:21 12:4,6,12	including 24:5	intervene 48:10	jurisdictional	24:16,22 25:17
13:18,20 29:6	inconsistent 20:1	intrastate 29:9	14:5	25:22 44:17
32:3,15 42:21	20:4,6 46:21	30:16	jurisprudence	Kansas 1:21
home 25:13	independent	intrude 19:6	5:19 22:18	Kennedy 4:2 9:4
Honor 5:2 34:23	7:10,21	22:14 49:24	25:24	9:11 19:19

20:15 24:1 25:9 25:13 26:20,25 27:1,5 50:7,12 50:24 Kennedy's 23:24 kill 31:4,5 kind 7:11 10:25 11:14 12:22 14:1,4 16:6 18:9,13,22 21:13 23:15 35:11 43:10,14 44:11 45:19 51:15 53:13 54:18 know 5:13,17 11:7 21:5 22:20 22:21 31:17 49:11 50:13 52:20,20 53:13 54:16	laws 16:3 19:5 lawsuit 48:23 lawyer 38:18 44:9 left 15:14 53:19 53:24 legal 16:19,19 54:16 legislation 5:9 42:11 46:8,21 legislative 47:10 legitimate 12:16 let's 7:7,18 10:10 12:23 23:6 27:23 53:6 liberties 9:9 liberty 3:13,17 4:17 9:24 20:11 license 15:21 life 29:21 light 32:21 42:20 47:21 limit 36:4 limitation 7:10 7:22 limited 8:10 9:9 13:17 40:19 51:16 54:1 limits 19:24 32:8 42:18,19,23,24 line 18:14 33:18 35:15 line-item 20:8 litigants 51:17 litigated 46:3 52:18 little 21:16 local 10:23 14:20 21:11,19 36:23 38:2 52:24 53:24 locates 10:12 logic 4:18 logical 3:24	long 8:15 longer 16:16,21 54:21 long-term 49:20 49:22 look 21:3 33:2 38:17 39:7 54:10 looked 19:12,15 looking 21:7 27:11 looks 12:8 32:20 Lopez 32:7 42:1 44:11 lose 25:20 49:11 49:17 loses 49:16 losing 13:18 lot 14:23 22:1,7 31:23 35:13 36:7 43:7 lower 16:22,25 17:1 34:23 38:9 39:7 40:22 47:23 53:2	11:24 12:23 13:1 21:20 45:2 49:25 53:5 56:2 mattered 23:1 matters 21:20 51:7,8 McALLISTER 1:21 2:10 34:4 34:5,8,22 36:14 37:4,19 38:5,9 40:1,5,10,16 41:16,21 42:12 43:21,24 44:17 45:5 46:12 47:12,16 49:3 49:21 50:12 51:11,24 52:7,8 55:21 mean 5:23 10:22 21:25 36:8 40:1 40:6 47:4 49:1 meaning 36:11 means 15:9 39:25 meant 46:13 mechanism 48:14,18,20 medical 30:14 Memphis 22:3 mentions 34:14 35:18 merge 43:14 merits 13:8,10 25:17 31:22,24 33:11 42:9,13 54:12,17 method 29:11 MICHAEL 1:17 2:6 17:15 military 30:21 mind 40:18 50:19 50:21 minimal 45:18 minor 54:22	minute 38:20 minutes 52:10 mirror 9:16 44:13 misapprehendi... 49:22 miscomprehen.. 9:22 misnomer 3:21 misread 18:6 Missouri 8:20 11:21 12:4,5,12 13:18,20 29:6 32:3,15 42:21 mistake 12:3 misunderstood 28:15 model 22:15 modern 3:14 Molotov 13:6 moment 4:4 39:20 money 10:23 morning 3:4 17:19 24:25 43:8 Morrison 42:1 mount 3:25 move 33:21 53:6 moving 33:20
L				
labels 36:8,8 41:14 lack 35:15 36:17 40:2 lacked 47:14 lacks 18:7,25 24:5 language 16:14 16:18 22:22 40:18 42:20 46:22 late 55:9 law 8:25 9:17 12:16 15:2 16:16 17:25 18:24 19:4,6,12 19:16 22:1 24:4 24:12 25:3,4 26:23 32:4,12 32:16,17 37:13 49:17 53:24 Lawrence 1:21		M		
		main 28:25 33:6 major 26:18 majority 7:16 making 6:16,19 6:22 8:1,16 11:6,8,17 17:20 18:10,23 32:22 36:18 38:24,25 39:22 42:24 46:10,10 49:10 49:12 manner 19:17 marijuana 30:14 30:24 market 30:15,16 31:7,11,13,16 31:19 matter 1:11 5:8	48:14,18,20 medical 30:14 Memphis 22:3 mentions 34:14 35:18 merge 43:14 merits 13:8,10 25:17 31:22,24 33:11 42:9,13 54:12,17 method 29:11 MICHAEL 1:17 2:6 17:15 military 30:21 mind 40:18 50:19 50:21 minimal 45:18 minor 54:22	
			N	
			N 2:1,1 3:1 nature 12:20 36:11 41:14 43:4 53:14 necessarily 41:5 50:3,15 necessary 9:17 12:10 19:4,14 24:6 29:5 31:13 42:4,6,21 44:19 44:22,23 45:3,7 45:16 46:8,22 need 6:4 44:9	

<p>45:13 47:3 needed 47:7 needs 18:21 neighbor's 53:23 neither 38:12 never 10:21 27:25 47:7 50:5 51:14 54:24 55:6 new 9:14 20:8 27:18 36:2 48:7 50:16,19 55:17 non-justiciable 5:6 normal 5:2 10:19 16:24 normally 4:12 12:21 notice 48:11 notify 48:14 nuclear 29:12 number 24:5 numerous 24:4</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objection 5:8 23:1,2,5 obligations 29:14 30:20 45:10 obstacle 8:16 53:1 odd 13:23,25 offender 24:3,13 24:14 25:1,7 officers 14:21 23:4 official 34:17 oh 39:12 55:5 okay 14:23 39:12 open 3:13 8:25 13:3 opinion 7:16 14:11 15:9 16:14 50:5</p>	<p>54:11,12 opinions 4:3 5:10 opposed 48:23 oral 1:11 2:2,5,9 3:7 17:15 34:5 44:5 54:18 order 31:14 47:8 ordinary 4:20 6:12 ought 12:17 13:3 14:7 outside 6:17 14:18 21:25 33:6 overall 15:15 overlap 37:21,25 overruled 16:17 54:7 overthrown 24:20 overturn 17:7 O'Connor 27:8</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 35:19 40:15 pages 35:20 38:17 paragraphs 16:2 parse 21:16 43:17 part 6:7 9:19 13:1 17:23 20:22 23:25 25:22,24 44:21 participate 27:7 particular 5:15 17:9 18:18 35:17 39:8 40:16,19 50:2 52:22 particularized 3:16 party 9:21 26:16</p>	<p>36:18,18 49:2,4 49:9 51:4 party's 3:19 pass 39:10 passed 16:3 passes 49:17 PAUL 1:15 2:3 2:14 3:7 52:11 peaceful 30:16 peculiarly 6:18 Pennsylvania 36:21 37:2,22 Pennsylvania's 37:6 people 12:21 25:2 31:3,5,16 35:22 39:19 51:1 perceive 41:10 perceived 20:23 Perez 32:7 perfect 54:20 perfectly 27:15 person 41:3,4 petition 33:3 38:14 petitioner 1:4,16 1:20 2:4,8,15 3:8,11 17:16,19 18:10 21:14,17 29:17 32:11,16 32:22,23 33:1,3 33:8 34:12 35:18 38:12 52:12 Petitioner's 28:13 33:2 51:13 52:3 pharmaceutical 30:17 piece 16:19 plain 42:20 46:21 55:7 plaintiff 3:21,21</p>	<p>4:13 43:1 plaintiffs 10:17 plaintiff's 15:12 plastic 29:12 please 3:10 17:18 34:9 55:18 plus 19:14 29:5 point 9:1 10:1,16 10:18 14:9 15:24 20:9,10 20:14 24:2,23 28:12 35:17 37:4,5 38:21 42:15 43:3 47:5 pointed 33:19 points 9:14 52:14 54:22 police 19:7 36:24 position 20:4 51:13 possesses 29:25 possible 32:16 possibly 11:18 post-argument 38:19 potentially 29:21 30:25 34:22 pouring 29:19 30:7 power 7:6,15 8:4 8:6 9:16 10:4 11:17 16:4 19:7 21:10,11 22:3 22:12 28:22,25 35:10,15,16 36:1 37:18 40:2 41:24 42:2,3,11 42:23 44:3,4,4 44:7,7,10,13 44:15 45:1,1,11 45:12,13,21,22 46:3,8,16,17 46:20,23 47:6</p>	<p>47:10 53:19,21 54:9 powers 6:17,21 7:2,17,21 9:8,8 9:13 10:7 17:22 18:12,15 19:10 20:2,6,9 21:13 23:16 28:8 32:8 32:12 33:7 35:4 41:20 42:5,7,18 42:23 43:9,13 43:19,20,23,24 44:19,20,21 48:1 50:9 52:5 55:11,15,16 practically 48:14 Preamble 35:24 precedent 12:2 42:22 50:4 precedents 18:14 precise 18:14 precisely 21:17 preemption 21:4 premise 50:7,14 prerogative 53:20 prerogatives 10:9,14 11:20 19:7 49:5 presence 23:1 present 36:18 48:9 presented 20:7 preserve 11:15 preserved 8:19 president 41:19 42:10 presumably 24:18 pretty 12:11 31:9 34:19 43:18 prevail 26:15 prevails 24:18</p>
---	--	---	---	--

<p>prevents 37:22 price 5:14 23:8,9 26:3 53:20 prices 23:11 principally 7:2 principles 4:11 5:2 6:12 16:24 28:3 32:2 43:14 Printz 7:8,13,14 9:15 26:21 27:8 36:2 prison 3:17 problem 6:1 7:3 7:13 9:20 11:16 43:25 52:22 53:1 process 27:6 35:9 program 27:7 prohibition 31:14 prohibits 19:5 proper 9:18 12:11 19:4,15 24:7 29:5 42:5 42:6,21 44:19 44:22,23 45:3,7 45:16 46:9,22 property 21:10 39:9 proposition 10:20 15:18 55:14 prosecute 10:24 37:12,13,16,20 52:25 53:23 prosecuted 36:22 47:15 prosecuting 37:22 prosecution 4:1 8:24 prosecutions 11:4 47:19 prosecutor 3:24</p>	<p>prosecutorial 37:11 prosecutors 10:24 52:24 protect 9:9,24 55:16 protected 21:2 protection 27:10 protections 20:17 province 17:24 provision 29:1 provisions 9:23 9:24 24:25 35:25 prudential 34:11 34:20 36:10,16 41:2 48:4,5 52:2 53:4 prudentially 36:12 punishable 29:21 punishment 18:24 pure 23:21 41:15 purely 21:19 purported 10:23 28:16 purports 10:11 52:24 purposes 30:17 put 14:23 18:16 18:21 31:5 43:11,16 putting 53:23</p> <hr/> <p style="text-align: center;">Q</p> <p>question 3:14 11:7 12:5 13:9 13:9,12 14:22 16:10 23:18,24 25:18,18 31:12 41:2 42:9,14 44:22 45:2 51:14,18 54:18</p>	<p>questions 13:10 quick 17:5,6 quite 14:23 32:21 quo 49:19</p> <hr/> <p style="text-align: center;">R</p> <p>R 1:17,21 2:6,10 3:1 17:15 34:5 Raich 29:8 30:14 30:23 42:1 raise 5:7 11:1 14:22 17:22 19:23 23:4 24:17,21 25:15 25:19 26:15 28:14,14 35:11 50:3 raised 20:13 33:4 55:6 raises 52:17 raising 21:14 23:13 48:16 51:4 53:17 rates 22:3 rationality 45:20 reach 35:17 51:12 reaching 18:3 read 12:5 15:8 15:25 22:23 29:20 40:15 41:17 42:4 reading 54:8 real 12:14,16 really 4:15 12:7 15:6 16:12 26:21 31:17 35:3 36:19,20 38:13 42:24 43:10 44:12 47:2 51:25 53:7 53:16 reason 3:24 4:17 6:11 25:14 32:6 41:9 47:4 50:24</p>	<p>52:15 53:8 reasons 38:11 rebuttal 2:13 52:11,14 receive 25:2,7 recognize 35:11 recognized 28:9 28:11,18 31:10 reconceptualize 11:14 redressability 27:22 28:3 52:22 53:4 refer 39:4 reference 16:1 referring 39:8 refers 42:5 54:3 register 25:3 registration 24:3 24:8 26:14,22 52:19 registrations 24:13 25:2 regulate 10:11 21:11 26:9 31:11 53:19,20 regulated 21:20 regulates 22:2 regulating 26:10 regulation 14:15 14:15 21:19 29:9 50:18 rehearing 33:3 38:15 Reid 35:11 reimagined 9:21 reinject 55:2 rejected 15:12 28:16 rejects 15:19 relation 37:17 relevant 34:10 relied 18:4 44:2 religion 5:24 6:7</p>	<p>6:8 rely 32:12 remainder 17:11 remaining 52:10 remand 8:1,17 8:23 11:18 19:2 19:2 remember 15:11 removed 46:16 reply 28:24 35:18 39:11 44:2 represented 26:17 representing 48:9 require 28:11 required 25:3 requirement 24:8 requires 8:22 24:12 26:3 30:15 requiring 24:14 reservations 36:1 reserve 17:11 reserved 18:11 44:14 residence 13:7 residuum 53:10 resolving 53:2,5 respect 5:22 14:3 31:2 54:4 respectfully 45:6 respond 13:11 Respondent 1:19 2:7 17:16 responsibility 43:12 55:23 result 25:8 retaliate 29:18 reverse 11:19 55:18</p>
---	--	---	---	--

<p>rid 54:20 right 9:6,10 13:13 15:23,23 16:25 17:1 18:23 20:11 21:1 26:8 27:22 30:24 39:21 51:5,6 53:1 54:19,24 rights 10:10,14 18:11 35:10,23 36:1 41:8 50:20 51:4 risk 8:10 Roberts 3:3 14:12 17:12 18:13 34:1,4,19 43:6,22 52:6,9 55:19 role 54:10 route 27:16,18 44:8,9 rule 10:16 12:4 14:14 15:20 20:6 25:23 34:11 36:15 52:15 rules 10:19 48:4</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Sabri 32:7 sake 19:3 sale 16:4 sarin 12:23 13:22 14:2 satisfies 3:14 satisfying 54:8 save 10:23 saved 33:14 saying 4:23 7:20 14:12,13 22:2 22:12 25:9 29:1 37:7 39:20 42:17,17,24</p>	<p>46:6 54:21 says 5:19 7:16 13:24 14:12,24 15:25 16:7 17:7 18:24,25 21:9 32:18 34:16 35:21,25 39:14 40:8,10,19 42:6 44:19,20 46:17 48:16 49:23 53:11 54:25 Scalia 4:21 5:7 5:16 6:3 13:8 13:13 25:25 27:9,17,21,23 28:1 31:15 37:9 37:24 38:6 50:23 51:18 scope 28:12 45:3 49:4 second 15:24 53:8 section 8:11,17 17:21 35:24 36:5 41:24 42:2 42:18 44:16 45:12,15,17,23 45:25 46:18,24 47:5,8 51:9 54:12 see 4:17 7:20 36:7 51:8 54:15 seeks 3:18,21 31:10 seen 23:2 self-identify 11:10 sense 4:10 44:25 49:10 sentence 4:8 14:10,11 15:6,8 15:25 22:23 39:2 40:4,6,6 54:21</p>	<p>separate 7:17 36:4 52:2 separation 10:7 20:6,9 48:1 52:4 55:11,15 55:16 serious 3:13 27:2 servicing 4:8 set 7:4 23:11 24:14 sets 23:8 setting 48:14 settings 49:7 sex 24:3,13,14 25:1,6 52:19 share 37:7 Shearson 17:6 sheriffs 26:22 show 9:7 19:21 51:20,22 shows 54:23 side 20:2 33:17 35:15 sides 51:5 similar 53:25 simple 53:6 simply 42:25 48:10 single 14:10 39:2 situation 17:10 six 3:17 sneak 55:8 solicit 48:15 Solicitor 1:17 somebody 4:7 8:2 17:1 somebody's 4:16 someone's 23:8 48:16 somewhat 45:6 SORNA 24:11 52:19 53:3 sort 6:23 7:25 13:4,21,23</p>	<p>28:10 32:19 41:1 42:17 45:18,21 Sotomayor 23:6 23:18 28:21 29:3 36:6 37:1 41:12,17 42:8 48:22 49:15 Sotomayor's 41:1 sought 33:8 sovereign 21:1 25:6 27:6 48:17 sovereigns 37:20 sovereignty 18:9 19:23 20:24 28:7,10,17,18 32:19 33:1,17 33:22 49:24 50:2 speaking 41:13 special 10:16 11:12 15:10 32:19 52:15 specific 9:5,5 19:22 20:13,23 21:1 26:8 28:4 28:7 32:25 36:10 specifically 34:14 36:7,9 Spencer 4:6 stage 55:9 stand 46:1 standard 27:9 37:16,19 standing 3:11,15 3:20 4:3,8,9,12 4:23,25 5:2 6:12 9:21 10:18 10:21 11:20 12:1 13:9,14,16 14:7,22 15:13 15:20,20 16:10</p>	<p>16:20,23,24 17:8 18:7,8,18 23:4,22 25:18 25:19,23 26:5,7 26:19 27:9,14 28:3,4,16 32:1 32:13 34:10,11 34:13,14,18,20 35:5,7 36:11,13 36:16 38:7,21 38:22,25 39:5 40:7,21,25 41:5 42:14,25 47:14 47:22 48:4 49:9 51:3,14 52:3,4 53:1,2,4,4 54:15,17 stands 15:18,22 stare 49:14,25 start 11:3 State 10:9,11,12 10:14 12:14,16 14:21 18:9 19:6 19:7,16,25 20:1 20:3,24 21:21 23:1,3,7,11 25:1,5 26:9,13 26:20 27:2,3,6 27:12 28:7,10 28:17,18 32:6 32:19 33:1,17 33:20,21 34:17 34:17 37:7,8,10 37:14 38:1 39:23 49:1,1,3 49:13,16,20 50:1,4,9,17 51:2,7,20 stated 49:18 statement 20:21 states 1:1,6,12 3:5 16:3,8 17:24 19:11 20:24 23:4</p>
---	--	---	---	--

24:12,14 29:14 30:20 36:2 41:8 41:9 45:10 47:7 48:15,15,18,18 49:14 50:16,16 50:19,20 51:1,2 51:4,6 54:11 55:18 state's 8:22,24 9:2 12:8,12 26:15 49:5,24 53:20 status 49:19 statute 3:12,25 5:18,18,20 6:14 6:18,23 7:9 10:5,11,22 12:10 13:5 14:15 20:1,3,3 24:11,19 26:2 29:4,16,20,21 29:24 30:12,13 30:16 31:18 41:23 45:8 46:17 47:15 48:11 50:2 52:24 55:6 statutes 29:13 statutory 13:2,22 14:1 step 46:16 52:2 STEPHEN 1:21 2:10 34:5 stepping 37:6 stop 36:22 53:7 straight 42:2 street 55:7 strictly 38:1 strikes 13:25 stripe 17:2 strongest 14:9 structural 9:23 20:17 24:24 subject 18:24	submitted 55:25 56:2 substantial 31:6 substantive 36:3 subtle 17:8 successfully 42:16 suggestion 9:20 40:11 suggests 15:16 suit 14:22 26:16 39:6 48:24 50:21 supplemental 38:18 support 1:19,22 2:7,11 17:16 32:14 33:2 34:6 55:22 suppose 5:7 8:18 12:20 26:14,20 26:21 29:17 supposed 14:24 15:1,1,3,4 Supreme 1:1,12 sure 5:1 7:3 29:23 30:2 46:5 46:6,12 47:1 surrender 27:2 surrendered 50:9 survives 54:21 sustainable 10:19 17:9 sustained 29:7 system 14:14,19 26:14 systems 14:20	T <hr/> T <hr/> T 2:1,1 take 5:25 7:13 20:16 23:23 26:22 31:3 40:4 51:7,8 taken 16:8 takes 26:8 talk 4:3,6 38:13 38:14 52:1 talking 24:1 34:20 35:22 40:6 48:4,5 51:16,25 talks 39:5 53:12 tea 5:14 technical 11:24 tell 27:11 36:9 40:12 Tennessee 9:20 11:14 16:17 17:5 18:5 21:7 21:17 34:15 53:6,10,11,15 53:18 54:1,4,5 54:14 Tenth 6:18,22 7:4,5,10,22 10:8,17 15:11 15:21 16:23 17:2 18:10,15 18:18 19:5 21:2 21:9,22 22:7 32:25 33:3 34:16,25 35:13 35:14,25 36:3 38:11,20,24,25 39:4 40:7,20,22 40:24 41:7,10 41:15,18 42:15 43:3,9,13 44:14 46:2 47:19,20 48:13 50:15,20 52:5 53:12 term 10:2 19:10 19:24 terms 40:12 41:2 terrorism 30:22 38:3 test 3:15 12:8	16:19,20 54:16 Thank 17:12,17 34:1,3,8 52:6,8 52:13 55:19 theory 13:24 18:17 50:11 thing 7:19 14:1,3 14:9 15:7 26:1 things 11:23 15:5 20:20 22:8 36:15 49:15 think 3:20 4:4,5 4:10,12,13 5:22 5:23 6:4,9,11 6:11 7:12,24 9:19 10:15,19 11:2,12,20 12:3 12:3,11,17,25 13:1,3,4,16,17 13:19,21 14:9 14:11 15:6,8,18 16:11,18,20 18:5,21 21:16 22:14 25:22 27:20 28:1,15 28:17 31:9 32:2 32:14,23 33:7 35:2 37:1 38:22 39:24,24 40:5 40:21 41:6,9,15 43:25 45:7,19 46:1,14 50:10 51:4 52:3 53:16 53:25 54:1,5,23 54:25 thinks 8:2 third 3:18 9:21 11:18,25 12:6 18:1,3 28:15 32:10 36:17 38:15,19 44:5 51:4 55:4 third-party 25:23 26:19 28:4	34:11 36:16 41:2 48:4 49:8 51:14 52:2,3 Thornton 19:24 thought 13:14 14:18 23:25 thousands 30:25 30:25 three 35:21,23 throws 13:6 tied 45:20 time 14:19 17:11 22:19 47:5 50:6 times 35:5,21 today 20:25 21:2 21:21 23:16 28:5 32:23 54:18 today's 22:15,17 told 9:1 toxic 30:5,5 traditional 53:20 trap 8:25 treaties 45:23 46:9,10 treaty 11:17 12:10 19:5 22:13 28:22 29:1,5,14 30:20 32:13 35:10 42:3,22 44:4,4 44:7,10,15 45:1 45:1,9,11,13 46:15,17,20,23 47:3,3,8,9 treaty-based 32:1 38:3 tried 5:24 11:2 28:14 34:25 tripartite 3:15 trouble 16:15 18:16,21 27:2 true 39:11 46:2 54:1
---	--	--	---	---

<p>try 46:1 53:8 trying 13:11 15:10 18:16 31:15,17 32:24 38:6 39:3 42:14 42:16 46:14 52:1 Tuesday 1:9 turned 39:17 turns 54:11 TVA 14:10,19 18:5,17 20:21 22:2,19 23:7,10 25:23 26:1 28:15,20 40:7 40:18,23 47:21 TVA's 16:4 two 9:14 11:23 15:5 20:20 49:15 54:22 Twombly 16:13 two-way 55:7 type 18:18 28:17 35:10 types 18:8 typical 29:11 typically 48:2</p> <hr/> <p style="text-align: center;">U</p> <p>unconstitutional 23:10 48:12 unconstitution... 17:21 underlying 50:7 understand 7:4 12:22 13:17 20:14,25 21:12 22:9 32:22 41:21 44:18 47:1,9 49:19 understanding 33:8 47:2 understood 21:18 38:10 46:6 47:6</p>	<p>undone 48:25 uniquely 7:5 United 1:1,6,12 3:5 10:1 19:11 29:14 30:20 36:2 45:10 47:7 50:16 55:17 unlawful 19:17 unreasonable 45:9 unsuccessful 36:23 unusual 44:1 upset 37:2 urging 27:19 use 7:7 27:17,23 30:20 31:4,5 uses 30:16 36:9 usual 36:15 utility 54:14 utilizes 29:11</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 3:4 11:21 12:4,5 13:18,20 18:5 19:11,24 20:7,8 29:6 32:3,15 35:11 36:2 42:21 48:7 50:16 vagueness 35:9 valid 29:4 51:19 52:21 Valley 34:15 versus 28:23 veto 20:8 view 15:2,3 21:22 29:7 33:9 46:25 52:3 viewed 22:18,19 views 50:6 vindicate 3:18 4:17 10:7 vinegar 29:19 30:2,7 31:4,8</p>	<p>31:16,18 53:23 violate 5:10,20 violated 14:14 violates 6:22 24:12 violating 23:9 violation 6:1,4 19:21 25:11,16 29:20 51:22 55:15 violations 41:11 virtue 16:21 vis-à-vis 49:5 voice 50:5 vs 8:20</p> <hr/> <p style="text-align: center;">W</p> <p>wait 9:1,1 38:19 waive 50:19 55:14 waived 55:3 want 9:4 19:19 22:21 25:5 37:15 49:17 wanted 23:24 26:20 27:13 wants 26:13 37:24,25 38:13 42:4 50:1 55:13 Washington 1:8 1:15,18 wasn't 10:3 49:2 wax 8:23 way 7:14 9:15 11:7,13,25 12:14 15:18 20:13 28:22 32:8,13 40:18 43:17 45:9 49:1 49:13 54:2,8 55:2 ways 3:20 36:10 weak 12:13 weapon 12:23 13:24 30:1,3,4</p>	<p>30:5,9 weapons 14:3 30:21 went 7:14 we're 6:7,8 11:11 13:10,15 34:20 40:6 41:13 48:3 50:17 51:4 53:17 we've 8:19 23:2 24:25 43:7 55:6 willing 30:10 win 11:18 window 52:4 wins 49:18 wish 17:22 woman 37:12 word 35:16,22 36:9 words 6:20 47:9 world 46:25 worry 9:11 worst 16:6 wouldn't 5:16 6:12 10:13 16:10 29:17,22 36:24 39:24 44:7 wrestled 40:22 writers 46:11 wrong 11:22 15:1 16:19 47:2</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <p>years 3:17 16:15 16:17 37:14 40:21 42:22 York 9:15 20:8 36:2 48:7 50:16 50:19 55:17</p> <hr/> <p style="text-align: center;">0</p>	<p>09-1227 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <p>1 35:24 10:19 1:13 3:2 11:19 56:1 17 2:8 41:24 45:14 46:18 1939 21:23</p> <hr/> <p style="text-align: center;">2</p> <p>2 35:24 45:23 2011 1:9 22 1:9 229 8:17 17:21 45:12 47:5,8 26 38:18 27 54:9</p> <hr/> <p style="text-align: center;">3</p> <p>3 2:4 42:2 32 38:18 34 2:12</p> <hr/> <p style="text-align: center;">4</p> <p>40 16:17</p> <hr/> <p style="text-align: center;">5</p> <p>50 16:15 52 2:15 579 35:20</p> <hr/> <p style="text-align: center;">7</p> <p>70 40:21</p> <hr/> <p style="text-align: center;">8</p> <p>8 8:11 36:5 37:14 41:24 42:18 44:16 45:15,17 45:25 46:18,24 51:9 80 35:20</p> <hr/> <p style="text-align: center;">9</p> <p>90 42:22</p>
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