

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 23-719  
 )  
 NORMA ANDERSON, ET AL., )  
 )  
 Respondents. )  
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Place: Washington, D.C.  
Date: February 8, 2024

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NORMA ANDERSON, ET AL., )  
Respondents.)  
- - - - -

Washington, D.C.

Thursday, February 8, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

JONATHAN F. MITCHELL, ESQUIRE, Austin, Texas; on behalf of the Petitioner.

JASON C. MURRAY, ESQUIRE, Denver, Colorado; on behalf of Respondents Anderson, et al.

SHANNON W. STEVENSON, Solicitor General, Denver, Colorado; on behalf of Respondent Griswold.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	JONATHAN F. MITCHELL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JASON C. MURRAY, ESQ.	
7	On behalf of Respondents Anderson,	
8	et al.	65
9	ORAL ARGUMENT OF:	
10	SHANNON W. STEVENSON, ESQ.	
11	On behalf of Respondent Griswold	123
12	REBUTTAL ARGUMENT OF:	
13	JONATHAN F. MITCHELL, ESQ.	
14	On behalf of the Petitioner	137
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3  
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument  
this morning in Case 23-719, Trump versus Anderson.

Mr. Mitchell.

ORAL ARGUMENT OF JONATHAN F. MITCHELL

ON BEHALF OF THE PETITIONER

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

The Colorado Supreme Court held that  
President Donald J. Trump is constitutionally  
disqualified from serving as president under  
Section 3 of the Fourteenth Amendment. The Colorado  
Supreme Court's decision is wrong and should be  
reversed for numerous independent reasons.

The first reason is that President Trump is  
not covered by Section 3 because the president is not  
"an officer of the United States" as that term is  
used throughout the Constitution. "Officer of the  
United States" refers only to appointed officials,  
and it does not encompass elected individuals, such  
as the President or members of Congress. This is  
clear from the Commissions Clause, the Impeachment  
Clause, and the Appointments Clause, each of which  
uses "officer of the United States" to refer only to

1 appointed and not elected officials.

2           The second reason is that Section 3 cannot  
3 be used to exclude a presidential candidate from the  
4 ballot even if that candidate is disqualified from  
5 serving as president under Section 3 because Congress  
6 can lift that disability after the candidate is  
7 elected but before he takes office. A state cannot  
8 exclude any candidate for federal office from the  
9 ballot on account of Section 3, and any state that  
10 does so is violating the holding of Term Limits by  
11 altering the Constitution's qualifications for  
12 federal office.

13           The Colorado Supreme Court's decision is no  
14 different from a state residency law that requires  
15 members of Congress to inhabit the state prior to  
16 Election Day, when the Constitution requires only  
17 that members of Congress inhabit the state that they  
18 represent when elected.

19           In both situations, a state is accelerating  
20 the deadline to meet a constitutionally imposed  
21 qualification and is thereby violating the holding of  
22 Term Limits. And in this situation, a ruling from  
23 this Court that affirms the decision below would not  
24 only violate Term Limits but take away the votes of  
25 potentially tens of millions of Americans.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Mitchell, would you --  
3 you didn't spend much time on your argument with  
4 respect to whether or not Section 3 is  
5 self-executing, so would you address that?

6 And -- and in doing that, your argument is  
7 that it's not self-executing, but then, in that case,  
8 what would the role of the state be, or is it  
9 entirely up to Congress to implement the  
10 disqualification in Section 3?

11 MR. MITCHELL: It is entirely up to  
12 Congress, Justice Thomas. And our argument goes  
13 beyond actually saying that Section 3 is  
14 non-self-executing. We need to say something more  
15 than that because a non-self-executing treaty or a  
16 non-self-executing constitutional provision normally  
17 can still be enforced by a state if it chooses to  
18 enact legislation.

19 The holding of Griffin's Case goes beyond  
20 even that by saying that a state is not allowed to  
21 implement or enforce Section 3 of the Fourteenth  
22 Amendment unless and until Congress enacts  
23 implementing legislation allowing it to do so. So,  
24 under Griffin's Case, which we believe is correctly  
25 decided -- the Anderson litigants disagree with us on

1 that point -- but, if this Court were to adhere to  
2 the holding of Griffin's Case, there would not be any  
3 role for the states in enforcing Section 3 unless  
4 Congress were to enact a statute that gives them that  
5 authority.

6 CHIEF JUSTICE ROBERTS: Counsel, what if  
7 somebody came into a state secretary of state's  
8 office and said, I took the oath specified in Section  
9 3, I participated in an insurrection, and I want to  
10 be on the ballot? Can the -- does the secretary of  
11 state have the authority in that situation to say,  
12 no, you're disqualified?

13 MR. MITCHELL: No, the secretary of state  
14 could not do that, consistent with Term Limits,  
15 because even if the candidate is an admitted  
16 insurrectionist, Section 3 still allows the candidate  
17 to run for office and even win election to office and  
18 then see whether Congress lifts that disability after  
19 the election.

20 This happened frequently in the wake of the  
21 Fourteenth Amendment, where Confederate  
22 insurrectionists were elected to Congress, and  
23 sometimes they obtained a waiver; sometimes they did  
24 not. And each House would determine for itself  
25 whether to seat that elected insurrectionist because

1 each House is the sole judge of the qualifications of  
2 its members.

3 So, if a state banned even an admitted  
4 insurrectionist from the ballot, it would be adding  
5 to and altering the Constitution's qualifications for  
6 office because, under Section 3, the candidate need  
7 only qualify during the time the candidate holds the  
8 office to which he's been elected. And under Your  
9 Honor's hypothetical, the secretary of state would be  
10 demanding essentially that the candidate obtain a  
11 waiver from Congress earlier than the candidate needs  
12 to obtain that waiver.

13 CHIEF JUSTICE ROBERTS: Well, even though  
14 it's pretty unlikely or at least would be difficult  
15 for an individual who says, you know, I -- I am an  
16 insurrectionist and I had taken the oath, that would  
17 require a two-thirds vote in Congress, right?

18 MR. MITCHELL: Correct.

19 CHIEF JUSTICE ROBERTS: Well, that's a  
20 pretty unlikely scenario.

21 MR. MITCHELL: It may be unlikely, but no  
22 secretary of state is permitted to predict the  
23 likelihood of a waiver because, in doing so, they're  
24 adding a new qualification to the ability to run for  
25 Congress.



1                   And the proper analogy, Mr. Chief Justice,  
2                   is to state residency laws because the Constitution  
3                   says that a member of Congress must inhabit the state  
4                   that he represents when elected. And the lower  
5                   courts have all held, in reliance on Term Limits,  
6                   that a state election official cannot move that  
7                   deadline any earlier by requiring the candidate for  
8                   Congress to inhabit the state --

9                   CHIEF JUSTICE ROBERTS: So even if somebody  
10                  --

11                  MR. MITCHELL: -- before the date of  
12                  election.

13                  CHIEF JUSTICE ROBERTS: -- comes in and  
14                  says, I'm -- I'm a resident of -- to the secretary of  
15                  state's office in Illinois and says, I'm a -- a  
16                  resident of Indiana, I have been all my life, I want  
17                  to run for office in Illinois, the secretary of state  
18                  can't say, no, you can't?

19                  MR. MITCHELL: Well, the question would be  
20                  is that person going to inhabit the state when the  
21                  election is held. So, if the candidate makes clear,  
22                  perhaps through a sworn declaration or through his  
23                  own statements, that he has no intention of  
24                  relocating to that state before Election Day, then  
25                  the secretary of state would be enforcing an extant

1 constitutional qualification rather than enforcing a  
2 new state-imposed qualification.

3 And that's the key under Term Limits: Is  
4 the state in any way altering the criteria for a  
5 federal office, either for Congress or for the  
6 presidency? And in this situation, the Colorado  
7 Supreme Court is going slightly beyond what Section 3  
8 requires because Section 3 on its face bans an  
9 insurrectionist only from holding office.

10 JUSTICE SOTOMAYOR: Counsel, can I stop you  
11 a moment and -- and back up a minute? You admitted  
12 that the concept of self-executing does generally  
13 permit states to provide a cause of action for  
14 breaches of a constitutional provision.

15 MR. MITCHELL: Correct.

16 JUSTICE SOTOMAYOR: In fact, they do it  
17 frequently for takings clauses. Here, there's no  
18 debate that Colorado has placed that -- provided that  
19 cause of action. You want to go a step further and  
20 say that this, like the Treaty Clause, requires  
21 implementing legislation to permit the state to  
22 disqualify an insurrectionist --

23 MR. MITCHELL: That's correct. So --

24 JUSTICE SOTOMAYOR: -- under Section 3.

25 MR. MITCHELL: That's right.

1 JUSTICE SOTOMAYOR: So history proves a lot  
2 to me --

3 MR. MITCHELL: Mm-hmm.

4 JUSTICE SOTOMAYOR: -- and to my colleagues  
5 generally. There's a whole lot of examples of states  
6 relying on Section 3 to disqualify insurrectionists  
7 for state offices, and you're basically telling us  
8 that you want us to go two steps further. You want  
9 to -- maybe three.

10 MR. MITCHELL: Mm-hmm.

11 JUSTICE SOTOMAYOR: You want us to say that  
12 self-execution doesn't mean what it generally means.  
13 You want us now to say it means that Congress must  
14 permit states or require states to stop  
15 insurrectionists from taking state office.

16 MR. MITCHELL: Mm-hmm.

17 JUSTICE SOTOMAYOR: And -- and so this is a  
18 complete preemption in a way that's very rare, isn't  
19 it?

20 MR. MITCHELL: Well, the -- the only thing  
21 I would --

22 JUSTICE SOTOMAYOR: It's rare under the  
23 Fourteenth Amendment.

24 MR. MITCHELL: Oh, of course, it's rare.  
25 This is -- this is a one-off situation. And, Your

1 Honor, the only thing I'm --

2 JUSTICE SOTOMAYOR: Well, it is one-off. I  
3 don't disagree with you. But it's not with -- with  
4 respect to how we define "self-executing."

5 MR. MITCHELL: We're not asking this Court  
6 to redefine the concept of non-self-execution. We  
7 were careful in our brief not to rely on that phrase.  
8 And Griffin's Case doesn't --

9 JUSTICE SOTOMAYOR: Right, you are, because  
10 it's not.

11 MR. MITCHELL: That's right.

12 JUSTICE SOTOMAYOR: All right.

13 MR. MITCHELL: And Griffin's Case --

14 JUSTICE SOTOMAYOR: So now the question is  
15 a very different one --

16 MR. MITCHELL: Mm-hmm.

17 JUSTICE SOTOMAYOR: -- in my mind. I  
18 understand you're relying on Griffin. Let's just be  
19 very clear.

20 MR. MITCHELL: Right.

21 JUSTICE SOTOMAYOR: Griffin was not a  
22 precedential Supreme Court decision.

23 MR. MITCHELL: That's correct.

24 JUSTICE SOTOMAYOR: All right. It was a  
25 circuit court decision by a justice who, when he

1 becomes a justice, writes in the Davis case, he  
2 assumed that Jefferson Davis would be ineligible to  
3 hold any office, particularly the presidency, and  
4 treated -- and this is his words --

5 MR. MITCHELL: Mm-hmm.

6 JUSTICE SOTOMAYOR: -- Section 3 as  
7 executing itself, needing no legislation on the part  
8 of Congress to give it effect.

9 So you're relying on a non-precedential  
10 case by a justice who later takes back what he said.

11 MR. MITCHELL: But the key point with  
12 Griffin's Case and why it's an important precedent,  
13 despite everything Your Honor said, it is not a  
14 precedent of this Court, but Griffin's Case provided  
15 the backdrop against which Congress legislated the  
16 Enforcement Act of 1870 when it first provided an  
17 enforcement mechanism for Section 3.

18 JUSTICE SOTOMAYOR: Then did away with it  
19 later.

20 MR. MITCHELL: It did away with it later.  
21 But, as --

22 JUSTICE SOTOMAYOR: But -- but that has  
23 nothing to say with respect to what Section 3 means.

24 Can we get to the issue, which is, I think,  
25 one that I go back to that I started with, and -- and

1 very briefly, what sense does it say that states  
2 can't enforce Section 3 against their own officials?

3 MR. MITCHELL: Be --

4 JUSTICE SOTOMAYOR: And I think, logically,  
5 those are two separate issues in my mind: Can states  
6 enforce the Insurrection Clause against their own  
7 officeholders, or can they enforce it against federal  
8 officials, or can they enforce it against the  
9 president? Those are all three different questions  
10 in my mind.

11 MR. MITCHELL: And the -- the answer to all  
12 three of those questions turns on whether this Court  
13 agrees with the holding of Griffin's Case. If  
14 Griffin's Case is the proper enunciation of the law,  
15 then a state cannot do any of the things Your Honor  
16 suggested unless Congress gives it authority to do so  
17 through implementing legislation.

18 JUSTICE SOTOMAYOR: So a non-precedential  
19 decision that relies on policy, doesn't look at the  
20 language, doesn't look at the history, doesn't  
21 analyze anything than the disruption that such a suit  
22 would bring, you want us to credit as precedential?

23 MR. MITCHELL: Because Congress relied on  
24 Griffin's Case when it enacted the Enforcement Act of  
25 1870 and established the --

1 JUSTICE KAGAN: So, Mr. Mitchell, if I may  
2 interrupt just to clarify, I mean, this sounds like  
3 your reply brief, where it sounds like you're not  
4 making a constitutional argument, you're really  
5 making a statutory preemption argument. And --

6 MR. MITCHELL: Right.

7 JUSTICE KAGAN: -- is that -- is that what  
8 you're doing here? You're not saying that the  
9 Constitution gives you this rule. It's the kind of  
10 combination of Griffin's Case plus the way Congress  
11 acted after Griffin's Case --

12 MR. MITCHELL: Yes.

13 JUSTICE KAGAN: -- that gives you the rule?

14 MR. MITCHELL: That's exactly right,  
15 Justice Kagan, because we have implementing  
16 legislation, Congress took up the invitation provided  
17 by Griffin's Case and established writs of quo  
18 warranto in the 1870 Enforcement Act, later repealed  
19 them.

20 The only enforcement legislation that's  
21 currently on the books is the insurrection criminal  
22 statute, Section 2383. And when Congress made all of  
23 these decisions -- the initial enactment of the  
24 Enforcement Act in 1870, the repeal of the quo  
25 warranto provisions in 1948 -- all of those were made

1 with Griffin's Case as the backdrop. The under --

2 JUSTICE KAGAN: I -- please.

3 MR. MITCHELL: Well, the understanding was  
4 that these congressionally established remedies would  
5 be exclusive of state court remedies. So there's not  
6 an express statement of preemption in these statutes,  
7 but there didn't need to be because Griffin's Case  
8 provided the backdrop.

9 JUSTICE KAGAN: And if I could just  
10 understand the argument a little bit better, suppose  
11 that we took all of that way away. You know, suppose  
12 there were no Griffin's Case and there were no  
13 subsequent congressional enactment. What do you then  
14 think the rule would be?

15 MR. MITCHELL: So in just as a matter of  
16 first principles without Griffin's Case, it's a much  
17 harder argument for us to make because, normally, I  
18 mean, every other provision of the Fourteenth  
19 Amendment has been treated as self-executing.

20 What we would argue in the hypothetical  
21 that Your Honor has suggested is that there are  
22 practical considerations unique to Section 3 that  
23 counsel in favor of a rule similar to what Chief  
24 Justice Chase spelled out in Griffin's Case and it  
25 goes to I think the policy concerns he talks about,



1 where this was a case -- Griffin's Case involved a  
2 convicted criminal who was seeking a writ of habeas  
3 corpus on the ground that the judge who tried his  
4 case was an insurrectionist disqualified under  
5 Section 3, and Chief Justice Chase realizes that if  
6 he enforces Section 3 in this situation, it would  
7 nullify every official act taken not only by this  
8 particular judge but by anyone who is an  
9 insurrectionist or arguably an insurrectionist under  
10 Section 3, and that was --

11 JUSTICE BARRETT: Well, why do you need  
12 those consequential concerns, though? I mean, it  
13 kind of seems to me that what Justice Kagan is  
14 getting at is why don't you have an argument that the  
15 Constitution of its own force, that Section 3 of its  
16 own force, preempts the states' ability not -- not  
17 necessarily, I think, not to enforce Section 3  
18 against its own officers but against federal  
19 officers, like in a Tarble's Case kind of way.

20 MR. MITCHELL: So there could also be an  
21 argument that's more limited. You're suggesting  
22 there may be a barrier under the Constitution to a  
23 state legislating an enforcement mechanism for  
24 Section 3 specific to federal officers.

25 We could rely on precedents such as McClung

1 that says that state courts lack the authority to  
2 issue mandamus relief against federal officials and  
3 extend that principle here.

4 JUSTICE BARRETT: Well, why aren't you  
5 making those arguments?

6 MR. MITCHELL: Because that doesn't get us  
7 -- that -- Griffin's Case --

8 JUSTICE BARRETT: That only gets you out of  
9 state court, it doesn't get you out of federal court?

10 MR. MITCHELL: Right. And also the holding  
11 of Griffin's Case went well beyond that because Chief  
12 Justice Chase said in this opinion, which, again,  
13 provided the backdrop for the congressional  
14 enforcement legislation, that states had no role in  
15 enforcing Section 3 unless Congress was to give them  
16 that authority through a statute that they passed  
17 pursuant to their legislative powers.

18 JUSTICE GORSUCH: I --

19 JUSTICE BARRETT: But your argument's --  
20 oh, sorry.

21 JUSTICE GORSUCH: No, please go ahead.

22 JUSTICE BARRETT: I was just going to add  
23 one last thing. I think your argument's a little  
24 broader than that because I think, if we accept your  
25 position that disqualifying someone from the ballot

1 is adding a qualification, really, your position is  
2 that Congress can't enact a statute that would allow  
3 Colorado to do what it's done either because then  
4 Congress would be adding a qualification, which it  
5 can't do either.

6 MR. MITCHELL: No, I don't agree with that,  
7 Justice Barrett. Congress is not bound by the  
8 holding of Term Limits. Term Limits only prohibits  
9 the states from adding additional qualifications or  
10 altering the Constitution's qualifications for  
11 federal office. It does not purport to restrain  
12 Congress.

13 So, if Congress were to enact implementing  
14 legislation that authorized the states to exclude  
15 insurrectionists from the ballot, we believe that  
16 would be valid enforcement legislation under Section  
17 3 with an important caveat. There has to be  
18 congruence and proportionality under this Court's  
19 precedents.

20 JUSTICE ALITO: Well, why would that be an  
21 important -- why would that be permissible? Because  
22 Section 3 refers to the holding of office, not  
23 running for office. And so --

24 MR. MITCHELL: Mm-hmm.

25 JUSTICE ALITO: -- if a state or Congress

1 were to go further and say that you can't run for the  
2 office, you can't compete in a primary, wouldn't that  
3 be adding an additional qualification for serving for  
4 president? You must have been free from this  
5 disqualification at an earlier point in time than  
6 Section 3 specifies.

7 MR. MITCHELL: I think the answer to your  
8 question, Justice Alito, depends on how you interpret  
9 the word "enforce" in Section 5. And some members of  
10 this Court, such as Justice Scalia, thought that  
11 "enforce" means you can do nothing more than enact  
12 legislation that mirrors the Fourteenth Amendment's  
13 self-executing requirements and you can't go an inch  
14 beyond that. That's not the current jurisprudence of  
15 this Court --

16 JUSTICE ALITO: No. Well, all right. We  
17 have --

18 MR. MITCHELL: -- that allow --

19 JUSTICE ALITO: -- to decide whether it's  
20 congruent and proportional.

21 MR. MITCHELL: Right.

22 JUSTICE ALITO: And we would get into the  
23 question of whether that would be congruent and  
24 proportional.

25 Well, let me shift gear a little bit. I --

1 I take you to -- to argue -- and I think this is  
2 right -- that the term "self-executing" is a misnomer  
3 as applied here.

4 MR. MITCHELL: Yes, it is.

5 JUSTICE ALITO: Very often, when we use the  
6 term, what we're referring to is the proposition that  
7 a particular provision of the Constitution or a  
8 statute in and of itself creates a private right of  
9 action. That's not what the issue is here.

10 MR. MITCHELL: No, that's not the issue  
11 here. And sometimes the phrase "self-executing" is  
12 used that way. The only thing I would add is  
13 sometimes it's used in a different sense. With  
14 self-executing treaties or non-self-executing  
15 treaties, the issue is whether that treaty has any  
16 force as domestic law whatsoever.

17 JUSTICE ALITO: Right. Right. Well, I  
18 don't see what is gained by using this term which is  
19 used in different contexts rather than directly  
20 addressing what's involved here, which is the  
21 question of who can enforce Section 3 with respect to  
22 a presidential candidate.

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE ALITO: The consequences of what  
25 the Colorado Supreme Court did, some people claim,

1 would be quite severe. Would it not permit -- would  
2 it not lead to the possibility that other states  
3 would say, using their choice-of-law rules and their  
4 rules on -- on collateral estoppel, that there's  
5 non-mutual collateral estoppel against former  
6 President Trump and so the decision of the Colorado  
7 Supreme Court could effectively decide this question  
8 for many other states, perhaps all other states?  
9 Could it not lead to that consequence?

10 MR. MITCHELL: I don't think so because  
11 Colorado law does not recognize non-mutual collateral  
12 estoppel. And I believe the preclusive effect of the  
13 decision would be determined by Colorado law rather  
14 than the law of another state.

15 But I think your question, Justice Alito,  
16 gives rise to an even greater concern because, if  
17 this decision does not have preclusive effect in  
18 other lawsuits, it opens the possibility that a  
19 different factual record could be developed in some  
20 of the litigation that occurs in other states, and  
21 different factual findings could be entered by state  
22 trial court judges. They might conclude as a matter  
23 of fact that President Trump did not have any intent  
24 to engage in incitement or make some other finding  
25 that differs from what this trial court judge found.

1 JUSTICE ALITO: Yeah, exactly. So this --  
2 in this decision, the -- the trial court in Colorado  
3 thought that it was proper to admit the January 6th  
4 report, and it also admitted the testimony of an  
5 expert --

6 MR. MITCHELL: Mm-hmm.

7 JUSTICE ALITO: -- who testified about the  
8 meaning of certain words and phrases to people who  
9 communicate with and among extremists, right?

10 Another -- another state court could reach  
11 an opposite conclusion on both of those questions.

12 MR. MITCHELL: Certainly. Other states  
13 could conclude that the January 6th report is  
14 inadmissible hearsay. They might also conclude that  
15 statements within the January 6th report were hearsay  
16 even if the report itself is not. And they could  
17 certainly reach a different conclusion with respect  
18 to the expert testimony of Professor Simi. Perhaps  
19 in another state, we would have time to produce our  
20 own sociology expert who would contradict Professor  
21 Simi.

22 JUSTICE ALITO: Now should -- should these  
23 considerations be dismissed as simply  
24 consequentialist arguments, or do they support a  
25 structural argument that supports the position that

1       you're taking here?

2               MR. MITCHELL: I think they all mutually  
3       reinforce each other. We have an argument, we  
4       believe, that is sufficient to dispose of this case  
5       just based on the meaning of "officer of the United  
6       States," as well as the argument we're making based  
7       on Term Limits, but all of the consequentialist  
8       considerations that Your Honor has suggested are  
9       additional reasons to reverse the Colorado Supreme  
10      Court, although we don't think it's necessary to get  
11      into consequences because the law is clearly on our  
12      side.

13              JUSTICE SOTOMAYOR: Can I -- you keep  
14      saying Term Limits. There are other presidential  
15      qualifications in the Constitution, age.

16              MR. MITCHELL: Yes.

17              JUSTICE SOTOMAYOR: Citizenship. There's a  
18      separate amendment, the Twenty-Second Amendment, that  
19      doesn't permit anyone to run for a second term.

20              We have a history of states disqualifying  
21      -- not all, but some -- of disqualifying candidates  
22      who won't be of age if elected. We have a history of  
23      at least one state disqualifying someone who wasn't a  
24      U.S. citizen.

25              MR. MITCHELL: Right.



1 JUSTICE SOTOMAYOR: Is -- are your  
2 arguments limited to Section 3?

3 MR. MITCHELL: Not quite. The question,  
4 Justice Sotomayor, is whether the state is violating  
5 Term Limits by adding to or altering the extant  
6 qualifications for the presidency in the  
7 Constitution. Now the hypo --

8 JUSTICE SOTOMAYOR: So you want us to say  
9 -- I'm wondering why the Term Limits qualification is  
10 important to you.

11 MR. MITCHELL: Because it --

12 JUSTICE SOTOMAYOR: Are you setting up so  
13 that if some president runs for a third term, that a  
14 state can't disqualify him from the ballot?

15 MR. MITCHELL: Of course, a state can  
16 disqualify him from the ballot because that is a  
17 qualification that is categorical. It's not  
18 defeasible by Congress. So a state is enforcing the  
19 Constitution when it says you can't appear on our  
20 ballot if you've already served two terms as  
21 president.

22 The same goes --

23 JUSTICE SOTOMAYOR: The same if they're  
24 under age when elected and the same if they're not a  
25 U.S. citizen.

1           MR. MITCHELL: The same if they're not --  
2 well, the same if they're not a U.S. citizen for  
3 sure. The age is a little more nuanced because you  
4 can imagine a scenario where the person is 34 years  
5 old at the time of the election, but he turns 35  
6 before Inauguration Day.

7           JUSTICE SOTOMAYOR: Well, then that would  
8 come up --

9           MR. MITCHELL: A state could not --

10          JUSTICE SOTOMAYOR: -- that would probably  
11 come up to us at some point. The state would make a  
12 decision and say he's ineligible, and we would have  
13 to decide that question then.

14          But my point is so what -- adding  
15 qualifications to what term limit --

16          MR. MITCHELL: You're --

17          JUSTICE SOTOMAYOR: -- is your argument  
18 based on?

19          MR. MITCHELL: You're changing --

20          JUSTICE SOTOMAYOR: I'm just confused.

21          MR. MITCHELL: Okay. With respect to the  
22 -- maybe I'll start with the age example.

23          JUSTICE SOTOMAYOR: Mm-hmm.

24          MR. MITCHELL: If a state like Colorado  
25 says you can't appear on our presidential ballot

1 unless you are 35 years old on the day of the  
2 election, that would be a violation of Term Limits  
3 because there could be a 34-year-old on the day of  
4 the election who turns 35 before Inauguration Day.

5 What Colorado has done here, what their  
6 supreme court has done, is similar because, under  
7 Section 3, President Trump needs to qualify during  
8 the time that he would hold office, and the Colorado  
9 Supreme Court is saying to President Trump: You have  
10 to show that you would qualify under Section 3 now,  
11 at the time of the election, or at the time that we,  
12 the state supreme court --

13 JUSTICE SOTOMAYOR: Now I understand.

14 JUSTICE KAGAN: So what -- what --

15 CHIEF JUSTICE ROBERTS: Now just -- just a  
16 point of clarification so we're all on the same page.  
17 When you say "Term Limits," you mean our decision in  
18 the Term Limits case --

19 MR. MITCHELL: Yes. I'm sorry.

20 CHIEF JUSTICE ROBERTS: -- not the  
21 constitutional provision governing term limits?

22 MR. MITCHELL: Yes. U.S. Term Limits  
23 against Thornton. Maybe I should call it Thornton  
24 instead of Term Limits.

25 CHIEF JUSTICE ROBERTS: That would be

1 easier for me to --

2 MR. MITCHELL: I'm sorry.

3 JUSTICE JACKSON: And does it have some --

4 JUSTICE SOTOMAYOR: I -- I was confused.

5 JUSTICE JACKSON: So does it have something  
6 to do with the fact that the particular circumstance  
7 that you're talking about can change? Is that what  
8 you mean? I'm trying to understand --

9 MR. MITCHELL: Yeah.

10 JUSTICE JACKSON: -- the distinction  
11 between the provision in the Constitution that  
12 relates to disqualification on the basis of  
13 insurrection behavior --

14 MR. MITCHELL: Mm-hmm.

15 JUSTICE JACKSON: -- and these other  
16 provisions that Justice Sotomayor points out. They  
17 all seem to me to be extant constitutional  
18 requirements. So you -- but you're drawing a  
19 distinction.

20 MR. MITCHELL: Right. I'm drawing a  
21 distinction because some of them are categorical,  
22 such as --

23 JUSTICE JACKSON: What do you mean by  
24 "categorical"? Whether or not you are an  
25 insurrectionist is or is not categorical?

1 MR. MITCHELL: It is not categorical  
2 because Congress --

3 JUSTICE JACKSON: Because?

4 MR. MITCHELL: -- because Congress can lift  
5 the disability by a two-thirds vote. And there is --

6 JUSTICE JACKSON: But -- but why does --  
7 why does that change the initial determination of  
8 whether or not you fall into the category? I don't  
9 understand the fact that you can be excused from  
10 having been in the category -- why does that not make  
11 it a categorical determination?

12 MR. MITCHELL: Because we don't know  
13 whether President Trump will be excused before he's  
14 sworn in, if he wins the election, on January 20th,  
15 2025. And a -- and a court that is saying that  
16 President Trump has to show now, today, that he would  
17 qualify under Section 3 is accelerating the deadline  
18 that the Constitution provides for him to obtain a  
19 waiver from Congress.

20 JUSTICE JACKSON: But that's by virtue of  
21 the "hold," right, "hold office." This is --

22 MR. MITCHELL: Correct. Yes.

23 JUSTICE JACKSON: Oh.

24 MR. MITCHELL: Section 3 bans him only from  
25 holding office. It does not --

1 JUSTICE JACKSON: All right. Can I ask you  
2 -- I'm just -- now that I have the floor --

3 MR. MITCHELL: Yes.

4 JUSTICE JACKSON: -- can I ask you to  
5 address your first argument, which is the  
6 office/officer point?

7 JUSTICE KAGAN: Could -- could --

8 JUSTICE JACKSON: Oh, sorry.

9 CHIEF JUSTICE ROBERTS: Yeah, why don't we  
10 --

11 JUSTICE KAGAN: -- could we --

12 JUSTICE JACKSON: Oh.

13 JUSTICE KAGAN: Is that okay if we do this  
14 and then we go to that?

15 JUSTICE JACKSON: Sure. Sure, sure, sure.

16 JUSTICE KAGAN: You know, but --

17 JUSTICE JACKSON: Go ahead.

18 JUSTICE KAGAN: Will there be an  
19 opportunity to do "officer" stuff, or should we --

20 CHIEF JUSTICE ROBERTS: Absolutely.  
21 Absolutely.

22 (Laughter.)

23 JUSTICE KAGAN: I just want to understand.  
24 So, on -- on -- on this theory, what is the sum total  
25 of ways that the -- that Section 3 can be enforced,

1 that -- that -- that -- that -- that some --

2 MR. MITCHELL: Yeah.

3 JUSTICE KAGAN: -- that somebody out there  
4 can say, yes, there has been a former president who  
5 engaged or led or participated in an insurrection and  
6 so should be disqualified from office, putting aside  
7 the officer argument --

8 MR. MITCHELL: Right.

9 JUSTICE KAGAN: -- what is the sum total of  
10 ways that that enforcement can happen?

11 MR. MITCHELL: So the answer to that  
12 question is going to depend on what Your Honor thinks  
13 of Griffin's Case. So, if this Court were to affirm  
14 the rationale of Griffin's Case, then the only way  
15 Section 3 could be enforced is through congressional  
16 legislation that creates a remedy. So Congress could  
17 reinstate the quo warranto provisions that they  
18 initially had in the 1870 --

19 JUSTICE KAGAN: Is that your position?

20 MR. MITCHELL: Yes, because we believe  
21 Griffin's Case is correctly decided and should be  
22 followed --

23 JUSTICE KAGAN: And how does that fit with  
24 -- a lot of the -- the -- the answers to the  
25 questions that we've been giving, you said, well,

1 Congress has to have the ability by a two-thirds vote  
2 to lift the disqualification.

3 MR. MITCHELL: Right.

4 JUSTICE KAGAN: But so too I -- I would  
5 think that that provision would -- would -- would be  
6 in some tension with what you just said --

7 MR. MITCHELL: There is some, yeah.

8 JUSTICE KAGAN: -- because, if Congress has  
9 the ability to lift the vote by a two-thirds  
10 majority, then, surely, it can't be right that one  
11 House of Congress can do the exact same thing by a  
12 simple majority.

13 MR. MITCHELL: Yeah, there certainly is  
14 some tension, Justice Kagan, and some commentators  
15 have pointed this out. Professor Baude and Professor  
16 Paulsen criticized Griffin's Case very sharply.

17 JUSTICE KAGAN: Then I must be right.

18 (Laughter.)

19 MR. MITCHELL: Well, we don't think it's --  
20 we don't think this problem is fatal because, to us,  
21 the -- the two-thirds provision that allows Congress  
22 to lift a disability is something akin to a pardon  
23 power, where Congress, through enforcement  
24 legislation, creates a mechanism by which the  
25 insurrectionist issue is to be determined by some



1       entity, it could be the legislature in the case of an  
2       elected member of Congress, each House has the  
3       ability to judge the qualifications of their members,  
4       or if it's outside the situation of Congress, it  
5       would be whatever Congress enacts.

6                So, when it was the writs of quo warranto,  
7       each federal prosecutor had the authority to bring a  
8       quo warranto writ against an incumbent official and  
9       seek his ouster from office under Section 3, but it  
10      was still subject to that amnesty provision in  
11      Section 3 of the Fourteenth Amendment.

12              So we do acknowledge the tension, but we  
13      don't think that's an insurmountable obstacle to you  
14      hearing the case.

15              JUSTICE ALITO: I don't even see why  
16      there's -- why there's a tension. If you analogize  
17      the -- the lifting by Congress of the  
18      disqualification by a two-thirds vote to a pardon,  
19      then, surely, one would not argue that the fact that  
20      the president or a governor can pardon someone from a  
21      criminal conviction or a criminal offense means that  
22      the person couldn't be prosecuted in the first place  
23      for the criminal offense.

24              MR. MITCHELL: That's right.

25              JUSTICE ALITO: Right?

1 MR. MITCHELL: Yes.

2 JUSTICE ALITO: So I don't see what the  
3 tension is. They're two separate things. Did the  
4 person engage in this activity which is prohibited,  
5 and second, even if the person did engage in the  
6 activity, are there reasons why the disqualification  
7 or the -- should be lifted or the pardon should be  
8 granted.

9 MR. MITCHELL: That's right. I mean, if --  
10 again, if the Court accepts the holding of Griffin's  
11 Case, that's exactly the regime that we would have,  
12 like the Court described.

13 JUSTICE ALITO: Yeah. I don't see there's  
14 a tension.

15 JUSTICE KAGAN: But I guess I don't --

16 JUSTICE ALITO: But, also, there's a limit  
17 on what one can infer from the mere fact that  
18 Congress can lift the disqualification. You can't  
19 infer from that that it is impermissible to have a  
20 prior determination that the person did engage in the  
21 insurrection. You can't make that inference.

22 MR. MITCHELL: Okay.

23 JUSTICE ALITO: It's not logical.

24 JUSTICE KAGAN: Well, but I think --

25 JUSTICE JACKSON: Yet isn't that what

1       you're doing?

2                   JUSTICE KAGAN:  -- what's -- what's --  
3       what's -- what's -- what's in tension is that you  
4       would have the exact same actor and say, look, that  
5       actor can lift --

6                   MR. MITCHELL:  Right.

7                   JUSTICE KAGAN:  -- the disqualification by  
8       a two-thirds vote.

9                   But you're saying only that actor can put  
10       the disqualification into effect in the first place  
11       and it can do that by far less than two-thirds.  It  
12       can do that just by a simple majority of one House.

13                   MR. MITCHELL:  Or -- or it could do that by  
14       doing nothing at all if -- if the holding of  
15       Griffin's Case is correct because just --

16                   JUSTICE KAGAN:  Yes, exactly.

17                   MR. MITCHELL:  -- congressional inaction  
18       would --

19                   JUSTICE KAGAN:  But that means that there  
20       will --

21                   MR. MITCHELL:  -- effectively act as a --

22                   JUSTICE KAGAN:  The only thing it takes --

23                   MR. MITCHELL:  Yeah.

24                   JUSTICE KAGAN:  -- to have no action --

25                   MR. MITCHELL:  Right.

1 JUSTICE KAGAN: -- is -- you know, is, you  
2 know, half plus one saying we don't feel like it.

3 MR. MITCHELL: But that's why we tried to  
4 characterize our Griffin's Case argument the way we  
5 did where we rely on preemption doctrines as well.  
6 So we have --

7 JUSTICE KAVANAUGH: Well, don't -- don't  
8 you think --

9 CHIEF JUSTICE ROBERTS: Why don't we --

10 JUSTICE KAVANAUGH: -- Griffin's Case is  
11 also relevant to trying to figure out what the  
12 original public meaning of Section 3 of the  
13 Fourteenth Amendment is? It's by the Chief Justice  
14 of the United States a year after the Fourteenth  
15 Amendment. That seems to me --

16 MR. MITCHELL: Yes.

17 JUSTICE KAVANAUGH: -- highly probative of  
18 what the meaning or understanding of that language,  
19 otherwise elusive language, is.

20 MR. MITCHELL: I do think it's probative,  
21 Justice Kavanaugh. We didn't rely too heavily on the  
22 point that you're making, partly because we have this  
23 other opinion from Justice Chase in the Jefferson  
24 Davis case. So that argument could potentially  
25 boomerang on us, which is why we didn't push it very

1 hard in our briefing.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MR. MITCHELL: But I think Your Honor is  
4 right. This is --

5 CHIEF JUSTICE ROBERTS: Why don't you  
6 finish your sentence and then we'll move on.

7 MR. MITCHELL: Just it is -- it is relevant  
8 and probative for sure, but I think there is other  
9 evidence too that might perhaps undercut the  
10 usefulness of trying to characterize Griffin's Case  
11 as completely emblematic of the original  
12 understanding.

13 CHIEF JUSTICE ROBERTS: Then why don't we  
14 move on to the officer point.

15 MR. MITCHELL: Certainly.

16 CHIEF JUSTICE ROBERTS: And, Justice  
17 Jackson, I think you --

18 JUSTICE JACKSON: Yes. So I had a question  
19 about it because you're making a textualist argument.

20 MR. MITCHELL: Mm-hmm.

21 JUSTICE JACKSON: And as I look at Section  
22 3, I see two parts of the first sentence of Section  
23 3.

24 MR. MITCHELL: Mm-hmm.

25 JUSTICE JACKSON: The first is a list of

1 offices that a disqualified person is barred from  
2 holding, and the second are specific circumstances  
3 that give rise to disqualification.

4 So, first, am I right about seeing that  
5 there are two different things happening in the first  
6 sentence?

7 MR. MITCHELL: Yes, for sure.

8 JUSTICE JACKSON: Okay. So are you arguing  
9 both in this case or just one? Are you arguing both  
10 that the office of the presidency should not be  
11 considered one of the barred offices --

12 MR. MITCHELL: Mm-hmm.

13 JUSTICE JACKSON: -- and that the person --  
14 a person who previously took the presidential oath is  
15 not subject to disqualification?

16 MR. MITCHELL: We are arguing both, Your  
17 Honor.

18 JUSTICE JACKSON: I don't see that in your  
19 brief.

20 MR. MITCHELL: Well --

21 JUSTICE JACKSON: I see a lot of focus on  
22 the second but not on the first.

23 MR. MITCHELL: -- there is definitely more  
24 focus on the second, and we acknowledge that we have  
25 a somewhat heavier lift on the first point just

1           because --

2                         JUSTICE JACKSON:   Why?  It seems to me that  
3           you have a list and president is not on it.

4                         MR. MITCHELL:   That -- that's certainly an  
5           argument in our favor, but there are also -- with  
6           respect to "officer of the United States," that's  
7           used repeatedly in the Constitution in the  
8           Commissions Clause, in the Appointments Clause, and  
9           also in the Impeachment Clause, and every time it  
10          appears, it's used in a way that clearly excludes the  
11          president.

12                        JUSTICE JACKSON:  No, I understand.

13                        MR. MITCHELL:   So we don't --

14                        JUSTICE JACKSON:  But that's the second  
15          argument.

16                        MR. MITCHELL:   That is.  And the --

17                        JUSTICE JACKSON:  So the first argument --

18                        MR. MITCHELL:   Mm-hmm.

19                        JUSTICE JACKSON:  -- is we have a list of  
20          offices --

21                        MR. MITCHELL:   Yes.

22                        JUSTICE JACKSON:  -- that a person is  
23          barred from holding, right --

24                        MR. MITCHELL:   Yes.

25                        JUSTICE JACKSON:  -- under your theory or

1 under the -- the language of --

2 MR. MITCHELL: Mm-hmm.

3 JUSTICE JACKSON: -- and we see it begins  
4 with senator, representative, elector --

5 MR. MITCHELL: Elector.

6 JUSTICE JACKSON: -- of the president and  
7 vice president, and all other civil or military  
8 officers -- offices.

9 MR. MITCHELL: Well, offices under the  
10 United States --

11 JUSTICE JACKSON: Offices under the United  
12 States.

13 MR. MITCHELL: -- is how it's phrased.

14 JUSTICE JACKSON: But the word "president  
15 or vice president" does not in it appear -- not  
16 appear specifically --

17 MR. MITCHELL: That's right.

18 JUSTICE JACKSON: -- in that list. So I  
19 guess I'm trying to understand, are you giving up  
20 that argument?

21 MR. MITCHELL: No.

22 JUSTICE JACKSON: And, if so, why?

23 MR. MITCHELL: No, we're not giving it up  
24 at all. You're right, the president and the vice  
25 president are not specifically listed, but the



1 Anderson litigants claim that they are encompassed  
2 within the meaning of the phrase "office under the  
3 United States." And that --

4 JUSTICE JACKSON: And do you agree that --  
5 that the Framers would have put such a high and  
6 significant and important office, sort of smuggled it  
7 in through that catch-all phrase?

8 MR. MITCHELL: No, we don't agree at all.  
9 That's why we're still making the argument that the  
10 presidency is excluded from the covered offices that  
11 are listed at the beginning of Section 3.

12 JUSTICE SOTOMAYOR: I -- I'm sorry, your  
13 brief says you didn't take a position on that point.

14 MR. MITCHELL: I'm sorry.

15 JUSTICE SOTOMAYOR: And your brief said --  
16 I don't have the -- the cite, I -- I apologize.

17 MR. MITCHELL: Okay.

18 JUSTICE SOTOMAYOR: You don't affirmatively  
19 argue that point I think is what your brief said.

20 MR. MITCHELL: In the blue brief?

21 JUSTICE SOTOMAYOR: Yes.

22 MR. MITCHELL: Well, we certainly argued it  
23 in the reply brief, and I'll have to look at what we  
24 -- how we phrased it. But we did point out in our  
25 opening brief that there are potential issues if this

1 Court were to rule on "office under" because that  
2 phrase appears in other parts of the Constitution,  
3 including the Emoluments Clause, the Impeachment  
4 Disqualification Clause, and it would --

5 JUSTICE JACKSON: Would we necessarily have  
6 to say -- I mean, I thought -- I thought the point  
7 was that Section 3 was unique, that there was  
8 something happening with Section 3 that could explain  
9 why certain offices were left off or whatnot.

10 MR. MITCHELL: Perhaps, but there are also  
11 implications from other parts of the Constitution  
12 which really help us on the "officer of the United  
13 States" argument in that second part of Section 3 but  
14 somewhat cut against us when it comes to "office  
15 under the United States."

16 And the Anderson litigants point this out  
17 in Footnote 9 in the red brief where they say, if  
18 this Court were to say the presidency is an excluded  
19 office under the United States, that could imply, for  
20 example, the president is not covered by the  
21 Emoluments --

22 JUSTICE GORSUCH: Mr. -- Mr. Mitchell --

23 MR. MITCHELL: Yes.

24 JUSTICE GORSUCH: -- stepping back on this

25 --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE GORSUCH: -- a -- a lot hinges on  
3 the difference between -- in your argument between  
4 the term "office" and "officer."

5 MR. MITCHELL: Yes.

6 JUSTICE GORSUCH: And I -- I -- I guess I'm  
7 wondering what theory do you have from an original  
8 understanding or a textualist perspective --

9 MR. MITCHELL: Mm-hmm.

10 JUSTICE GORSUCH: -- why those two terms so  
11 closely related would carry such different weight?

12 MR. MITCHELL: Because it's clear from the  
13 constitutional text that there are officers that do  
14 not hold offices under the United States, for  
15 example, the Speaker of the House and the President  
16 Pro Tempore. They're described as officers in  
17 Article I who are chosen by the legislature.

18 They also have to be officers if they're  
19 able to be covered by the Presidential Succession Act  
20 because, under the Constitution, only officers can  
21 serve when there's a vacancy in both the presidency  
22 and the vice presidency.

23 So they're officers, but they're not  
24 offices under the United States because of the  
25 Incompatibility Clause, which says that if you're a

1 member of Congress, you cannot simultaneously hold an  
2 office under the United States. So that provision of  
3 the Constitution clearly demonstrates that --

4 JUSTICE GORSUCH: I -- I --

5 MR. MITCHELL: -- members of Congress can't  
6 hold offices.

7 JUSTICE GORSUCH: -- I -- I appreciate that  
8 response. Is -- is there anything in the original  
9 drafting, history, discussion that you think  
10 illuminates why that distinction would carry such  
11 profound weight?

12 MR. MITCHELL: Not -- not of which we're  
13 aware. So these are textual inferences that we're  
14 drawing --

15 JUSTICE GORSUCH: Yeah.

16 MR. MITCHELL: -- from constitutional  
17 structure, intratextualist analysis.

18 JUSTICE GORSUCH: Yeah.

19 MR. MITCHELL: But we aren't relying  
20 necessarily on the thought processes of the people  
21 who drafted these provisions because they're  
22 unknowable. But, even if they were knowable, we're  
23 not sure they would be relevant in any event because  
24 this language, especially in Section 3, was enacted  
25 as a compromise.

1                   There were certainly radical Republicans  
2 who wanted to go much further. If you look at some  
3 of the earlier drafts that were proposed, some people  
4 wanted to ban all insurrectionists from holding  
5 office regardless of whether they previously swore an  
6 oath. Some people wanted to go further and ban them  
7 even from voting. And --

8                   CHIEF JUSTICE ROBERTS: Thank you. Thank  
9 you, counsel.

10                   I just have one very technical question.  
11 The statute in 1870, if it were still in effect,  
12 would require you to modify your arguments slightly.  
13 It was repealed, as you say, in 1948.

14                   I tried to find it, but I couldn't. Do you  
15 know why it was repealed?

16                   MR. MITCHELL: No, we don't know why. It  
17 looks like it was done as part of a reorganization of  
18 the U.S. Code, so it doesn't appear there was any  
19 policy motivation behind that decision. I think a  
20 lot of things got repealed during the 1948 decisions  
21 that were made.

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

24 Justice Alito?

25 JUSTICE ALITO: Is there any history of

1 states using Section 3 as a way to bar federal  
2 officeholders?

3 MR. MITCHELL: Not that I'm aware, Justice  
4 Alito, because of Griffin's Case. I mean, Griffin's  
5 Case has been the law -- I shouldn't say that it's  
6 been the law because it was just a circuit court  
7 decision, but that has been the settled understanding  
8 of Section 3 since 1870 when it was decided.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

11 JUSTICE SOTOMAYOR: I just want to pin down  
12 your principal argument on Section 3. You argue that  
13 even though the president may or may not qualify --  
14 presidency may or may not qualify as an office under  
15 the United States, your principal argument is that  
16 the president is not an officer of the United States,  
17 correct?

18 MR. MITCHELL: Yeah, I would say it a  
19 little more forcefully than what Your Honor just  
20 described. We believe the presidency is excluded  
21 from "office under the United States," but the  
22 argument we have that he's excluded, the president,  
23 as an officer of the United States is the stronger of  
24 the two textually.

25 JUSTICE SOTOMAYOR: Ah.

1 MR. MITCHELL: It has fewer implications  
2 for other constitutional --

3 JUSTICE SOTOMAYOR: A bit of a  
4 gerrymandered rule, isn't it, designed to benefit  
5 only your client?

6 MR. MITCHELL: I certainly wouldn't call it  
7 gerrymandered. That implies nefarious intent. We're  
8 --

9 JUSTICE SOTOMAYOR: Well, that you didn't  
10 make it up. I know some scholars have been  
11 discussing it. But just so we're clear, under that  
12 reading, only -- only the Petitioner is disqualified  
13 because virtually every other president except  
14 Washington --

15 MR. MITCHELL: Mm-hmm.

16 JUSTICE SOTOMAYOR: -- has taken an oath to  
17 support the Constitution, correct?

18 MR. MITCHELL: That's right. Every  
19 president -- to our knowledge, every other president  
20 -- John Adams might also be excluded because he took  
21 the oath as a vice president, which is not an officer  
22 -- but, yes, President Biden would certainly be  
23 covered. He took the oath as a member of Congress.  
24 And that's true of every previous president.

25 JUSTICE SOTOMAYOR: Would that be true if

1 we were to hold more narrowly in a reversal that it's  
2 not Section 3 that's at issue but Thornton and others  
3 as to whether Section 3 can be enforced by states  
4 against the president?

5 MR. MITCHELL: That would extend to every  
6 presidential candidate --

7 JUSTICE SOTOMAYOR: Exactly.

8 MR. MITCHELL: -- not just our client.  
9 That's correct.

10 JUSTICE SOTOMAYOR: Not just to yours.

11 MR. MITCHELL: Yes.

12 JUSTICE SOTOMAYOR: Okay. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: If I could just understand,  
15 I mean, given that you say you don't have a lot of  
16 evidence that the founding generation -- or the  
17 generation that we're looking at is really thinking  
18 about "office" versus "officer of the United States,"  
19 I mean, it -- it -- it would suggest that we should  
20 ask what -- is that rule a sensible one? You know,  
21 if they had thought about it, what reason would they  
22 have given for that rule?

23 And it does seem as though there -- there's  
24 no particular reason, and you can think of lots of  
25 reasons for the contrary --



1 MR. MITCHELL: Right.

2 JUSTICE KAGAN: -- to say that the only  
3 people who have engaged in insurrection who are not  
4 disqualified from office are presidents who have not  
5 held high office before. Why would that rule exist?

6 MR. MITCHELL: Yeah. I don't think there  
7 is a good rationale given that this was compromise  
8 legislation. And sometimes this happens with  
9 statutory compromises and even constitutional  
10 compromises. There's an agreed-upon set of words  
11 that can pass both Houses of Congress, but different  
12 legislators may have had goals and motivations. They  
13 didn't all get their way. In a compromise, everyone  
14 goes away miserable.

15 But this was the text that was settled  
16 upon. And it does seem odd that President Trump  
17 would fall through the cracks in a sense, but if  
18 "officer of the United States" means appointed  
19 officials, there's just no way he can be covered  
20 under Section 3. The Court would have to reject our  
21 officer argument to get to that point.

22 JUSTICE KAGAN: And is there any better  
23 reason, if you go to the office argument that Justice  
24 Jackson was suggesting, is there any better reason  
25 for saying that an insurrectionist cannot hold the

1 whole panoply of offices in the United States, but  
2 we're perfectly fine with that insurrectionist being  
3 president?

4 MR. MITCHELL: I think that's an even  
5 tougher argument for us to make as a policy matter  
6 because one would think, of all offices, the  
7 presidency would be the one you'd want to keep out  
8 the Confederate insurrectionists. That's the  
9 commander-in-chief of the Army. So, again, that's  
10 why we're leaning more on the "officer of" argument  
11 than the "office under."

12 We're not conceding "office under," but we  
13 definitely have the stronger textual case and  
14 structural case on "officer of the United States."

15 JUSTICE KAGAN: Thank you.

16 MR. MITCHELL: Thanks.

17 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

18 JUSTICE GORSUCH: Do you want to respond to  
19 some of the specific textual arguments on the  
20 "officer of" with respect to the Appointments Clause,  
21 the Impeachment Clause, and some of the others?

22 MR. MITCHELL: Yeah. So the way -- let's  
23 start with --

24 JUSTICE GORSUCH: But why --

25 MR. MITCHELL: Well, I'll start with the

1 Commissions Clause.

2 JUSTICE GORSUCH: The ball has been  
3 bouncing --

4 MR. MITCHELL: Yeah.

5 JUSTICE GORSUCH: -- on that back and  
6 forth, and I wanted to see where you landed today.

7 MR. MITCHELL: There are three textual  
8 inferences that could be drawn from each of those  
9 provisions Your Honor just mentioned, but the  
10 Commissions Clause, I think, is the strongest because  
11 it says "the president shall," you know, "commission  
12 all the officers of the United States." "Shall" is  
13 mandatory. "All" is all-encompassing. And the  
14 president doesn't commission himself, and he can't  
15 commission himself. So that's one of the first  
16 problems.

17 I think the Anderson litigants are trying  
18 to say, you know, there's somehow an implied  
19 exception there because the president obviously can't  
20 commission himself, so we should construe that to  
21 mean all officers of the United States besides the  
22 president. But you also have members of Congress who  
23 are not commissioned by the president, and that's  
24 because they're not officers of the United States.

25 So the only sensible distinction that we

1 can see, given the language of the Commissions  
2 Clause, is that officers of the United States are  
3 appointed officials, and elected officials, such as  
4 members of Congress and the president and the vice  
5 president, are not.

6 And the Impeachment Clause reinforces that.  
7 The president, the vice president, and all civil  
8 officers of the United States shall be removed from  
9 office upon impeachment for and conviction of all  
10 high crimes and misdemeanors. The president and the  
11 vice president are listed separately from officers of  
12 the United States.

13 And then, of course, the Appointments  
14 Clause, we know the president is not appointed  
15 pursuant to Article II. Neither is the vice  
16 president. Neither are members of Congress. So they  
17 can't be officers either.

18 JUSTICE GORSUCH: And how does Article I,  
19 Section 6, fit into this discussion?

20 MR. MITCHELL: And this is about officers  
21 being in the line of succession?

22 JUSTICE GORSUCH: Yes, exactly.

23 MR. MITCHELL: Right. So you have to be an  
24 officer to be in the line of succession. We have a  
25 federal statute that puts the Speaker and the

1 President Pro Tempore in the line of succession.  
2 They are officers. But they're not officers of the  
3 United States because they're not subject to  
4 impeachment, they're not commissioned by the  
5 president, and they're not appointed pursuant to  
6 Article II.

7 So there is this gap between the term  
8 "officer" and the phrase "officers of the United  
9 States," reinforcing the idea that "officers of the  
10 United States" is a term of art that doesn't refer  
11 just to federal officeholders, which is what the  
12 Anderson litigants are claiming, but refers only to  
13 those who are appointed, not to those who are  
14 elected.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Can I just make sure I  
18 understand how you're using Griffin's Case again?  
19 Section 3 refers to insurrection and raises questions  
20 about who decides what processes are to be used.  
21 That's ratified in 1868. The next year, Chief  
22 Justice Chase opines that states do not have the  
23 authority, that only Congress has the authority to  
24 enforce that. That could be evidence, as you say, of  
25 the original public meaning, at least some evidence.

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE KAVANAUGH: It's a precedent,  
3 although not binding. But your point then is it's  
4 reinforced because Congress itself relies on that  
5 precedent in the Enforcement Act of 1870 and forms  
6 the backdrop against which Congress does legislate.  
7 And then, as Justice Alito says, the historical  
8 practice for 155 years has been that that's the way  
9 it's gone. There hasn't -- there haven't been state  
10 attempts to enforce disqualification under Section 3  
11 against federal officers in the years since.

12 MR. MITCHELL: Right.

13 JUSTICE KAVANAUGH: So whether that's a  
14 Federalist 37 liquidation argument, it all reinforces  
15 what happened back in 1868, 1869, and 1870.

16 MR. MITCHELL: Right.

17 JUSTICE KAVANAUGH: Do you want to add to  
18 that, alter that?

19 MR. MITCHELL: No, I think that's exactly  
20 right. And the last part you mentioned, Your Honor,  
21 is crucial to our argument, that Congress relied on  
22 Griffin's Case. It provided the backdrop against  
23 which they legislated, which is why we should read  
24 these extant enforcement mechanisms -- and, right  
25 now, the only one left is the federal insurrection

1 statute, 2383 -- as exclusive of state court  
2 remedies. It's a -- it's a form of implied  
3 preemption, almost Sea Clammers implicit preemption  
4 of other remedies, because Congress made these  
5 decisions in explicit reliance on Griffin's Case.

6 JUSTICE KAVANAUGH: And if we agree with  
7 you on Griffin's Case and what you've elaborated on  
8 there, that's the end of the case, right?

9 MR. MITCHELL: It should be, yes, unless  
10 Congress decides to enact a statute, which we can't  
11 --

12 JUSTICE KAVANAUGH: A new --

13 MR. MITCHELL: -- rule out the possibility.

14 JUSTICE KAVANAUGH: -- a new statute in  
15 addition to 2383. And just to be clear, under 2383,  
16 you agree that someone could be prosecuted for  
17 insurrection by federal prosecutors and, if  
18 convicted, could be or shall be disqualified then  
19 from office?

20 MR. MITCHELL: Yes. But the only caveat  
21 that I would add is that our client is arguing that  
22 he has presidential immunity. So we would not  
23 concede that he can be prosecuted for what he did on  
24 January 6th under 2383.

25 JUSTICE KAVANAUGH: Understood. Asking --

1 MR. MITCHELL: Yes.

2 JUSTICE KAVANAUGH: -- the question about  
3 the theory of 2383. Thank you.

4 MR. MITCHELL: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Barrett?

6 JUSTICE BARRETT: So Griffin's Case was a  
7 collateral proceeding, so it's habeas relief.

8 MR. MITCHELL: Yes.

9 JUSTICE BARRETT: Could Griffin have -- so  
10 even if Section 3 is not a basis for collateral  
11 relief in habeas, which was new at the time, could  
12 Griffin have raised at his trial or in direct appeal  
13 the argument that Sheffey, Judge Sheffey, you know,  
14 you can't legitimately sit -- or constitutionally sit  
15 on my case because you're an insurrectionist and  
16 you're disqualified? Could he have won then?

17 MR. MITCHELL: No.

18 JUSTICE BARRETT: Why?

19 MR. MITCHELL: Not if -- not if Griffin's  
20 Case is correct. So a court would have to reject the  
21 rationale of Griffin's Case to accept what Your Honor  
22 was suggesting.

23 JUSTICE BARRETT: Well, why? Like I said,  
24 Griffin's Case -- I mean, I think there's some  
25 language that might be a little bit broad --



1 MR. MITCHELL: Mm-hmm.

2 JUSTICE BARRETT: -- but, at bottom,  
3 Griffin's Case is about a collateral habeas  
4 proceeding. And Griffin had brought his case after  
5 the fact. He needed a cause of action.

6 Why wouldn't it work in a trial for him to  
7 challenge Sheffey's constitutional ability to  
8 adjudicate his case?

9 MR. MITCHELL: What Griffin's Case holds is  
10 that only Congress can provide the means of enforcing  
11 Section 3. And under Your Honor's hypothetical,  
12 Congress has not enacted any such statute that would  
13 give Mr. Griffin the right to raise those types of  
14 arguments at his trial. So he would have to await  
15 legislation from Congress.

16 JUSTICE BARRETT: Okay. Let's assume that  
17 I disagree with you about the officer argument, so  
18 Section 3 covers President Trump. Let's say that  
19 Congress enacts a quo warranto provision that would  
20 allow a state or I guess it doesn't really matter for  
21 this purpose, even -- even a federal prosecutor, to  
22 bring such an action against him to remove him from  
23 office --

24 MR. MITCHELL: Mm-hmm.

25 JUSTICE BARRETT: -- in a quo warranto way.

1                   Wouldn't that be in some tension with  
2                   impeachment? He would be extracted from office  
3                   outside of the process of impeachment. Couldn't then  
4                   President Trump simply say, well, the only way to get  
5                   me out of office is the impeachment process and not  
6                   this quo warranto action?

7                   MR. MITCHELL: So I don't know how that  
8                   would play out because the quo warranto actions that  
9                   were brought that I'm aware of under the 1870  
10                  Enforcement Act were brought against state officials.  
11                  And Your Honor's impeachment hypothetical would apply  
12                  not only to the president but any federal --

13                  JUSTICE BARRETT: I know.

14                  MR. MITCHELL: -- officer of the United  
15                  States.

16                  JUSTICE BARRETT: I know.

17                  MR. MITCHELL: So I don't know how that  
18                  played out in the courts and whether anyone ever  
19                  tried to argue that impeachment was the exclusive  
20                  remedy for --

21                  JUSTICE BARRETT: Well, I don't think  
22                  anybody did argue it. I guess what I'm asking is,  
23                  you know, you said it's Congress's exclusive  
24                  province.

25                  MR. MITCHELL: Yes.

1                   JUSTICE BARRETT: And you also said that it  
2 has to apply, you know, after one is holding office,  
3 is elected. And I'm asking whether then the  
4 implication of your argument is that Congress could  
5 not enact such a provision that applied against  
6 federal officeholders that were covered by Section 3  
7 as opposed to state ones?

8                   MR. MITCHELL: I believe they could. The  
9 Impeachment Clause says that the president, the vice  
10 president, and also the officers of the United States  
11 shall be removed from office upon impeachment and  
12 conviction. But it doesn't say that's the only way  
13 you can remove them.

14                   I mean, Congress can defund a position and  
15 effectively, it's not quite the same as formal  
16 removal, but the other relevant precedent is Stuart  
17 against Laird when the Jeffersonians repealed the  
18 Midnight Judges Act and abolished all of these  
19 positions for federal judges. And some people  
20 thought that was unconstitutional because they  
21 thought the only way you could eliminate federal  
22 judges was through impeachment, but Chief Justice  
23 Marshall upheld that statute.

24                   So that to me is a relevant precedent  
25 showing that impeachment is not the only way to get

1 rid of a federal official.

2 JUSTICE BARRETT: Okay. Let me just ask  
3 one question, and this is just a point of  
4 clarification.

5 Does President Trump have any kind of due  
6 process right here? I mean, I'm wondering, this kind  
7 of goes not to the cause of action point or the  
8 preemption point but more to the question of what  
9 procedures he might have been entitled to. You don't  
10 make the argument that he was entitled to any, nor  
11 did I see the argument that he had any kind of  
12 constitutionally protected right to ballot access so  
13 that he was, you know, constitutionally entitled to  
14 an opportunity to be heard. Is that right?

15 MR. MITCHELL: We -- we made --

16 JUSTICE BARRETT: He had no due process  
17 right?

18 MR. MITCHELL: We made that argument below.  
19 We did not make that in our briefs to this Court for  
20 several reasons. I mean, Your Honor's, I think,  
21 suggesting and this is correct that the proceedings  
22 below, to put it charitably, were highly irregular.

23 JUSTICE BARRETT: Well, I wasn't suggesting  
24 that. I was just asking --

25 MR. MITCHELL: I'm sorry. The question --

1 JUSTICE BARRETT: Yeah.

2 MR. MITCHELL: -- seems to suggest that  
3 there might be due process issues. But we didn't  
4 develop that argument in this Court for several  
5 issues. Winning on due process doesn't really do as  
6 much for our client as the other arguments that we've  
7 made because that would be a ruling specific to this  
8 particular proceeding in the State of Colorado and  
9 would leave the door open for Colorado to continue on  
10 remand to exclude him from the ballot.

11 JUSTICE BARRETT: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Jackson?

13 JUSTICE JACKSON: Going back to whether the  
14 presidency is one of the barred offices, I -- I guess  
15 I'm a little surprised at your response to Justice  
16 Kagan because I thought that the history of the  
17 Fourteenth Amendment actually provides the reason for  
18 why the presidency may not be included.

19 And by that, I mean I didn't see any  
20 evidence that the presidency was top of mind for the  
21 Framers when they were drafting Section 3 because  
22 they were actually dealing with a different issue.

23 The pressing concern, at least as I see the  
24 historical record, was actually what was going on at  
25 lower levels of the government, the possible

1 infiltration and embedding of insurrectionists into  
2 the state government apparatus and the real risk that  
3 former Confederates might return to power in the  
4 South via state-level elections either in local  
5 offices or as representatives of the states in  
6 Congress. And that's a very different lens.

7 Your concern is trying to make sure that  
8 these people don't come back through the state  
9 apparatus and control the government in that  
10 direction seems to me very different than the worry  
11 that an insurrectionist will seize control of the  
12 entire national government through the presidency.

13 And so I just am surprised that you would  
14 -- given the text of the provision and the historical  
15 context that seems to demonstrate that their concern  
16 or their focus was not about the presidency, I just  
17 don't understand why you're giving that argument up.

18 MR. MITCHELL: There -- there is some  
19 evidence to suggest that, Justice Jackson, but --

20 JUSTICE JACKSON: Is there any evidence to  
21 suggest that the presidency was what they were  
22 focused on?

23 MR. MITCHELL: There is some evidence of  
24 that. There were people saying we don't want  
25 Jefferson Davis to be elected president, and there

1 was also -- one of the drafts of Section 3  
2 specifically mentioned the presidency and the vice  
3 presidency --

4 JUSTICE JACKSON: But it wasn't the final  
5 --

6 MR. MITCHELL: -- as an office.

7 JUSTICE JACKSON: -- but it wasn't the  
8 final enactment. So where do you --

9 MR. MITCHELL: It -- it wasn't the final --  
10 it wasn't --

11 JUSTICE JACKSON: Right.

12 MR. MITCHELL: I'm sorry. It wasn't the  
13 final enactment, but it does show that there was some  
14 concern by some people about Confederate  
15 insurrectionists ascending to the presidency.

16 And we didn't want to make a law office  
17 history type argument where we just look at the  
18 historical evidence and pick the evidence that we  
19 like and interpret it tendentiously because the other  
20 side can come back with us and throw the  
21 countervailing evidence back in our face.

22 So we wanted to focus more on the text of  
23 the Constitution because this was ultimately a  
24 compromise provision that was enacted in Section 3,  
25 and --

1 JUSTICE JACKSON: All right. Let me ask  
2 you another question --

3 MR. MITCHELL: Mm-hmm.

4 JUSTICE JACKSON: -- about the states  
5 because you have forcefully made an argument about  
6 the states not being able to enforce Section 3.

7 So, if we agree with you on that, what  
8 happens next? I mean, I thought you also wanted us  
9 to end the litigation. So is there a possibility  
10 that this case continues in federal court if that's  
11 our conclusion?

12 MR. MITCHELL: I don't see how it could  
13 unless Congress were to enact a statute in response  
14 to this Court's decision.

15 JUSTICE JACKSON: So your point is that it  
16 would -- we would have to say congressional enacting  
17 legislation is necessary for either state or federal  
18 enforcement?

19 MR. MITCHELL: That's correct.

20 JUSTICE JACKSON: All right. Final  
21 question. The Colorado Supreme Court concluded that  
22 the violent attempts of the Petitioner's supporters  
23 in this case to halt the count on January 6th  
24 qualified as an insurrection as defined by Section 3.

25 And I read your opening brief to accept



1 that those events counted as an insurrection, but  
2 then your reply seemed to suggest that they were not.

3 So what is your position as to that?

4 MR. MITCHELL: Oh, we -- we never accepted  
5 or conceded in our opening brief that this was an  
6 insurrection. What we said in our opening brief was  
7 President Trump did not engage in any act that can  
8 plausibly be characterized as insurrection because he  
9 did not engage --

10 JUSTICE JACKSON: All right. So why would  
11 this not be an -- what is your argument that it's not  
12 -- your reply brief says that it wasn't because, I  
13 think, you say, it did not involve an organized  
14 attempt to overthrow the government. So --

15 MR. MITCHELL: Right. That's one of many  
16 reasons. But, for an insurrection, there needs to be  
17 an organized, concerted effort to overthrow the  
18 government of the United States through violence.  
19 And this riot that occurred --

20 JUSTICE JACKSON: So your point is that a  
21 chaotic effort to overthrow the government is not an  
22 insurrection?

23 MR. MITCHELL: No, we didn't concede that  
24 it's an effort to overthrow the government either,  
25 Justice Jackson. None of these criteria were met.

1 This was a riot. It was not an insurrection. The  
2 events were shameful, criminal, violent, all of those  
3 things, but it did not qualify as insurrection as  
4 that term is used in Section 3 --

5 JUSTICE JACKSON: Thank you.

6 MR. MITCHELL: -- because -- thanks.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. MITCHELL: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Murray.

10 ORAL ARGUMENT OF JASON C. MURRAY

11 ON BEHALF OF RESPONDENTS ANDERSON, ET AL.

12 MR. MURRAY: Mr. Chief Justice, and may it  
13 please the Court:

14 We are here because, for the first time  
15 since the War of 1812, our nation's capitol came  
16 under violent assault. For the first time in  
17 history, the attack was incited by a sitting  
18 president of the United States to disrupt the  
19 peaceful transfer of presidential power.

20 By engaging in insurrection against the  
21 Constitution, President Trump disqualified himself  
22 from public office. As we heard earlier, President  
23 Trump's main argument is that this Court should  
24 create a special exemption to Section 3 that would  
25 apply to him and to him alone. He says Section 3

1 disqualifies all oath-breaking insurrectionists,  
2 except a former president who never before held other  
3 state or federal office.

4 There is no possible rationale for such an  
5 exemption, and the Court should reject the -- the  
6 claim that the Framers made an extraordinary mistake.  
7 Section 3 uses deliberately broad language to cover  
8 all positions of federal power requiring an oath to  
9 the Constitution.

10 My friend relies on a claimed difference  
11 between "an office under" and "an officer of the  
12 United States," but this case does not come down to  
13 mere prepositions. The two phrases are two sides of  
14 the same coin, referring to any federal office or to  
15 anyone who holds one.

16 President Trump's other arguments for  
17 reversal ignore the constitutional role of the states  
18 in running presidential elections. Under Article II  
19 and the Tenth Amendment, states have the power to  
20 ensure that their citizens' electoral votes are not  
21 wasted on a candidate who is constitutionally barred  
22 from holding office.

23 States are allowed to safeguard their  
24 ballots by excluding those who are under age,  
25 foreign-born, running for a third presidential term,

1 or, as here, those who have engaged in insurrection  
2 against the Constitution, in violation of their oath.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Do you have  
5 contemporaneous examples -- and by contemporaneous, I  
6 mean shortly after the adoption of the Fourteenth  
7 Amendment -- where the states disqualified national  
8 candidates, not its own candidates, but national  
9 candidates?

10 MR. MURRAY: The only example I can think  
11 of, Justice Thomas, is the example of governor -- of  
12 -- of Congressman Christy, who was elected in Georgia  
13 in I believe 1868, and the governor of Georgia  
14 refused -- or -- or declined to certify the results  
15 of that election because Mr. Christy was  
16 disqualified.

17 But I think it's not surprising that there  
18 are few examples because we didn't have ballots in  
19 the same way back then. Candidates were either  
20 write-in or they were party ballots, so the states  
21 didn't run the ballots in the same way, and there  
22 wouldn't have been a process for determining before  
23 an election whether a candidate was qualified, unlike  
24 the processes that we have now that states have  
25 created under their Article I and Article II powers

1 to run elections.

2 JUSTICE THOMAS: But it would seem that  
3 particularly after Reconstruction and after the  
4 Compromise of 1877 and during the period of Redeemers  
5 that you would have that kind of conflict. There  
6 were a plethora of Confederates still around. There  
7 were any number of people who would continue to  
8 either run for state offices or national offices.

9 So it would seem -- that would suggest that  
10 there would at least be a few examples of national  
11 candidates being disqualified if your reading is  
12 correct.

13 MR. MURRAY: Well, there were certainly  
14 national candidates who were disqualified by Congress  
15 refusing to seat them.

16 JUSTICE THOMAS: I understand that, but  
17 that's not this case. I'm talking -- did states  
18 disqualify them? That's what we're talking about  
19 here. I understand Congress would not seat them.

20 MR. MURRAY: Other than the example I gave,  
21 no, but, again, Your Honor, that's not surprising  
22 because there wouldn't have been -- states certainly  
23 wouldn't have the authority to remove a sitting  
24 federal officer.

25 JUSTICE THOMAS: So what's the purpose of

1 the -- what was the purpose of the -- of Section 3?  
2 The states were sending people -- the concern was  
3 that the former Confederate states would continue  
4 being bad actors, and the effort was to prevent them  
5 from doing this.

6 And you're saying that, well, this also  
7 authorized states to disqualify candidates. So what  
8 I'm asking you for, if you are right, what are the  
9 examples?

10 MR. MURRAY: Well, Your Honor, the examples  
11 are states excluded many candidates for state office,  
12 individuals holding state offices. We have a number  
13 of published cases of states concerning that.

14 JUSTICE THOMAS: I understand that. I -- I  
15 understand the states controlling state elections and  
16 state positions. What we are talking about here are  
17 national candidates.

18 The -- I understand. You look at Foner or  
19 Foote, Shelby Foote, or McPherson, they all talk  
20 about, of course, the conflict after the Civil War,  
21 and there were people who felt very strongly about  
22 retaliating against the South, the radical  
23 Republicans, but they did not think about authorizing  
24 the South to disqualify national candidates.

25 And that's the argument you're making, and

1        what I would like to know is you give -- is do you  
2        have any examples of this?

3                MR. MURRAY:  Many of those historians have  
4        filed briefs in our support in this case, making the  
5        point that the -- the -- the idea of the Fourteenth  
6        Amendment was that both states and the federal  
7        government would ensure rights and that if states  
8        failed to do so, the federal government certainly  
9        would also step in.

10               But I think the reason why there aren't  
11        examples of states doing this is an idiosyncratic one  
12        of the fact that elections worked differently back  
13        then.  States have a background power under Article  
14        II and the Tenth Amendment to run presidential  
15        elections.  They didn't use that power to police  
16        ballot access until about the 1890s.  And by the  
17        1890s, everyone had received amnesty and these issues  
18        had become moot.  So I don't think the history tells  
19        us --

20               CHIEF JUSTICE ROBERTS:  Counsel, I'd like  
21        to sort of look at Justice Thomas's question sort of  
22        from the 30,000-foot level.  I mean, the whole point  
23        of the Fourteenth Amendment was to restrict state  
24        power, right?  States shall not abridge privilege of  
25        immunity, they won't deprive people of property

1 without due process, they won't deny equal  
2 protection. And on the other hand, it augmented  
3 federal power under Section 5. Congress has the  
4 power to enforce it.

5 So wouldn't that be the last place that  
6 you'd look for authorization for the states,  
7 including Confederate states, to enforce --  
8 implicitly authorize to enforce the presidential  
9 election process? That -- that seems to be a  
10 position that is at -- at war with the whole thrust  
11 of the Fourteenth Amendment and very ahistorical.

12 MR. MURRAY: No, Your Honor. First, we  
13 would locate the states' authority to run  
14 presidential elections not in the Fourteenth  
15 Amendment but in Article II. And that power is  
16 merely plenary to determine the means --

17 CHIEF JUSTICE ROBERTS: Yeah, but you're  
18 relying on -- you have no reliance on Section 3, is  
19 that what you're saying?

20 MR. MURRAY: No, Your Honor. Certainly, we  
21 have reliance on Section 3 insofar as Article II  
22 gives states this broad power to determine how their  
23 electors are selected, and that broad power implies  
24 the narrower power to enforce federal constitutional  
25 qualifications like mentioned in the brief.



1 CHIEF JUSTICE ROBERTS: Well, but the  
2 narrower power you're looking for is the power of  
3 disqualification, right? That is a very specific  
4 power in the Fourteenth Amendment. And you're saying  
5 that was implicitly extended to the states under a  
6 clause that doesn't address that at all?

7 MR. MURRAY: We would say that nothing in  
8 the Fourteenth Amendment takes away from the states  
9 their broad and merely plenary power to determine the  
10 manner of selecting their electors in the manner that  
11 they see fit. As this Court said in Chiafalo, that  
12 power is merely plenary unless something in the  
13 Constitution tells states they can't do it.

14 And -- and the structure of the Fourteenth  
15 Amendment certainly was intended to expand federal  
16 power and certainly to restrict state power in some  
17 ways, but states are bound to enforce and apply, for  
18 example, Section 1 of the Fourteenth Amendment. And  
19 so it's hard to see why states wouldn't be similarly  
20 bound or at least authorized --

21 JUSTICE KAVANAUGH: But that's -- that's a  
22 --

23 JUSTICE KAGAN: Well, just --

24 JUSTICE KAVANAUGH: -- "greater includes  
25 the lesser" argument. The -- the states have the

1 power, the legislature has the power to choose  
2 electors. Granted. But just because there's one  
3 authorized means in the Constitution to a particular  
4 end does not mean that there's any means to that end.

5 And so I think you're taking that electors  
6 argument and bringing it into Section 3, where, as  
7 the Chief Justice says, there's just no -- and  
8 Justice Thomas, there's no historical evidence to  
9 support kind of the theory of Section 3, nor the  
10 overall -- to explain the overall structure of -- of  
11 the Fourteenth Amendment.

12 MR. MURRAY: We certainly have a long  
13 history in this country of states using their power  
14 to determine the manner of selecting presidential  
15 electors to enforce other qualifications in the  
16 Constitution. I don't -- I don't take it there's a  
17 great debate about whether or not states are allowed  
18 to exclude underaged or foreign-born candidates or,  
19 if President Bush or Obama wanted to run for a third  
20 term, that they could be excluded under that broad  
21 Article II power.

22 I don't see why Section 3 should be treated  
23 any differently. Section 3 speaks in the same  
24 mandatory terms.

25 JUSTICE KAVANAUGH: Well, when you look at

1 Section 3, the term "insurrection" jumps out, and the  
2 question is -- the questions are: What does that  
3 mean? How do you define it? Who decides? Who  
4 decides whether someone engaged in it? What  
5 processes -- as Justice Barrett alluded to, what  
6 processes are appropriate for figuring out whether  
7 someone did engage in that?

8 And that's all what Chief Justice Chase  
9 focused on a year after the Fourteenth Amendment to  
10 say these are difficult questions and you look right  
11 at Section 5 of the Fourteenth Amendment, as the  
12 Chief Justice said, and that tells you Congress has  
13 the primary role here.

14 I think what's different is -- is the  
15 processes, the definition, who decides questions  
16 really jump out at you when you look at Section 3.

17 MR. MURRAY: Cert --

18 JUSTICE KAVANAUGH: Your response to that?

19 MR. MURRAY: Well, certainly, Justice  
20 Kavanaugh, there has to be some process for  
21 determining those questions, and then the question  
22 becomes, does anything in the Fourteenth Amendment  
23 say that only Congress can create that process? And  
24 Section 5 very clearly is not an exclusive provision.  
25 It says Congress shall have power. And --

1 JUSTICE KAGAN: But maybe put most baldly,  
2 I think that the question that you have to confront  
3 is why a single state should decide who gets to be  
4 president of the United States. In other words, you  
5 know, this question of whether a former president is  
6 disqualified for insurrection to be president again  
7 is, you know, just say it, it sounds awfully national  
8 to me. So whatever means there are to enforce it  
9 would suggest that they have to be federal, national  
10 means.

11 Why does -- you know, if you weren't from  
12 Colorado and you were from Wisconsin or you were from  
13 Michigan and it really -- you know, what the Michigan  
14 secretary of state did is going to make the  
15 difference between, you know, whether Candidate A is  
16 elected or Candidate B is elected, I mean, that seems  
17 quite extraordinary, doesn't it?

18 MR. MURRAY: No, Your Honor, because,  
19 ultimately, it's this Court that's going to decide  
20 that question of federal constitutional eligibility  
21 and settle the issue for the nation. And, certainly,  
22 it's not unusual that questions of national  
23 importance come up through different states.

24 JUSTICE KAGAN: Well, I suppose this Court  
25 would be saying something along the lines of that a

1 state has the power to do it. But I guess I was -- I  
2 was asking you to go a little bit further in saying  
3 why should that be the right rule. Why should a  
4 single state have the ability to make this  
5 determination not only for their own citizens but for  
6 the rest of the nation?

7 MR. MURRAY: Because Article II gives them  
8 the power to -- to appoint their own electors as they  
9 see fit. But, if they're going to use a federal  
10 constitutional qualification as a ballot access  
11 determinant, then it's creating a federal  
12 constitutional question that then this Court decides  
13 and other courts, other states -- if this Court  
14 affirms the decision below, determining that  
15 President Trump is ineligible to be president, other  
16 states would still have to determine what effect that  
17 would have on their own state's law and state  
18 procedure --

19 JUSTICE BARRETT: Well, if we --

20 MR. MURRAY: -- in terms of ballot access.

21 JUSTICE BARRETT: -- if we affirmed and we  
22 said he was ineligible to be president, yes, maybe  
23 some states would say, well, you know, we're going to  
24 keep him on the ballot anyway, but, I mean, really,  
25 it's going to have, as Justice Kagan said, the effect

1 of Colorado deciding. And it's true, I just want to  
2 push back a little bit on, well, it's a national  
3 thing because this Court will decide it.

4 You say that we have to review Colorado's  
5 factual record with clear error as the standard of  
6 review. So we would be stuck. The first mover  
7 state, here, Colorado, we're stuck with that record.  
8 And, you know, I -- I -- I don't want to get into  
9 whether the -- the record -- I mean, maybe the record  
10 is great, but what if the record wasn't? I mean,  
11 what if it wasn't a fulsome record? What if, you  
12 know, the -- the hearsay rules are, you know,  
13 one-offs? Or what if this is just made by the  
14 secretary of state without much process at all?

15 How do we review those factual findings?  
16 Why should clear error review apply? And doesn't  
17 that just kind of buckle back into this point that  
18 Justice Kagan was making, you know, that -- that we  
19 made with Mr. Mitchell too that it just doesn't seem  
20 like a state call?

21 MR. MURRAY: Three points, Your Honor. The  
22 first is that ordinarily, of course, this Court  
23 reviews factual findings for clear error, but  
24 President Trump made the point in -- in his reply  
25 brief that sometimes on constitutional questions that

1       require a uniform resolution, this Court can do more,  
2       something more like a Bose Corp. style independent  
3       review of the factual record.

4               And we would have no objection to that  
5       given that the record here -- really -- really, the  
6       facts that are disputed here are incredibly narrow.  
7       The essence of our case is President Trump's own  
8       statements that he made in public view for all to  
9       see.

10              JUSTICE BARRETT: But then that's saying  
11       that in this context, which is very high stakes, if  
12       we review the facts essentially de novo, you want us  
13       all to just watch the video of the Ellipse and then  
14       make a decision without any deference to or guidance  
15       from lower court fact finding? That's unusual.

16              MR. MURRAY: Well, ultimately, President  
17       Trump himself urges this Court to decide the merits  
18       of his eligibility on the factual record here at page  
19       2 of his brief. He's never at any point in this  
20       proceeding suggested there was something else that  
21       needed to be in the factual record, any other  
22       witnesses that he wanted to call to present his case.

23              And, again, the essence of our case is his  
24       own statements and -- and -- and, in particular, his  
25       own videotaped statements on the Ellipse --

1 JUSTICE GORSUCH: Mr. Murray, just to  
2 circle back to -- I'm sorry to interrupt. But I  
3 wanted to -- before we left it, I wanted to circle  
4 back to where Justice Kagan was.

5 Do you agree that the state's powers here  
6 over its ballot for federal officer election have to  
7 come from some constitutional authority?

8 MR. MURRAY: Members of this Court have  
9 disagreed about that.

10 JUSTICE GORSUCH: I'm asking you.

11 (Laughter.)

12 MR. MURRAY: The -- the majority of this  
13 Court has said that those powers come from Article  
14 II. But we think that the result is the same whether  
15 the Court locates it in Article II or in a reserved  
16 power under the Tenth Amendment.

17 JUSTICE GORSUCH: Okay. But you accept  
18 that this Court has held, you're not contesting this  
19 or asking us to revisit that decision in Thornton or  
20 Term Limits or whatever you want to call it that it  
21 has to come from some federal constitutional  
22 authority?

23 MR. MURRAY: No, we are not, Your Honor.

24 JUSTICE GORSUCH: Okay. And -- and -- and,  
25 here, we're not talking about the Qualifications



1 Clause, right? Nobody's talking about whether he's  
2 35 years old or a natural born, whatever, right, not  
3 -- not at issue, okay?

4 We're talking about something under the  
5 Fourteenth Amendment and Section 3, so that's where  
6 you have to find your authority, right?

7 MR. MURRAY: We find our authority in  
8 Article II in states' plenary power to run their  
9 elections.

10 JUSTICE GORSUCH: Federal election -- but  
11 this is for a federal office. It has to come from  
12 the Constitution. And you're seeking to enforce  
13 Section 3?

14 MR. MURRAY: We're suggesting that in their  
15 broad power to determine the -- to select  
16 presidential electors in any manner they see fit,  
17 they can take account of Section 3 and apply Section  
18 3 --

19 JUSTICE GORSUCH: Could they do it without  
20 Section 3? Could they disqualify somebody for -- you  
21 know, on whatever basis they wanted outside of the  
22 Qualifications Clause?

23 MR. MURRAY: That would run into Term  
24 Limits, I think, Your Honor.

25 JUSTICE GORSUCH: Yeah, I would think so,

1 right? So it has to come back to Section 3. And if  
2 that's true, how does that work given that Section 3  
3 speaks about holding office, not who may run for  
4 office. It was a point Mr. Mitchell was making  
5 earlier and I just wanted to give you a chance to  
6 respond to it because it seems to me that -- that,  
7 you know, that you're asking to enforce in an  
8 election context a provision of the Constitution that  
9 speaks to holding office. So it's different than the  
10 Qualifications Clause, which is all about who can run  
11 and then serve, yeah.

12 MR. MURRAY: I -- I don't know that it is  
13 different.

14 JUSTICE GORSUCH: Okay.

15 MR. MURRAY: Other qualifications for  
16 office similarly talk about eligibility for the  
17 office. There's nothing unconstitutional about a  
18 30-year-old trying to get on the ballot.

19 JUSTICE GORSUCH: Except for this  
20 disability can be removed, right, under Section 3.  
21 That's what's different about it. So thoughts on  
22 that?

23 MR. MURRAY: Well, the fact that there's an  
24 extraordinary provision for removing the disability  
25 does not negate the fact that the disability exists

1 today and it's existed since January 6th, 2021, when  
2 President Trump engaged in insurrection against the  
3 Constitution.

4 JUSTICE GORSUCH: So were his actions after  
5 that date, before he left office, ultra vires? Is  
6 that -- is that where your theory leads?

7 MR. MURRAY: Well, that would raise the  
8 separate question of whether one can collaterally  
9 attack the actions of a de facto officer. And that  
10 may be the one place in Griffin's Case at the very  
11 end where we would agree, which is -- which is when  
12 Justice Chase said, I've talked to my Supreme Court  
13 colleagues and we unanimously agree that you can't  
14 collaterally attack all official actions of an  
15 officer who's holding -- who's, in fact, holding the  
16 position under --

17 JUSTICE GORSUCH: All right. But just  
18 circle back to where we started, right? This is  
19 Section 3. Your authority has to come from there.  
20 And it's about holding office and it's a particular  
21 kind of disability that can be removed by Congress  
22 and it's the only one like that, right? They can't  
23 remove age or citizenship.

24 How should that inform our thoughts about a  
25 state's efforts to regulate the ballot for a federal

1 office?

2 MR. MURRAY: The colloquy that my friend  
3 had with Justice Alito earlier, I think, is  
4 illustrative here. The fact that Congress has an  
5 extraordinary removal power does not negate that the  
6 disability exists today and exists indefinitely into  
7 the future, much like the fact that Congress -- that  
8 the president can pardon somebody for a criminal  
9 conviction doesn't make that conviction somehow --  
10 somehow contingent.

11 And -- and I would note that if President  
12 Trump were appointed to an office today, if he were  
13 appointed as a state judge, he could not hold that  
14 office, which shows that the disability exists now.

15 And -- and the fact that Congress has a  
16 power to remove the disability doesn't negate the  
17 present qualification, nor does it implicitly bestow  
18 on President Trump a constitutional right to run for  
19 offices that he cannot hold in violation of state law  
20 and state procedure under Article II.

21 JUSTICE SOTOMAYOR: In fact, there was a --  
22 a congressional action to permit Confederate officers  
23 or people who supported the Confederacy to hold  
24 office before the Fourteenth Amendment, correct? So  
25 there must have been a thought that there was a -- a

1 preexisting disqualification.

2 MR. MURRAY: That's absolutely right.  
3 There were a flood of amnesty requests even before  
4 Section 3 went into effect because everybody  
5 understood at the time that those people would be  
6 disqualified the moment that Section 3 was enacted  
7 forever unless they received amnesty.

8 JUSTICE JACKSON: Can I --

9 CHIEF JUSTICE ROBERTS: Counsel, what do  
10 you do with the -- what would seem to me to be plain  
11 consequences of your position? If -- if Colorado's  
12 position is upheld, surely, there will be  
13 disqualification proceedings on the other side, and  
14 some of those will succeed.

15 Some of them will have different standards  
16 of proof. Some of them will have different rules  
17 about evidence. Maybe the Senate report won't be  
18 accepted in others because it's hearsay. Maybe it's  
19 beyond a reasonable doubt, whatever.

20 In very quick order, I would expect,  
21 although my predictions have never been correct --

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: -- I would expect  
24 that, you know, a goodly number of states will say,  
25 whoever the Democratic candidate is, you're off the

1 ballot, and others for the Republican candidate,  
2 you're off the ballot. It'll come down to just a  
3 handful of states that are going to decide the  
4 presidential election. That's a pretty daunting  
5 consequence.

6 MR. MURRAY: Well, certainly, Your Honor,  
7 the fact that there are potential frivolous  
8 applications of a constitutional provision isn't a  
9 reason that would --

10 CHIEF JUSTICE ROBERTS: Well, no, hold on.  
11 I mean, you might think they're frivolous, but the  
12 people who are bringing them may not think they're  
13 frivolous. Insurrection is a broad, broad term, and  
14 if there's some debate about it, I suppose that will  
15 go into the decision and then, eventually, what, we  
16 would be deciding whether it was an insurrection when  
17 one president did something as opposed to when  
18 somebody else did something else? And what do we do?  
19 Do we wait until near the time of counting the  
20 ballots and sort of go through which states are valid  
21 and which states aren't?

22 MR. MURRAY: There's a reason Section 3 has  
23 been dormant for 150 years, and it's because we  
24 haven't seen anything like January 6th since  
25 Reconstruction.

1                   Insurrection against the Constitution is  
2 something extraordinary. And --

3                   CHIEF JUSTICE ROBERTS: It seems to me  
4 you're avoiding the question, which is other states  
5 may have different views about what constitutes  
6 insurrection.

7                   And now you're saying, well, it's all right  
8 because somebody, presumably us, are going to decide,  
9 well, they said they thought that was an  
10 insurrection, but they were wrong. And maybe they  
11 thought it was right. And we'd have to develop rules  
12 for what constitutes an insurrection.

13                   MR. MURRAY: Yes, Your Honor. Just like  
14 this Court interprets other constitutional  
15 provisions, this Court can make clear that an  
16 insurrection against the Constitution is something  
17 extraordinary.

18                   And, in particular, it really requires a  
19 concerted group effort to resist through violence not  
20 some ordinary application of state or federal law but  
21 the functions mandated by the Constitution itself.

22                   JUSTICE KAVANAUGH: On -- on your point  
23 that it's been dormant for 155 years, I think the  
24 other side would say the reason for that is Chief  
25 Justice Chase's opinion in 1869 in Griffin's Case to

1 start, which says that Congress has the authority  
2 here, not the states. That's followed up by the  
3 Enforcement Act of 1870, in which Congress acts upon  
4 that understanding, which is followed -- and there's  
5 no history contrary in that period, as Justice Thomas  
6 pointed out, there's no history contrary in all the  
7 years leading up to this of states exercising such  
8 authority.

9 I think the reason it's been dormant is  
10 because there's been a settled understanding that  
11 Chief Justice Chase, even if not right in every  
12 detail, was essentially right, and the branches of  
13 the government have acted under that settled  
14 understanding for 155 years.

15 And Congress can change that. And Congress  
16 does have Section 2383, of course, the Insurrection  
17 Act, a criminal statute. But Congress could change  
18 it, but they have not in 155 years in relevant  
19 respects for what you want here today at least.

20 MR. MURRAY: No, Justice Kavanaugh. The  
21 reason why it's been dormant is because, by 1876,  
22 essentially, all former Confederates had received  
23 amnesty. And we haven't seen anything like an  
24 insurrection since then.

25 I'd like to address your point --



1 JUSTICE ALITO: Well, you know, we didn't

2 --

3 JUSTICE SOTOMAYOR: Can I go to that

4 point --

5 JUSTICE ALITO: -- after the --

6 JUSTICE SOTOMAYOR: Sorry.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: I don't know how much we  
9 can infer from the fact that we haven't seen anything  
10 like this before and therefore conclude that we're  
11 never -- we're not going to see something in the  
12 future.

13 From the time of the impeachment of  
14 President Johnson until the impeachment of President  
15 Clinton more than a hundred years later, there were  
16 no impeachments of presidents, and in fairly short  
17 order, over the last couple of decades, we've had  
18 three. So I don't know how much you can infer from  
19 that.

20 MR. MURRAY: Certainly, but if this Court  
21 affirms, this Court can write an opinion that  
22 emphasizes how extraordinary insurrection against the  
23 Constitution is and how rare that is because it  
24 requires an assault not just on the application of  
25 law but on constitutionally mandated functions

1 themselves, like we saw on January 6th, a coordinated  
2 attempt to -- to disrupt a function mandated by the  
3 Twelfth Amendment and essential to constitutional  
4 transfer of presidential power.

5 JUSTICE ALITO: Well, let me ask you a  
6 question about whether the power that you've  
7 described as plenary really is plenary.

8 Suppose that the outcome of an election for  
9 president comes down to the vote of a single state,  
10 how the electors of the vote of a single state are  
11 going to vote. And suppose that Candidate A gets a  
12 majority of the votes in that state, but the  
13 legislature really doesn't like Candidate A, thinks  
14 Candidate A is an insurrectionist, so the legislature  
15 then passes a law ordering its electors to vote for  
16 the other candidate.

17 Do you think the state has that power?

18 MR. MURRAY: I think there may be  
19 principles that come into play in terms of after the  
20 people have voted that Congress -- that the state  
21 can't change the rules midstream. I'm not sure  
22 because I'm not aware of this Court addressing it.  
23 And, certainly, as the --

24 JUSTICE ALITO: Well, let's change it so  
25 that it's not after the election; it's three days

1 before the election based on the fact that the polls  
2 in that state look bad. Can they do it?

3 MR. MURRAY: I think they probably could  
4 under this Court's decision in Chiafalo, where this  
5 Court emphasized that for much of American history,  
6 state legislatures picked their -- their own electors  
7 and assigned their own electors themselves. But, of  
8 course, that would be much more extraordinary than  
9 what we have here, which is simple application of  
10 normal state ballot access principles to say that  
11 we're only going to put on the ballot an individual  
12 who is qualified to assume the office.

13 JUSTICE ALITO: Can I ask you again the  
14 question that Justice Gorsuch asked, and you -- to  
15 which you responded by citing the de facto officer  
16 doctrine. But suppose we look at that going forward  
17 rather than judging the validity of an act committed  
18 between the time when a president allegedly engages  
19 in an insurrection and the time when the president  
20 leaves office.

21 During that interim period, would it be  
22 lawful for military commanders and other officers to  
23 disobey orders of the -- of the -- the president in  
24 question?

25 MR. MURRAY: I'm not sure that anything

1 gives military officers the authority to adjudicate  
2 effectively the -- the -- the legality of the  
3 presidency.

4 JUSTICE GORSUCH: Why -- why -- why -- why  
5 not? You say he's disqualified from the moment it  
6 happens. Now I understand the de facto officer  
7 doctrine might be used to prohibit people from  
8 seeking judicial remedies for decisions that take  
9 place after the date he was disqualified.

10 But, if he is, in fact, disqualified, from  
11 that moment, why would anybody have to obey a  
12 direction from him?

13 MR. MURRAY: Well, ultimately, there still  
14 has to be some kind of procedure in place to  
15 adjudicate the disqualification. Certainly, Congress  
16 could impeach a sitting president, but that's the  
17 only remedy I'm aware of that exists for -- for  
18 removal or otherwise negating the authority of a  
19 sitting president.

20 JUSTICE GORSUCH: Why?

21 MR. MURRAY: Well, the --

22 JUSTICE GORSUCH: On what theory? Because  
23 Section 3 speaks about disqualification from holding  
24 office. You say he is disqualified from holding  
25 office from the moment it happens.

1 MR. MURRAY: Correct. But, nevertheless --

2 JUSTICE GORSUCH: So -- so it operates --  
3 you say there's no -- no legislation necessary -- I  
4 thought that was the whole theory of your case -- and  
5 no procedure necessary -- it happens automatically.

6 MR. MURRAY: Well, certainly, you need a  
7 procedure in order to have any remedy to enforce the  
8 disqualification, which is different --

9 JUSTICE GORSUCH: I -- that's a whole  
10 separate question. That's the de facto -- doesn't  
11 work here, okay? Put that aside.

12 He's disqualified from the moment.  
13 Self-executing, done. And I would think that a  
14 person who would receive a direction from that  
15 person -- president, former president in your view,  
16 would be free to act as he or she wishes without  
17 regard to that individual.

18 MR. MURRAY: I don't think so because I  
19 think, again, the --

20 JUSTICE GORSUCH: Why?

21 MR. MURRAY: -- de facto officer doctrine  
22 would nevertheless come into play to say this is the  
23 --

24 JUSTICE GORSUCH: No, de facto -- that --  
25 that doesn't work, Mr. Murray, because de facto

1 officer is to ratify the conduct that's done  
2 afterwards and -- and -- and insulate it from  
3 judicial review. Put that aside. I'm not going to  
4 say it again. Put it aside, okay?

5 I think Justice Alito is asking a very  
6 different question, a more pointed one and more  
7 difficult one for you, I understand, but I think it  
8 deserves an answer.

9 On your theory, would anything compel a  
10 lower official to obey an order from, in your view,  
11 the former president?

12 MR. MURRAY: I'm imagining a situation  
13 where, for example, a former president was -- you  
14 know, a -- a president was elected and they were 25  
15 and they were ineligible to hold office --

16 JUSTICE GORSUCH: No. No.

17 MR. MURRAY: -- but, nevertheless, they  
18 were put into that office --

19 JUSTICE GORSUCH: No. No. We're talking  
20 about Section 3.

21 MR. MURRAY: And --

22 JUSTICE GORSUCH: Please don't change the  
23 hypothetical, okay?

24 MR. MURRAY: I'm --

25 JUSTICE GORSUCH: Please don't change the

1       hypothetical. I know. I like doing it too, but  
2       please don't do it, okay?

3               MR. MURRAY: Well, the -- the point I'm  
4       trying to make is that --

5               JUSTICE GORSUCH: He's disqualified from  
6       the moment he committed an insurrection, whoever it  
7       is, which -- whichever party. It -- that -- that  
8       happens. Boom. It happened.

9               What would compel -- and I'm not going to  
10       say it again, so just try and answer the question.  
11       If you don't have an answer, fair enough, we'll move  
12       on. What would compel a lower official to obey an  
13       order from that individual?

14              MR. MURRAY: Because, ultimately, we have  
15       -- we have statutes and rules requiring chains of  
16       command. The person is in the office, and even if  
17       they don't have the authority to hold the office, the  
18       only way to get someone out of the office of the  
19       presidency is impeachment, and so I think, if you  
20       interpreted Section 3 in light of other provisions in  
21       the Constitution like impeachment, while they hold  
22       office, impeachment's the only way to validate that  
23       they don't have the ability to hold that office and  
24       should be removed.

25              JUSTICE JACKSON: Mr. Murray, can I -- oh.

1 Can I just ask you about something Justice Kagan  
2 brought up earlier, which is the concern about  
3 uniformity and the lack thereof if states are  
4 permitted to enforce Section 3 in presidential  
5 elections, and I -- I guess I -- I didn't really  
6 understand your argument or your response to her  
7 about that.

8 MR. MURRAY: Well, certainly, if Congress  
9 is concerned about uniformity, they can provide for  
10 legislation and they can preempt state legislation.

11 JUSTICE JACKSON: Yes --

12 MR. MURRAY: But --

13 JUSTICE JACKSON: -- but you say that's not  
14 necessary.

15 MR. MURRAY: But it's not necessary in the  
16 absence of federal enforcement legislation. These  
17 questions come up to this Court in the same way that  
18 other federal questions come up to this Court, which  
19 is that a state adjudicates them. If the state  
20 hasn't provided sufficient process to comport with  
21 due process and notice and opportunity to be heard,  
22 one can make those challenges. But assuming, as  
23 here, we have a full evidentiary record, an  
24 opportunity to present evidence --

25 JUSTICE JACKSON: No, I understand -- I



1 understand that we could resolve it so that we have a  
2 uniform ultimate ruling on it.

3 I guess my question is why the Framers  
4 would have designed a system that would -- could  
5 result in interim disuniformity in this way, where we  
6 have elections pending and different states suddenly  
7 saying you're eligible, you're not, on the basis of  
8 this kind of thing?

9 MR. MURRAY: Well, what they were concerned  
10 most about was ensuring that insurrectionists and  
11 rebels don't hold office. And so, once one  
12 understands the sort of imperative that they had to  
13 ensure that oath-breakers wouldn't take office, it  
14 would be a little bit odd to say that states can't  
15 enforce it, that only the federal government can  
16 enforce it, and that Congress can essentially rip the  
17 heart out of Section 3 by a simple majority just by  
18 failing to pass enforcement legislation.

19 Federalism creates redundancy. And, here,  
20 the fact that states have the ability to enforce it  
21 as well, absent federal preemption, provides an  
22 additional layer of safeguards around what really  
23 Section 3 --

24 JUSTICE JACKSON: Yeah, and I'll --

25 MR. MURRAY: -- supports.

1 JUSTICE JACKSON: -- ask you about the  
2 history when I get a chance again. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
4 Justice Thomas?  
5 Justice Alito?

6 JUSTICE ALITO: Suppose there's a country  
7 that proclaims again and again and again that the  
8 United States is its biggest enemy and suppose that  
9 the president of the United States for diplomatic  
10 reasons think that it's in the best interests of the  
11 United States to provide funds or release funds so  
12 that they can be used by that -- by that country.

13 Could a state determine that that person  
14 has given aid and comfort to the enemy and,  
15 therefore, keep that person off the ballot?

16 MR. MURRAY: No, Your Honor. This Court  
17 has never interpreted the aid and comfort language,  
18 which also is present in the Treason Clause, but  
19 commentators have suggested -- it's been rarely  
20 applied because treason prosecutions are so rare, but  
21 commentators have suggested that, first of all, that  
22 aid and comfort really only applies in the context of  
23 a declared war or at least an adversarial  
24 relationship where there is, in fact, a war between  
25 two countries.

1                   And, second, the intent standard would do a  
2                   lot of work there because, under Section 3, whatever  
3                   the underlying conduct is, engaging in insurrection  
4                   or aid and comfort, has to be done with the intent to  
5                   further the unlawful purpose of the insurrection or  
6                   -- or to aid the enemies in their pursuit of war  
7                   against the United States.

8                   JUSTICE ALITO: Let me come back to the  
9                   question of what we would do if we were -- if  
10                  different states had adjudicated the question of  
11                  whether former President Trump is an insurrectionist  
12                  using a different record, different rulings on the  
13                  admissibility of evidence, perhaps different  
14                  standards of proof. Then what would we do?

15                 MR. MURRAY: Ultimately, this Court would  
16                 -- first of all, if there were deficiencies in the  
17                 record, the Court could either refuse to hear the  
18                 case or it could decide on the basis of deficiencies  
19                 of the record.

20                 JUSTICE ALITO: Well, would we have to  
21                 decide what is the appropriate rule of evidence that  
22                 should be applied in this -- in this case? Would we  
23                 have to decide what is the appropriate standard of  
24                 proof? Would we give any deference to these findings  
25                 by state court judges, some of whom may be elected?

1           Would we have to have our own trial?

2                       MR. MURRAY:  No, Your Honor.  This Court  
3           takes the evidentiary record as -- as it's given.  
4           And, here, we have an evidentiary record that all the  
5           parties agree is sufficient for a decision in -- in  
6           this case.

7                       And then, as -- as I discussed earlier,  
8           there's a possibility of a Bose Corp. independent  
9           review of the facts, but, ultimately, what we have  
10          here is an insurrection that was incited in plain  
11          sight for all to see.

12                      JUSTICE ALITO:  Yeah, but you're really not  
13          answering my question.  It's not helpful if you don't  
14          do that.

15                      We have -- suppose we have two different  
16          records, two different bodies of evidence, two  
17          different rulings on questions of admissibility, two  
18          different standards of proof, two different sets of  
19          fact findings by two different judges or maybe  
20          multiple judges in multiple states.

21                      Then what do we do?

22                      MR. MURRAY:  Well, first, this Court would  
23          set the legal standard, and then it would decide  
24          which view of the record was -- was correct, I think,  
25          under that -- if -- if this Court had two cases --

1 JUSTICE ALITO: Which view of -- which view  
2 of what record?

3 MR. MURRAY: If this Court --

4 JUSTICE ALITO: Of which record?

5 MR. MURRAY: If this Court had two cases  
6 before it and both of the records were sufficient  
7 insofar as both sides had the opportunity to present  
8 their case and -- and the essential facts in the  
9 record that everyone agreed was sufficient for a  
10 decision, then this Court would have to look at  
11 the -- the evidence -- the evidence presented and  
12 decide which -- which holding was correct and then  
13 decide that issue for the country.

14 And, certainly, here, when -- when there is  
15 a complete record, lower courts then will be applying  
16 that decision, and I think it's unlikely that any  
17 court would say we're going to reach a different  
18 decision than the U.S. Supreme Court did,  
19 particularly if the Court relies on the facts, the  
20 indisputable facts, of what President Trump said on  
21 video and in his Twitter feed, which is really the  
22 essence of our case here.

23 JUSTICE ALITO: Well, you had an expert --  
24 just take -- let's just take that example -- had an  
25 expert testify about the meaning of what President

1 Trump said. But do you -- do you think it's possible  
2 that a different state court would apply Daubert  
3 differently and say that this person should not be  
4 allowed to express an expert opinion on that  
5 question? Do you think that's beyond the realm of  
6 imagination?

7 MR. MURRAY: Not -- not at all, Your Honor.  
8 Two points on that. Number one, President Trump  
9 didn't appeal the admission of that evidence in this  
10 case, but, number two, you know, the second point is  
11 that Professor Simi really -- he didn't opine on the  
12 meaning of President Trump's words.

13 He opined on the effect that those words  
14 had on violent extremists, and the essence of his  
15 testimony was built around videotaped statements of  
16 President Trump himself encouraging, inciting, and  
17 praising political violence when --

18 JUSTICE ALITO: Well, I -- I'm not taking a  
19 position one way or the other about whether the  
20 expert's testimony should have been admitted or  
21 anything like that or the meaning of President  
22 Trump's words.

23 I'm just trying to get you to grapple with  
24 what some people have seen as the consequences of the  
25 argument that you're advancing, which is that there

1 will be conflicts in decisions among the states, that  
2 different states will disqualify different  
3 candidates, but I -- I'm not getting a whole lot of  
4 help from you about how this would not be an  
5 unmanageable situation.

6 MR. MURRAY: If this Court writes an  
7 opinion affirming on the basis of the indisputable  
8 facts of what President Trump said on January 6th and  
9 in the weeks leading up to it and his virtual  
10 confession on Twitter after the fact, then it would  
11 be reversible error for any other state to conclude  
12 otherwise on that question of federal law, or -- or,  
13 at the very least, this Court could address that when  
14 those issues come up, but it seems unlikely.

15 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

16 JUSTICE SOTOMAYOR: There's two sides to --  
17 to the other side's position. The first is that it's  
18 not self-executing. I want to put that aside.

19 Deal with if we were to hold that states  
20 don't have the right to enforce or create a cause of  
21 action in this situation. They want the flip to say  
22 that nobody -- even Congress can't do it because they  
23 need implementing legislation. Address that  
24 argument.

25 MR. MURRAY: That -- that --

1 JUSTICE SOTOMAYOR: Because assume we rule  
2 that states don't have it. What would you have us  
3 say for the other side of the argument? One of my  
4 colleagues says you need or what -- what not -- not  
5 then Chief Justice but Circuit Court Justice Chase  
6 said, which is that somehow you need implementing  
7 legislation, like the 1870 Act.

8 You seem to say that's not true because  
9 they could decide not to seat the -- seat a  
10 candidate, et cetera. So I don't know that  
11 legislation's necessary.

12 MR. MURRAY: And, certainly, there are  
13 historical examples of member -- members of Congress  
14 under their Article -- under Congress's Article I  
15 power to judge the qualifications of its members, of  
16 members of Congress refusing to seat ineligible  
17 candidates under Section 3 who have won election.

18 In the context of the presidency, I think  
19 it would create a number of really difficult issues  
20 if the Court says there's no procedure for  
21 determining President Trump's eligibility until after  
22 the election.

23 And then what happens when members of  
24 Congress on January 6th, when they count the  
25 electoral votes, say we're not going to count



1 electoral votes cast for President Trump because he's  
2 disqualified under Section 3 under the Electoral  
3 Count Reform Act.

4 A number of the amicus briefs, such as  
5 those of Professor Ginsburg, Hassan, and Foley, have  
6 made the point that that is kind of a  
7 disenfranchisement and constitutional crisis in the  
8 making and is all the more reason to address those  
9 issues now in a judicial process on a full  
10 evidentiary record so that everybody can have  
11 certainty on those issues before they go to the  
12 polls.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: Mr. Murray, you talked --  
15 you relied on the states' extensive powers under the  
16 Electors Clause. You talked about the states having  
17 a role in enacting, you know, typical ballot access  
18 provisions.

19 I -- I guess, you know, it strikes me that  
20 we've put some limits on that, and I'll just give you  
21 Anderson versus Celebrezze as an example of that,  
22 where we said, in fact, states are limited in who  
23 they can take off a ballot, and that was a case about  
24 minor party candidates, but the reason was that one  
25 state's decision to take a candidate off the ballot

1 affects everybody else's rights.

2           And we talked about the pervasive national  
3 interest in the selection of candidates for national  
4 office. We talked about how an individual state's  
5 decision would have an impact beyond its own borders.  
6 So, if that goes for minor political party  
7 candidates, why doesn't it go a fortiori for the  
8 situation in this case?

9           MR. MURRAY: Well, certainly,  
10 constitutional principles like Section 3 apply to  
11 everybody, but in Celebrezze, the issue there was a  
12 First Amendment question, and, certainly, there's no  
13 doubt that states' exercise of their power under  
14 Article II is constrained by First Amendment  
15 principles.

16           And -- and in -- in that case, the -- the  
17 state law deadlines for when a minor party candidate  
18 got on the ballot just came too soon to be reactive  
19 to what major parties had done and, therefore, risked  
20 disenfranchising people who were disillusioned with  
21 who the major parties had picked, and it raised First  
22 Amendment problems. Here, there's no real First  
23 Amendment problem and -- and a state is just trying  
24 to enforce an existing qualification that's baked  
25 into our constitutional fabric.

1 JUSTICE KAGAN: Yeah, I -- I guess, you  
2 know, it -- it did come up in the First Amendment,  
3 but there's a broader principle there and it's a  
4 broader principle about who has power over certain  
5 things in our federal system, and, you know, within  
6 our federal system, states have great power over many  
7 different areas. But that there's some broader  
8 principle about that there are certain national  
9 questions that -- that -- that -- that, you know,  
10 states -- where states are not the repository of  
11 authority. And I took a lot -- First Amendment, not  
12 First Amendment -- a lot of Anderson's reasoning is  
13 really about that. Like, what's a state doing  
14 deciding who gets to -- who other citizens get to  
15 vote for for president?

16 MR. MURRAY: Colorado is not deciding who  
17 other states get to vote for for president. It's  
18 deciding how to assign its own electors under its  
19 Article II power. And the Constitution grants them  
20 that broad power as --

21 JUSTICE KAGAN: Well, but the effect of  
22 that is obvious, yes?

23 MR. MURRAY: No, Your Honor, because  
24 different states can have different procedures. Some  
25 states may allow insurrectionists to be on the

1 ballot. They may say we're not looking past the  
2 papers; we're not going to look into federal  
3 constitutional questions. It's the sort of -- even  
4 in this election cycle, there are -- there are  
5 candidates who are on the ballot in some states even  
6 though they're not natural-born citizens and off the  
7 ballot in other states. And that's just a function  
8 of states' power to enforce -- to preserve their own  
9 electors and avoid disenfranchisement of their own  
10 citizens.

11 JUSTICE KAGAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

13 JUSTICE GORSUCH: You haven't had a chance  
14 to talk about the officer point, and I just want to  
15 give you an opportunity to do that. Mr. Mitchell  
16 makes the argument that particularly in the  
17 Commissions Clause, for example, all officers are to  
18 be commissioned by the president, seems to be  
19 all-encompassing, that language. And I'm curious,  
20 your response to that.

21 And along the way, if you would, I -- I --  
22 I poked a little bit at the difference between  
23 "office" and "officer" in the earlier discussion, you  
24 may recall, but I -- I think one point your -- your  
25 friends on the other side would make is, well, that's

1 just how the Constitution uses those terms. So, for  
2 example, we know that the President Pro Tem of the  
3 Senate and the Speaker of the House are officers of  
4 the United States because the Constitution says they  
5 are, but we also know that they don't hold an office  
6 under the United States because of the  
7 Incompatibility Clause that says they can't.

8 So maybe the Constitution to us today, to a  
9 lay reader, might look a little odd in distinguishing  
10 between "office" and "officer," not prepositions,  
11 nouns, a distinction, but maybe that's exactly how it  
12 works. Thoughts?

13 MR. MURRAY: Well, I'd start with the idea  
14 that the meaning of "officer" in the 1780s was the  
15 same meaning that it has today, which is a person who  
16 holds an office. And, certainly, in particular  
17 contexts like the Commissions Clause, it appears that  
18 that's referring -- you know, that that is referring  
19 to a narrower class of officers because we know that  
20 there are --

21 JUSTICE GORSUCH: Except it says "all."

22 MR. MURRAY: Well, we know that there are  
23 classes of officers, like the President Pro Tem, who  
24 don't get their commissions from the president.

25 JUSTICE GORSUCH: Well, that's because the

1 Constitution elsewhere says that.

2 MR. MURRAY: We know that the Appointments  
3 Clause refers to a class of officers who get their  
4 appointment from the Constitution itself --

5 JUSTICE GORSUCH: Mm-hmm.

6 MR. MURRAY: -- rather than from  
7 presidential appointment. People who get their  
8 commissions from the president himself are not  
9 commissioned by the president. And so, if you read  
10 the Appointments Clause in line with the Commissions  
11 Clause, then the Commissions Clause is really talking  
12 about the president's power. If one needs a  
13 commission, it's the president who grants it.

14 But I think it's important to bring us back  
15 to Section 3 in particular because that was 80 years  
16 --

17 JUSTICE GORSUCH: But, before -- before we  
18 get to that, though, just the distinction between  
19 "office" and "officer," do you -- do you agree that  
20 the Constitution does make that distinction,  
21 particularly with respect to the Speaker and  
22 President Pro Tem?

23 MR. MURRAY: The Constitution makes that  
24 distinction, but the -- at least in Section 3, an  
25 officer of the United States is a person who swears

1 an oath and holds an office. Now the President Pro  
2 Tem and the Speaker of the House, they don't swear a  
3 constitutional oath in that capacity. They swear a  
4 constitutional oath if they are a senator or  
5 representative in Congress in that separate  
6 non-official capacity. But I think that narrow --

7 JUSTICE GORSUCH: You agree they are  
8 officers who don't hold an office?

9 MR. MURRAY: They're officers who -- who  
10 may hold an office but don't swear an oath under  
11 Article VI in that official capacity.

12 JUSTICE GORSUCH: Well, how can they hold  
13 an office? Under the Incompatibility Clause, it says  
14 they can't.

15 MR. MURRAY: Well, I think that's a fair  
16 point, and I think that that may be an exception to  
17 the general rule, and one might consider them perhaps  
18 officers of the House and Senate because they are  
19 appointed by those bodies and preside over those  
20 bodies.

21 JUSTICE GORSUCH: Well, no, the  
22 Constitution says they're officers of the United  
23 States -- so -- so there are some instances when you  
24 have an officer but not an office?

25 MR. MURRAY: Those may be an exceptional

1 circumstance.

2 JUSTICE GORSUCH: Okay. Okay.

3 MR. MURRAY: But I would --

4 JUSTICE GORSUCH: Thank you.

5 MR. MURRAY: You're welcome.

6 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

7 JUSTICE KAVANAUGH: The concerns of some  
8 questions have been the states having such power over  
9 a national office, other questions about different  
10 states having different standards of proof, and they  
11 seem underscored by this case, at least the  
12 dissenting opinion below. Justice Samour said, "I've  
13 been involved" -- "I've been involved in the justice  
14 system for 33 years now, and what took place here  
15 doesn't resemble anything I've seen in a courtroom"  
16 and then added, "What transpired in this litigation  
17 fell woefully short of what due process demands."

18 Now I don't know whether I agree or not.  
19 I'm not going to take a position on that. But the --  
20 the fact that someone's complaining not about the  
21 bottom-line conclusion but about the very processes  
22 that were used in the state would seem to -- and that  
23 that would be permitted seems to underscore the  
24 concerns that have been raised about state power.  
25 Just wanted to give you a chance to address that



1 because that was powerful language. Again, not  
2 disagreeing about the conclusion but about the very  
3 fairness of the process.

4 MR. MURRAY: Yes, Your Honor, but that  
5 language was, with respect to Justice Samour, just  
6 not correct. President Trump had a five-day trial in  
7 this case. He had the opportunity to call any  
8 witnesses that he wanted. He had the opportunity to  
9 cross-examine our witnesses. He had the opportunity  
10 to testify if he wanted to testify. And, of course,  
11 the process was expedited because ballot access  
12 decisions are always on a fast schedule.

13 But, in this whole case, from the trial  
14 court all the way up to this Court, President Trump  
15 has never identified a single process, other than  
16 expert depositions, that he wanted to have that he  
17 didn't get. He had the opportunity for fact witness  
18 depositions. He had the opportunity to call  
19 witnesses remotely. He didn't use all of his time at  
20 trial. There was ample process here, and this is how  
21 ballot access determinations in election cases are  
22 decided all the time.

23 JUSTICE KAVANAUGH: Okay. Second question,  
24 some of the rhetoric of your position -- I don't  
25 think it is your position, but some of the rhetoric

1 of your position seems to suggest, unless the states  
2 can do this, no one can prevent insurrectionists from  
3 holding federal office. But, obviously, Congress has  
4 enacted statutes, including one still in effect.  
5 Section 2383 of Title 18 prohibits insurrection.  
6 It's a federal criminal statute. And if you're  
7 convicted of that, you are -- it says, "shall be  
8 disqualified" from holding any office.

9 And so there is a federal statute on the  
10 books, but President Trump has not been charged with  
11 that. So what -- what are we to make of that?

12 MR. MURRAY: Two things, Your Honor.  
13 Section 2383 was initially enacted about six years  
14 before Section 3. It wasn't meant as implementing  
15 legislation related to Section 3. And I would  
16 emphasize that by the time that Section 3 was  
17 ratified, most Confederates had already received a  
18 criminal pardon.

19 JUSTICE KAVANAUGH: I guess the question is  
20 --

21 MR. MURRAY: So --

22 JUSTICE KAVANAUGH: -- a little bit  
23 different, which is, if the concern you have, which I  
24 understand, is that insurrectionists should not be  
25 able to hold federal office, there is a tool to

1 ensure that that does not happen, namely, federal  
2 prosecution of insurrectionists. And if convicted,  
3 Congress made clear you are automatically barred from  
4 holding a federal office. That tool exists, you  
5 agree, and could be used but has not -- could be used  
6 against someone who committed insurrection. You  
7 agree with that?

8 MR. MURRAY: That's absolutely right, Your  
9 Honor. But I would just make the point that the  
10 Framers of Section 3 clearly understood that criminal  
11 prosecutions weren't sufficient because oftentimes  
12 insurrectionists go unpunished, as was the case in  
13 the Civil War, and that the least we can do is impose  
14 a civil disqualification penalty so that even if we  
15 don't have the stomach to throw someone in jail --

16 JUSTICE KAVANAUGH: Well, they had the quo  
17 warranto provision that was in effect then from 18 --  
18 1870 until 1948, but then, obviously, that dropped  
19 out and hasn't been seen as necessary since then.

20 Last question. In trying to figure out  
21 what Section 3 means and kind of to the extent it's  
22 elusive language or vague language, what about the  
23 idea that we should think about democracy, think  
24 about the right of the people to elect candidates of  
25 their choice, of letting the people decide? Because

1 your position has the effect of disenfranchising  
2 voters to a significant degree.

3 And should that be something -- does that  
4 come in when we think about should we read Section 3  
5 this way or read it that way? What about the  
6 background principle, if you agree, of democracy?

7 MR. MURRAY: I'd like to make three points  
8 on that, Justice Kavanaugh. The first is that  
9 constitutional safeguards are for the purpose of  
10 safeguarding our democracy not just for the next  
11 election cycle but for generations to come.

12 And, second, Section 3 is designed to  
13 protect our democracy in that very way. The Framers  
14 of Section 3 knew from painful experience that those  
15 who had violently broken their oaths to the  
16 Constitution couldn't be trusted to hold power again  
17 because they could dismantle our constitutional  
18 democracy from within, and so they created a  
19 democratic safety valve. President Trump can go ask  
20 Congress to give him amnesty by a two-thirds vote.  
21 But, unless he does that, our Constitution protects  
22 us from insurrectionists.

23 And, third, this case illustrates the  
24 danger of refusing to apply Section 3 as written  
25 because the reason we're here is that President Trump

1       tried to disenfranchise 80 million Americans who  
2       voted against him, and the Constitution doesn't  
3       require that he be given another chance.

4                 JUSTICE KAVANAUGH: Thank you.

5                 CHIEF JUSTICE ROBERTS: Justice Barrett?

6                 JUSTICE BARRETT: So the general rule is  
7       that, absent rare circumstances, state courts and  
8       federal courts share authority. State courts have  
9       authority to enforce the Constitution, but there are  
10      certain limits to that, certain situations in which  
11      the Constitution itself preempts the states' ability  
12      to resolve constitutional questions.

13                And, you know, Tarble's Case is one. And  
14      you said earlier that once a president is elected,  
15      you accepted that a state couldn't do anything about  
16      that, like you couldn't -- Colorado couldn't enact  
17      its own say quo warranto provision and then use it to  
18      get the secretary of state or the president or anyone  
19      else out of office, and I -- I assume that's because  
20      of this principle of structural preemption.

21                Am I right?

22                MR. MURRAY: Yes, Your Honor.

23                JUSTICE BARRETT: Okay. So I just want to  
24      clarify what that means for your argument. That  
25      means that your eggs are really in the basket of the

1 Electors Clause, really in the Article I basket,  
2 because you're saying that even though all of the  
3 questions that people have been asking have suggested  
4 that there's a problem with giving a single state the  
5 authority to render a decision that would have an  
6 effect on a national election, but you're saying that  
7 those structural concerns, which might otherwise lead  
8 to the kind of result that you would accept after  
9 someone is in office, are overcome by the Electors  
10 Clause?

11 MR. MURRAY: Absolutely. States run  
12 presidential elections. That's very clear from  
13 Article II. Once states have selected the electors  
14 and the electors have voted, states have no more  
15 power over the -- the candidate who has been then  
16 nominated for president. But, until then, the states  
17 do have the power to adjudicate those issues.

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Jackson?

20 JUSTICE JACKSON: So, when I asked you  
21 earlier about the uniformity concern and the  
22 troubling potential disuniformity of having different  
23 states enforce Section 3 with respect to presidential  
24 elections, you seemed to point to history in a  
25 certain way. You said, I think, that the Framers

1 actually envisioned states enforcing Section 3 at  
2 least in some circumstances where there were  
3 insurgents and Confederates.

4 And I guess, in my view of the history, I'm  
5 wondering really whether presidential elections were  
6 such a circumstance, that the Framers actually  
7 envisioned states enforcing Section 3 with respect to  
8 presidential elections as opposed to senatorial  
9 elections, representatives, the sort of more local  
10 concerns.

11 So can you speak to the argument that  
12 really Section 3 was about preventing the South from  
13 rising again in the context of these sort of local  
14 elections as opposed to focusing on the presidency?

15 MR. MURRAY: Well, two points on that,  
16 Justice Jackson. First is that, as I discussed  
17 earlier, there isn't the same history of states  
18 regulating ballot access at this time, so ballot  
19 access rules to restrict presidential candidates  
20 wouldn't have -- wouldn't have existed. They  
21 wouldn't have been raised one way or another.

22 JUSTICE JACKSON: Right, but --

23 MR. MURRAY: So --

24 JUSTICE JACKSON: -- I'm not making a --

25 MR. MURRAY: But --

1 JUSTICE JACKSON: -- distinction between  
2 ballot access and --

3 MR. MURRAY: No. My --

4 JUSTICE JACKSON: -- anything else. Yeah.

5 MR. MURRAY: Understood. But the more --

6 JUSTICE JACKSON: Yeah.

7 MR. MURRAY: -- the more broad point I want  
8 to make is that what is very clear from the history  
9 is -- is that the Framers were concerned about  
10 charismatic rebels who might rise through the ranks  
11 up to and including the presidency of the United  
12 States.

13 JUSTICE JACKSON: But then why didn't they  
14 put the word "president" in the very enumerated list  
15 in Section 3? The thing that really is troubling to  
16 me is I totally understand your argument, but they  
17 were listing people that were barred and president is  
18 not there.

19 And so I guess that just makes me worry  
20 that maybe they weren't focusing on the president,  
21 and, for example, the fact that electors of vice  
22 president and president are there suggests that  
23 really what they thought was, if we're worried about  
24 the charismatic person, we're going to bar  
25 insurrectionist electors and, therefore, that person



1 is never going to rise.

2 MR. MURRAY: This came up in the debates in  
3 Congress over Section 3 where Reverdy Johnson said,  
4 why haven't you included president and vice president  
5 in the language? And Senator Moore responds, we  
6 have. Look at the language, "any office under the  
7 United States."

8 JUSTICE JACKSON: Yes. But doesn't that at  
9 least suggest ambiguity? And this sort of ties into  
10 Justice Kavanaugh's point.

11 In other words, we had a person right there  
12 at the time saying what I'm saying, the -- the  
13 language here doesn't seem to include president, why  
14 is that?

15 And so, if there's an ambiguity, why would  
16 we construe it to -- as Justice Kavanaugh pointed  
17 out -- against democracy?

18 MR. MURRAY: Well, Reverdy Johnson came  
19 back and agreed with that reading. "Any office" is  
20 clear, the Constitution says about 20 times that the  
21 presidency is an office and --

22 JUSTICE JACKSON: No, I'm not going to  
23 that. So let me -- let me -- let me just say you --  
24 so your point is that it -- that there's no ambiguity  
25 with -- with -- with -- with having a list and not

1       having "president" in it, with having a history that  
2       suggests that they were really focused on local  
3       concerns in the South, with this conversation where  
4       the legislators actually discussed what looked like  
5       an ambiguity, you're saying there is no ambiguity in  
6       Section 3?

7               MR. MURRAY: Let me take the point  
8       specifically about electors and senators if I might  
9       because I think that's --

10              JUSTICE JACKSON: Yes.

11              MR. MURRAY: -- important. Presidential  
12       electors were not covered because they don't hold an  
13       office. They vote. And this particular decision --

14              JUSTICE JACKSON: No, I'm talking about the  
15       barred office part of this, right?

16              MR. MURRAY: Exactly. So the barred office  
17       is, if you want to include everybody, first, you have  
18       to specify presidential electors because they're not  
19       offices, so they wouldn't fall under any office.

20              Second of all, senators and representatives  
21       don't hold office either. The Constitution tells us  
22       that under the Incompatibility Clause and refers to  
23       them as holding seats, not offices. And so you want  
24       to make sure that there is no doubt that senators and  
25       representatives are covered. Given that the

1 Constitution suggests otherwise, you have to include  
2 them.

3 The Constitution says the presidency holds  
4 an office, as do members of this Court. And so other  
5 high offices, the president, vice president, members  
6 of this Court --

7 JUSTICE JACKSON: All right. Let me -- let  
8 me ask you -- I -- I -- I appreciate that argument.

9 If we think that the states can't enforce  
10 this provision for whatever reason in this context,  
11 in the presidential context, what happens next in  
12 this case? I mean, are -- is it done?

13 MR. MURRAY: If this Court concludes that  
14 Colorado did not have the authority to exclude  
15 President Trump from the presidential ballot on  
16 procedural grounds, I think -- I think this case  
17 would be done, but I think it could come back with a  
18 vengeance because, ultimately, members of Congress  
19 would -- may have to make the -- the determination  
20 after a presidential election if President Trump wins  
21 about whether or not he is disqualified from office  
22 and whether to count votes cast for him under the  
23 Electoral Count Reform Act.

24 So President Trump himself urges this Court  
25 in the first few pages of his brief to resolve the

1 issues on the merits, and we think that the Court  
2 should do so as well.

3 JUSTICE JACKSON: And there is no federal  
4 litigation you would say?

5 MR. MURRAY: Well, that's correct, because  
6 there is no federal procedure for deciding these  
7 issues, short of a criminal prosecution.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10 Ms. Stevenson.

11 MS. STEVENSON: Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Ms. Anderson -- no,  
13 Stevenson. That's right. I'm sorry.

14 ORAL ARGUMENT OF SHANNON W. STEVENSON

15 ON BEHALF OF RESPONDENT GRISWOLD

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

18 Exercising its far-reaching powers under  
19 the Electors Clause, Colorado's legislature  
20 specifically directed Colorado's courts to resolve  
21 any challenges to the listing of any candidate on the  
22 presidential primary ballot before Coloradans cast  
23 their votes.

24 Despite this law, Petitioner contends that  
25 Colorado must put him on the ballot because of the

1 possibility there would be a super majority act of  
2 Congress to remove his legal disability.

3 Under this theory, Colorado and every other  
4 state would have to indulge this possibility not just  
5 for the primary but through the general election and  
6 up to the moment that an ineligible candidate was  
7 sworn into office.

8 Nothing in the Constitution strips the  
9 states of their power to direct presidential  
10 elections in this way. This case was handled capably  
11 and efficiently by the Colorado courts under a  
12 process that we've used to decide ballot challenges  
13 for more than a century. And as everyone agrees, the  
14 Court now has the record that it needs to resolve  
15 these important issues.

16 I welcome your questions.

17 JUSTICE THOMAS: Is there an express  
18 provision with respect to -- that defines what a  
19 qualified candidate is?

20 MS. STEVENSON: No, Your Honor, there's not  
21 an express provision. When the Colorado Supreme  
22 Court looked at this, they looked at the need to be  
23 qualified, plus the fact that the -- this part was --

24 JUSTICE THOMAS: So what does it say then  
25 if -- if it's not express? How do we get to this

1 issue of qualified candidate?

2 MS. STEVENSON: What the court -- the  
3 Colorado Supreme Court did -- and let me, if I could  
4 have a standing objection, I do want to make the  
5 argument that you shouldn't review the Court's  
6 statutory interpretation.

7 JUSTICE THOMAS: No, I'm just looking at  
8 the statute.

9 MS. STEVENSON: Right. What the Court did  
10 was to say that we have three important provisions in  
11 this section that show that candidates have to be  
12 qualified. First, it requires that under 12032(a)  
13 that a political party that wants to participate has  
14 to have a qualified candidate.

15 It also looked at the fact that the  
16 comparable write-in candidates also had to be  
17 qualified, and --

18 JUSTICE THOMAS: I know, but this isn't a  
19 write-in candidate. So we're actually talking about  
20 the participation of a political party, right? We're  
21 not talking about the participation of a candidate?

22 MS. STEVENSON: Sure. I think that the  
23 fact that the write-in candidate also had to be  
24 qualified was confirmatory of the fact that the  
25 political party candidate also had to be qualified,

1 and it would be otherwise incongruous to read those  
2 things differently.

3 JUSTICE THOMAS: So how is Section 3 a  
4 qualification?

5 MS. STEVENSON: Under the reasoning of the  
6 Colorado Supreme Court, a candidate --

7 JUSTICE THOMAS: No, just on the -- on its  
8 face.

9 MS. STEVENSON: A -- a candidate must meet  
10 all the criteria for eligibility. And I don't  
11 perceive any distinction between being -- meeting the  
12 --

13 JUSTICE THOMAS: Okay.

14 MS. STEVENSON: -- eligibility criteria and  
15 not being disqualified. There -- I just don't see  
16 any meaningful difference between those two things.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: You -- you  
19 represent the secretary of state, right?

20 MS. STEVENSON: That's correct, Your Honor.

21 CHIEF JUSTICE ROBERTS: If you're the  
22 secretary of state somewhere and someone comes in and  
23 says, I think this candidate should be disqualified,  
24 what -- what do you do next?

25 MS. STEVENSON: Administratively and what

1 the deputy elections director testified to at the  
2 hearing is that if they obtain objective --  
3 objective, knowable information, the secretary can  
4 act on that and inform the candidate --

5 CHIEF JUSTICE ROBERTS: So the secretary at  
6 first decides whether that's objective, knowable  
7 information?

8 MS. STEVENSON: In some instances. In this  
9 case, the challenge was actually brought before the  
10 candidate's paperwork had even been submitted, and  
11 because there had already been a challenge asserted  
12 and -- and put into the proper court procedure, the  
13 secretary didn't even make that determination because  
14 she didn't have the paperwork.

15 CHIEF JUSTICE ROBERTS: Well, what -- in  
16 another case where that wasn't the procedure that was  
17 filed, somebody comes in --

18 MS. STEVENSON: Sure.

19 CHIEF JUSTICE ROBERTS: -- maybe they've  
20 got a stack of papers saying here's why I think this  
21 person is guilty of insurrection, it's not a big  
22 insurrection, something that, you know, happened down  
23 -- down the street, but they say this is still an  
24 insurrection, I don't know what the standard is for  
25 when it arises to that.



1 MS. STEVENSON: I think anything that even  
2 presented that level of controversy about one person  
3 having a set of facts that they said proved this  
4 would send this case to the 113 procedure that we use  
5 to resolve ballot challenge issues like that, and if  
6 -- if another elector or the individual who brought  
7 the information didn't want to bring it, the  
8 secretary herself could bring that action.

9 CHIEF JUSTICE ROBERTS: Is there a  
10 provision for judicial review of the secretary of  
11 state's action both in Colorado and perhaps what you  
12 know about other states?

13 MS. STEVENSON: Well, certainly, in  
14 Colorado, if -- any action that the secretary takes  
15 that anyone wants to challenge, they can use the 113  
16 process to do so. I think states have varying  
17 degrees of that. There are certainly other states  
18 that allow versions of that, and then I don't know  
19 whether there are others that don't. I certainly  
20 know that there are some that do.

21 JUSTICE ALITO: I think we're told that  
22 there are states that do not provide for any judicial  
23 review of a secretary of state's determination. Is  
24 that incorrect?

25 MS. STEVENSON: No, no. I think that's

1 right, and I think there are some states that  
2 actually have no mechanism, to come to, I think,  
3 Justice Kagan's point, or there are some states that  
4 don't have any mechanism to exclude a disqualified  
5 candidate from the ballot at all. And I do want to  
6 speak to that for just a minute about the -- the  
7 actual thing that --

8 JUSTICE ALITO: Well, would that be  
9 constitutional, if the -- the secretary of state's  
10 determination was final?

11 MS. STEVENSON: I think so, under Article  
12 II, the Electors Clause, Your Honor, that that be  
13 would be constitutional. States get very broad  
14 authority to determine how to run their presidential  
15 elections.

16 JUSTICE ALITO: Could a state enact a  
17 statute that provides different rules of evidence and  
18 different rules of procedure and different standards  
19 of proof for this type of proceeding than for other  
20 civil proceedings?

21 MS. STEVENSON: Yes, Your Honor, I believe  
22 it could under the same Electors Clause power.

23 JUSTICE SOTOMAYOR: That issue would be  
24 determined under perhaps a different constitutional  
25 provision, like the Due Process Clause, correct?

1 MS. STEVENSON: Correct. The bounds of the  
2 Electors Clause are other constitutional constraints,  
3 which would include due process, equal protection,  
4 First Amendment.

5 JUSTICE BARRETT: What's the due process  
6 right? Does the candidate have a due process right?  
7 What's the liberty interest?

8 MS. STEVENSON: I think it's not very  
9 precisely defined in the case law, but I think there  
10 is a recognition that there is a liberty interest of  
11 a candidate and -- and there is some due process  
12 interest in being able to access the ballot.

13 JUSTICE BARRETT: I thought that was -- I  
14 thought that was for voters. You -- you think for  
15 the candidate too, that there's -- that it would be  
16 taking something away from the candidate?

17 MS. STEVENSON: Certainly, yes. And I  
18 think a lot of times you see that in the First  
19 Amendment context, where candidates can have an issue  
20 about being on the ballot, but it's sort of a hybrid  
21 or oftentimes First Amendment, Fourteenth Amendment,  
22 Qualifications Clause, all discussed together.

23 JUSTICE BARRETT: Let me ask you a question  
24 about -- just follow-up to Justice Alito. You know,  
25 these decisions might be made different ways in

1 different states. Maybe a secretary of state makes  
2 it in one state with very little process, or a  
3 process more like Colorado's could be followed by  
4 others.

5           Would our standard of review of the record  
6 vary depending on the procedure employed by the  
7 state?

8           MS. STEVENSON: I think this Court has  
9 tremendous discretion to decide its standard of  
10 review, and it might be based on the process that was  
11 employed by an individual state. I think you could  
12 exercise the independent review of Bose Corp. that  
13 Mr. Murray talked about, or you could give deference  
14 where you have a full-blown proceeding like the one  
15 here that had all the protections of Rules of  
16 Evidence and cross-examination and things like that.

17           CHIEF JUSTICE ROBERTS: You -- I'm sorry.  
18 You think we should give deference in reviewing the  
19 factual record, the legal conclusions? What -- in  
20 other words, we shouldn't undertake a de novo review?

21           MS. STEVENSON: I don't think the review  
22 should be de novo. However, I -- I am amenable to  
23 the suggestion that the Court would do the Bose Corp.  
24 type independent review that might provide greater  
25 certainty to states around the country as to what the

1 Court's position is on the factual record in this  
2 case.

3 CHIEF JUSTICE ROBERTS: Of course, if it  
4 were not de novo review, we could reach disparate  
5 results even on the same record, right?

6 MS. STEVENSON: I -- I think that's  
7 possible.

8 JUSTICE KAGAN: I take it your position is  
9 that this disqualification is really the same as any  
10 other disqualification, age or residence or what have  
11 you.

12 MS. STEVENSON: That's correct.

13 JUSTICE KAGAN: And -- and -- and what if I  
14 were to push back on that and say, well, this  
15 disqualification, number one, it's in the Fourteenth  
16 Amendment, and the point of the Fourteenth Amendment  
17 was to take away certain powers from the states?  
18 Number two, Section 3 itself gives Congress a very  
19 definite role, which Mr. Mitchell says is interfered  
20 with by the ability of states to take somebody off  
21 the ballot? And maybe, number three, it's just more  
22 complicated and more contested and, if you want, more  
23 political? And why don't all of those things make a  
24 difference in our thinking about this qualification  
25 as opposed to any other?

1 MS. STEVENSON: And so, Your Honor, I think  
2 the trouble with categorizing the insurrection issue  
3 as -- as necessarily more difficult is it's just an  
4 assumption that's coming up, I think, because of this  
5 case.

6 And, again, back to the Chief Justice's  
7 point, we could have a very easy case under the  
8 Fourteenth Amendment with an avowed insurrectionist  
9 who, you know, came in and wrote on his paperwork, I  
10 engaged in an insurrection in violation of the  
11 Fourteenth Amendment, and it would be a open-and-shut  
12 case as to whether or not that person would meet the  
13 qualifications to be on the Colorado ballot.

14 With respect to your other questions about  
15 the Fourteenth Amendment, my positions are based on  
16 the assumption that, under the Fourteenth Amendment,  
17 the states have the power to enforce Section 3, just  
18 like they do other presidential qualifications, and I  
19 would defer to the electors arguments on those  
20 points.

21 JUSTICE ALITO: Suppose a state that does  
22 recognize non-mutual collateral estoppel makes a  
23 determination using whatever procedures it decides to  
24 adopt that a particular candidate is an  
25 insurrectionist.

1           Could that have a cascading effect, and so  
2           the decision by a court in one state -- the decision  
3           by a single judge whose factual findings are given  
4           deference, maybe an elected trial judge, would have  
5           potentially an enormous effect on the candidates who  
6           run for president across the country? Is that  
7           something we should be concerned about?

8           MS. STEVENSON: I think you should be  
9           concerned about it, Your Honor, but I think the  
10          concern is not as high as maybe it's made out to be  
11          in particularly some of the amicus briefs. And,  
12          again, under Article II, there is a huge amount of  
13          disparity in the candidates that end up on the ballot  
14          on -- in different states in every election.

15          Just this election, there's a candidate who  
16          Colorado excluded from the primary ballot who is on  
17          the ballot in other states even though he is not a  
18          natural-born citizen. And that's just a -- that's a  
19          feature of our process. It's not a bug.

20          And then I think, with respect to the  
21          decision-making and -- and -- you know, we're here so  
22          that this Court can give us nationwide guidance on  
23          some of the legal principles that are involved. I  
24          think that reduces the potential amount of disparity  
25          that would arise between the states.

1                   And then, with respect to the factual  
2                   record and how that gets issued and implemented, the  
3                   states have processes for this, and I think we need  
4                   to let that play out and accept that there may be  
5                   some messiness of federalism here because that's what  
6                   the Electors Clause assumes will happen. And if  
7                   different states apply their principles of -- of  
8                   collateral estoppel and come to different results,  
9                   that's okay. And -- and Congress can -- can act at  
10                  any time if -- if it thinks that it's truly  
11                  federalism run amok.

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

14                 Justice Alito?

15                 JUSTICE ALITO: Well, just one further  
16                  question, and it's along the same lines of a lot of  
17                  other questions. We have been told that if what  
18                  Colorado did here is sustained, other states are  
19                  going to retaliate and they are going to potentially  
20                  exclude another candidate from the ballot. What  
21                  about that situation?

22                 MS. STEVENSON: Your Honor, I think we have  
23                  to have faith in our system that people will follow  
24                  their election process -- processes appropriately,  
25                  that they will take realistic views of what



1 insurrection is under the Fourteenth Amendment.  
2 Courts will review those decisions. This Court may  
3 review some of them.

4 But I don't think that this Court should --  
5 should take those threats too seriously in its  
6 resolution of this case.

7 JUSTICE ALITO: You don't think that's a  
8 serious threat?

9 MS. STEVENSON: I -- I think we have  
10 processes --

11 JUSTICE ALITO: We should proceed on the  
12 assumption that it's not a serious threat?

13 MS. STEVENSON: I think we have  
14 institutions in place to handle those types of  
15 allegations.

16 JUSTICE ALITO: What -- what are those  
17 institutions?

18 MS. STEVENSON: Our -- our states, their  
19 own electoral rules, the administrators who enforce  
20 those rules, the courts that will review those  
21 decisions, and up to this Court to ultimately review  
22 that decision.

23 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

24 Justice Kagan?

25 Justice Gorsuch?

1 Justice Kavanaugh?

2 Justice Jackson, anything further?

3 Thank you, counsel.

4 MS. STEVENSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

6 Mitchell?

7 REBUTTAL ARGUMENT OF JONATHAN F. MITCHELL

8 ON BEHALF OF THE PETITIONER

9 MR. MITCHELL: Both Mr. Murray and Ms.

10 Stevenson rely heavily on the Electors Clause and the  
11 authority that it gives the legislature of each state  
12 to direct the manner of appointing presidential  
13 electors.

14 But that prerogative under Article II must  
15 be exercised in a manner consistent with other  
16 constitutional provisions and restrictions. And  
17 Justice Kagan alluded to one of those restrictions  
18 that might be imposed by the First Amendment, but  
19 there are others.

20 A state cannot use its power under Article  
21 II's Electors Clause to instruct its presidential  
22 electors only to vote for white candidates. That  
23 would violate the Equal Protection Clause. But nor  
24 can it exercise its power in a manner that would  
25 violate the constitutional holding of U.S. Term

1 Limits against Thornton and they cannot use the  
2 Electors Clause as an excuse to impose additional  
3 qualifications for the presidency that go beyond what  
4 the Constitution enumerates in Article II.

5 And the problem with what the Colorado  
6 Supreme Court has done is they have in a way changed  
7 the criteria in Section 3 by making it a requirement  
8 that must be met before the candidate who is seeking  
9 office actually holds the office, effectively moving  
10 forward in time the deadline that the candidate has  
11 for obtaining a congressional waiver.

12 There has still been no answer from the  
13 Anderson litigants on how to distinguish the  
14 congressional residency cases, where the courts of  
15 appeals, not decisions from this Court, but the  
16 courts of appeals in applying this Court's holding in  
17 U.S. Term Limits have unanimously disapproved state  
18 laws requiring congressional candidates to show that  
19 they inhabit the state from which they seek election  
20 prior to Election Day.

21 And there still in our view is no possible  
22 way to distinguish those from the situation below in  
23 the Colorado Supreme Court.

24 Mr. Murray also invoked the de facto  
25 officer doctrine as a possible way to mitigate the

1 dramatic consequences that would follow from the  
2 decision of this Court that rejects the rationale of  
3 Griffin's Case and that also agrees with Mr. Murray's  
4 contentions that President Trump is disqualified from  
5 holding office on account of the events of January  
6 6th and that he's covered by Section 3 as an officer  
7 of the United States.

8 This Court's recent decisions in Lucia and  
9 Arthrex held that officers who are unconstitutionally  
10 appointed under Article II and that made decisions  
11 under the APA that were attacked as invalid, those  
12 decisions were still vacated and this Court did not  
13 use any variant of the de facto officer doctrine to  
14 salvage the decisions that were made by these  
15 unconstitutionally appointed officers.

16 There is no way to escape the conclusion  
17 that if this Court rejects Griffin's Case and also  
18 agrees with Mr. Murray's construction of Section 3  
19 that every executive action taken by the Trump  
20 Administration during its last two weeks in office is  
21 vulnerable to attack under the APA and, further, that  
22 if President Trump is reelected and sworn in as the  
23 next president, that any executive action that he  
24 takes could be attacked in federal court by anyone  
25 who continues to believe that President Trump is

1 barred from office under Section 3.

2 I'm happy to answer any other questions  
3 that the Court may have.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. MITCHELL: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is  
7 submitted.

8 (Whereupon, at 12:17 p.m., the case was  
9 submitted.)

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## Official - Subject to Final Review

<b>1</b>	<p><b>1</b> [1] 72:18  <b>10:08</b> [2] 1:15 3:2  <b>113</b> [2] 128:4,15  <b>12:17</b> [1] 140:8  <b>12032(a)</b> [1] 125:12  <b>123</b> [1] 2:11  <b>137</b> [1] 2:14  <b>150</b> [1] 85:23  <b>155</b> [4] 53:8 86:23 87:14,18  <b>1780s</b> [1] 108:14  <b>18</b> [2] 113:5 114:17  <b>1812</b> [1] 65:15  <b>1868</b> [3] 52:21 53:15 67:13  <b>1869</b> [2] 53:15 86:25  <b>1870</b> [13] 12:16 13:25 14:18,24 30:18 44:11 45:8 53:5,15 57:9 87:3 103:7 114:18  <b>1876</b> [1] 87:21  <b>1877</b> [1] 68:4  <b>1890s</b> [2] 70:16,17  <b>1948</b> [4] 14:25 44:13,20 114:18</p>	<p><b>34</b> [1] 25:4  <b>34-year-old</b> [1] 26:3  <b>35</b> [4] 25:5 26:1,4 80:2  <b>37</b> [1] 53:14</p> <p style="text-align: center;"><b>5</b></p> <p><b>5</b> [4] 19:9 71:3 74:11,24</p> <p style="text-align: center;"><b>6</b></p> <p><b>6</b> [1] 51:19  <b>65</b> [1] 2:8  <b>6th</b> [11] 22:3,13,15 54:24  <b>63:23 82:1 85:24 89:1 102:8 103:24 139:6</b></p> <p style="text-align: center;"><b>8</b></p> <p><b>8</b> [1] 1:11  <b>80</b> [2] 109:15 116:1</p> <p style="text-align: center;"><b>9</b></p> <p><b>9</b> [1] 41:17</p> <p style="text-align: center;"><b>A</b></p> <p><b>a.m</b> [2] 1:15 3:2  <b>ability</b> [11] 7:24 16:16 31:1,9 32:3 56:7 76:4 94:23 96:20 116:11 132:20  <b>able</b> [4] 42:19 63:6 113:25 130:12  <b>abolished</b> [1] 58:18  <b>above-entitled</b> [1] 1:13  <b>abridge</b> [1] 70:24  <b>absence</b> [1] 95:16  <b>absent</b> [2] 96:21 116:7  <b>Absolutely</b> [5] 29:20,21 84:2 114:8 117:11  <b>accelerating</b> [2] 4:19 28:17  <b>accept</b> [6] 17:24 55:21 63:25 79:17 117:8 135:4  <b>accepted</b> [3] 64:4 84:18 116:15  <b>accepts</b> [1] 33:10  <b>access</b> [12] 59:12 70:16 76:10,20 90:10 104:17 112:11,21 118:18,19 119:2 130:12  <b>account</b> [3] 4:9 80:17 139:5  <b>acknowledge</b> [2] 32:12 37:24  <b>across</b> [1] 134:6  <b>Act</b> [21] 12:16 13:24 14:18,24 16:7 34:21 42:19 53:5 57:10 58:18 64:7 87:3,17 90:17 92:16 103:7 104:3 122:23 124:1 127:4 135:9  <b>acted</b> [2] 14:11 87:13  <b>action</b> [15] 9:13,19 20:9 34:24 56:5,22 57:6 59:7 83:22 102:21 128:8,11,14 139:19,23  <b>actions</b> [4] 57:8 82:4,9,14  <b>activity</b> [2] 33:4,6  <b>actor</b> [3] 34:4,5,9  <b>actors</b> [1] 69:4</p>	<p><b>acts</b> [1] 87:3  <b>actual</b> [1] 129:7  <b>actually</b> [11] 5:13 60:17,22,24 118:1,6 121:4 125:19 127:9 129:2 138:9  <b>Adams</b> [1] 46:20  <b>add</b> [4] 17:22 20:12 53:17 54:21  <b>added</b> [1] 111:16  <b>adding</b> [8] 7:4,24 18:1,4,9 19:3 24:5 25:14  <b>addition</b> [1] 54:15  <b>additional</b> [5] 18:9 19:3 23:9 96:22 138:2  <b>address</b> [8] 5:5 29:5 72:6 87:25 102:13,23 104:8 111:25  <b>addressing</b> [2] 20:20 89:22  <b>adhere</b> [1] 6:1  <b>adjudicate</b> [4] 56:8 91:1,15 117:17  <b>adjudicated</b> [1] 98:10  <b>adjudicates</b> [1] 95:19  <b>Administration</b> [1] 139:20  <b>Administratively</b> [1] 126:25  <b>administrators</b> [1] 136:19  <b>admissibility</b> [2] 98:13 99:17  <b>admission</b> [1] 101:9  <b>admit</b> [1] 22:3  <b>admitted</b> [5] 6:15 7:3 9:11 22:4 101:20  <b>adopt</b> [1] 133:24  <b>adoption</b> [1] 67:6  <b>advancing</b> [1] 101:25  <b>adversarial</b> [1] 97:23  <b>affects</b> [1] 105:1  <b>affirm</b> [1] 30:13  <b>affirmatively</b> [1] 40:18  <b>affirmed</b> [1] 76:21  <b>affirming</b> [1] 102:7  <b>affirms</b> [3] 4:23 76:14 88:21  <b>afterwards</b> [1] 93:2  <b>age</b> [8] 23:15,22 24:24 25:3,22 66:24 82:23 132:10  <b>agree</b> [16] 18:6 40:4,8 54:6,16 63:7 79:5 82:11,13 99:5 109:19 110:7 111:18 114:5,7 115:6  <b>agreed</b> [2] 100:9 120:19  <b>agreed-upon</b> [1] 48:10  <b>agrees</b> [4] 13:13 124:13 139:3,18  <b>Ah</b> [1] 45:25  <b>ahead</b> [2] 17:21 29:17  <b>ahistorical</b> [1] 71:11  <b>aid</b> [5] 97:14,17,22 98:4,6  <b>akin</b> [1] 31:22  <b>AL</b> [4] 1:6,21 2:8 65:11  <b>ALITO</b> [52] 18:20,25 19:8,16,19,22 20:5,17,24 21:15</p>	<p><b>22:1,7,22 32:15,25 33:2,13,16,23 44:24,25 45:4,9 53:7 83:3 88:1,5,7,8 89:5,24 90:13 93:5 97:5,6 98:8,20 99:12 100:1,4,23 101:18 128:21 129:8,16 130:24 133:21 135:14,15 136:7,11,16</b>  <b>all-encompassing</b> [2] 50:13 107:19  <b>allegations</b> [1] 136:15  <b>allegedly</b> [1] 90:18  <b>allow</b> [5] 18:2 19:18 56:20 106:25 128:18  <b>allowed</b> [4] 5:20 66:23 73:17 101:4  <b>allowing</b> [1] 5:23  <b>allows</b> [2] 6:16 31:21  <b>alluded</b> [2] 74:5 137:17  <b>almost</b> [1] 54:3  <b>alone</b> [1] 65:25  <b>already</b> [3] 24:20 113:17 127:11  <b>alter</b> [1] 53:18  <b>altering</b> [5] 4:11 7:5 9:4 18:10 24:5  <b>although</b> [3] 23:10 53:3 84:21  <b>ambiguity</b> [5] 120:9,15,24 121:5,5  <b>amenable</b> [1] 131:22  <b>Amendment</b> [49] 3:13 5:22 6:21 10:23 15:19 23:18,18 32:11 35:13,15 60:17 66:19 67:7 70:6,14,23 71:11,15 72:4,8,15,18 73:11 74:9,11,22 79:16 80:5 83:24 89:3 105:12,14,22,23 106:2,11,12 130:4,19,21,21 132:16,16 133:8,11,15,16 136:1 137:18  <b>Amendment's</b> [1] 19:12  <b>American</b> [1] 90:5  <b>Americans</b> [2] 4:25 116:1  <b>amicus</b> [2] 104:4 134:11  <b>amnesty</b> [6] 32:10 70:17 84:3,7 87:23 115:20  <b>amok</b> [1] 135:11  <b>among</b> [2] 22:9 102:1  <b>amount</b> [2] 134:12,24  <b>ample</b> [1] 112:20  <b>analogize</b> [1] 32:16  <b>analogy</b> [1] 8:1  <b>analysis</b> [1] 43:17  <b>analyze</b> [1] 13:21  <b>ANDERSON</b> [13] 1:6,21 2:7 3:4 5:25 40:1 41:16 50:17 52:12 65:11 104:21 123:12 138:13  <b>Anderson's</b> [1] 106:12  <b>another</b> [10] 21:14 22:10,10,19 63:2 116:3 118:21 127:16 128:6 135:20  <b>answer</b> [8] 13:11 19:7 30:11 93:8 94:10,11 138:12</p>	<p><b>140:2</b>  <b>answering</b> [1] 99:13  <b>answers</b> [1] 30:24  <b>anybody</b> [2] 57:22 91:11  <b>anyway</b> [1] 76:24  <b>APA</b> [2] 139:11,21  <b>apologize</b> [1] 40:16  <b>apparatus</b> [2] 61:2,9  <b>appeal</b> [2] 55:12 101:9  <b>appeals</b> [2] 138:15,16  <b>appear</b> [5] 24:19 25:25 39:15,16 44:18  <b>APPEARANCES</b> [1] 1:17  <b>appears</b> [3] 38:10 41:2 108:17  <b>application</b> [3] 86:20 88:24 90:9  <b>applications</b> [1] 85:8  <b>applied</b> [4] 20:3 58:5 97:20 98:22  <b>applies</b> [1] 97:22  <b>apply</b> [10] 57:11 58:2 65:25 72:17 77:16 80:17 101:2 105:10 115:24 135:7  <b>applying</b> [2] 100:15 138:16  <b>appoint</b> [1] 76:8  <b>appointed</b> [12] 3:20 4:1 48:18 51:3,14 52:5,13 83:12,13 110:19 139:10,15  <b>appointing</b> [1] 137:12  <b>appointment</b> [2] 109:4,7  <b>Appointments</b> [6] 3:24 38:8 49:20 51:13 109:2,10  <b>appreciate</b> [2] 43:7 122:8  <b>appropriate</b> [3] 74:6 98:21,23  <b>appropriately</b> [1] 135:24  <b>areas</b> [1] 106:7  <b>aren't</b> [4] 17:4 43:19 70:10 85:21  <b>arguably</b> [1] 16:9  <b>argue</b> [7] 15:20 20:1 32:19 40:19 45:12 57:19,22  <b>argued</b> [1] 40:22  <b>arguing</b> [4] 37:8,9,16 54:21  <b>argument</b> [69] 1:14 2:2,5,9,12 3:3,6 5:3,6,12 14:4,5 15:10,17 16:14,21 22:25 23:3,6 25:17 29:5 30:7 35:4,24 36:19 38:5,15,17 39:20 40:9 41:13 42:3 45:12,15,22 48:21,23 49:5,10 53:14,21 55:13 56:17 58:4 59:10,11,18 60:4 61:17 62:17 63:5 64:11 65:10,23 69:25 72:25 73:6 95:6 101:25 102:24 103:3 107:16 116:24 118:11 119:16 122:8 123:14 125:5 137:7  <b>argument's</b> [2] 17:19,23  <b>arguments</b> [9] 17:5 22:24 24:2 44:12 49:19 56:14 60:6 66:16 133:19</p>
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## Official - Subject to Final Review

<p><b>arise</b> <sup>[1]</sup> 134:25  <b>arises</b> <sup>[1]</sup> 127:25  <b>Army</b> <sup>[1]</sup> 49:9  <b>around</b> <sup>[4]</sup> 68:6 96:22 101:15 131:25  <b>art</b> <sup>[1]</sup> 52:10  <b>Arthrex</b> <sup>[1]</sup> 139:9  <b>Article</b> <sup>[29]</sup> 42:17 51:15,18 52:6 66:18 67:25,25 70:13 71:15,21 73:21 76:7 79:13,15 80:8 83:20 103:14,14 105:14 106:19 110:11 117:1,13 129:11 134:12 137:14,20 138:4 139:10  <b>ascending</b> <sup>[1]</sup> 62:15  <b>aside</b> <sup>[5]</sup> 30:6 92:11 93:3,4 102:18  <b>assault</b> <sup>[2]</sup> 65:16 88:24  <b>asserted</b> <sup>[1]</sup> 127:11  <b>assign</b> <sup>[1]</sup> 106:18  <b>assigned</b> <sup>[1]</sup> 90:7  <b>assume</b> <sup>[4]</sup> 56:16 90:12 103:1 116:19  <b>assumed</b> <sup>[1]</sup> 12:2  <b>assumes</b> <sup>[1]</sup> 135:6  <b>assuming</b> <sup>[1]</sup> 95:22  <b>assumption</b> <sup>[3]</sup> 133:4,16 136:12  <b>attack</b> <sup>[4]</sup> 65:17 82:9,14 139:21  <b>attacked</b> <sup>[2]</sup> 139:11,24  <b>attempt</b> <sup>[2]</sup> 64:14 89:2  <b>attempts</b> <sup>[2]</sup> 53:10 63:22  <b>augmented</b> <sup>[1]</sup> 71:2  <b>Austin</b> <sup>[1]</sup> 1:18  <b>authority</b> <sup>[27]</sup> 6:5,11 13:16 17:1,16 32:7 52:23,23 68:23 71:13 79:7,22 80:6,7 82:19 87:1,8 91:1,18 94:17 106:11 116:8,9 117:5 122:14 129:14 137:11  <b>authorization</b> <sup>[1]</sup> 71:6  <b>authorize</b> <sup>[1]</sup> 71:8  <b>authorized</b> <sup>[4]</sup> 18:14 69:7 72:20 73:3  <b>authorizing</b> <sup>[1]</sup> 69:23  <b>automatically</b> <sup>[2]</sup> 92:5 114:3  <b>avoid</b> <sup>[1]</sup> 107:9  <b>avoiding</b> <sup>[1]</sup> 86:4  <b>avowed</b> <sup>[1]</sup> 133:8  <b>await</b> <sup>[1]</sup> 56:14  <b>aware</b> <sup>[5]</sup> 43:13 45:3 57:9 89:22 91:17  <b>away</b> <sup>[8]</sup> 4:24 12:18,20 15:11 48:14 72:8 130:16 132:17  <b>awfully</b> <sup>[1]</sup> 75:7</p>	<p>109:14 120:19 122:17 132:14 133:6  <b>backdrop</b> <sup>[6]</sup> 12:15 15:1,8 17:13 53:6,22  <b>background</b> <sup>[2]</sup> 70:13 115:6  <b>bad</b> <sup>[2]</sup> 69:4 90:2  <b>baked</b> <sup>[1]</sup> 105:24  <b>baldly</b> <sup>[1]</sup> 75:1  <b>ball</b> <sup>[1]</sup> 50:2  <b>ballot</b> <sup>[50]</sup> 4:4,9 6:10 7:4 17:25 18:15 24:14,16,20 25:25 59:12 60:10 70:16 76:10,20,24 79:6 81:18 82:25 85:1,2 90:10,11 97:15 104:17,23,25 105:18 107:1,5,7 112:11,21 118:18,18 119:2 122:15 123:22,25 124:12 128:5 129:5 130:12,20 132:21 133:13 134:13,16,17 135:20  <b>ballots</b> <sup>[5]</sup> 66:24 67:18,20,21 85:20  <b>ban</b> <sup>[2]</sup> 44:4,6  <b>banned</b> <sup>[1]</sup> 7:3  <b>bans</b> <sup>[2]</sup> 9:8 28:24  <b>bar</b> <sup>[2]</sup> 45:1 119:24  <b>barred</b> <sup>[10]</sup> 37:1,11 38:23 60:14 66:21 114:3 119:17 121:15,16 140:1  <b>BARRETT</b> <sup>[34]</sup> 16:11 17:4,8,19,22 18:7 55:5,6,9,18,23 56:2,16,25 57:13,16,21 58:1 59:2,16,23 60:1,11 74:5 76:19,21 78:10 116:5,6,23 117:18 130:5,13,23  <b>barrier</b> <sup>[1]</sup> 16:22  <b>based</b> <sup>[6]</sup> 23:5,6 25:18 90:1 131:10 133:15  <b>basically</b> <sup>[1]</sup> 10:7  <b>basis</b> <sup>[6]</sup> 27:12 55:10 80:21 96:7 98:18 102:7  <b>basket</b> <sup>[2]</sup> 116:25 117:1  <b>Baude</b> <sup>[1]</sup> 31:15  <b>become</b> <sup>[1]</sup> 70:18  <b>becomes</b> <sup>[2]</sup> 12:1 74:22  <b>beginning</b> <sup>[1]</sup> 40:11  <b>begins</b> <sup>[1]</sup> 39:3  <b>behalf</b> <sup>[11]</sup> 1:18,20,23 2:4,7,11,14 3:7 65:11 123:15 137:8  <b>behavior</b> <sup>[1]</sup> 27:13  <b>behind</b> <sup>[1]</sup> 44:19  <b>believe</b> <sup>[10]</sup> 5:24 18:15 21:12 23:4 30:20 45:20 58:8 67:13 129:21 139:25  <b>below</b> <sup>[6]</sup> 4:23 59:18,22 76:14 111:12 138:22  <b>benefit</b> <sup>[1]</sup> 46:4  <b>besides</b> <sup>[1]</sup> 50:21  <b>best</b> <sup>[1]</sup> 97:10  <b>bestow</b> <sup>[1]</sup> 83:17  <b>better</b> <sup>[3]</sup> 15:10 48:22,24  <b>between</b> <sup>[15]</sup> 27:11 42:3,3</p>	<p>52:7 66:11 75:15 90:18 97:24 107:22 108:10 109:18 119:1 126:11,16 134:25  <b>beyond</b> <sup>[9]</sup> 5:13,19 9:7 17:11 19:14 84:19 101:5 105:5 138:3  <b>Biden</b> <sup>[1]</sup> 46:22  <b>big</b> <sup>[1]</sup> 127:21  <b>biggest</b> <sup>[1]</sup> 97:8  <b>binding</b> <sup>[1]</sup> 53:3  <b>bit</b> <sup>[9]</sup> 15:10 19:25 46:3 55:25 76:2 77:2 96:14 107:22 113:22  <b>blue</b> <sup>[1]</sup> 40:20  <b>bodies</b> <sup>[3]</sup> 99:16 110:19,20  <b>books</b> <sup>[2]</sup> 14:21 113:10  <b>Boom</b> <sup>[1]</sup> 94:8  <b>boomerang</b> <sup>[1]</sup> 35:25  <b>borders</b> <sup>[1]</sup> 105:5  <b>born</b> <sup>[1]</sup> 80:2  <b>Bose</b> <sup>[4]</sup> 78:2 99:8 131:12,23  <b>both</b> <sup>[12]</sup> 4:19 22:11 37:9,9,16 42:21 48:11 70:6 100:6,7 128:11 137:9  <b>bottom</b> <sup>[1]</sup> 56:2  <b>bottom-line</b> <sup>[1]</sup> 111:21  <b>bouncing</b> <sup>[1]</sup> 50:3  <b>bound</b> <sup>[3]</sup> 18:7 72:17,20  <b>bounds</b> <sup>[1]</sup> 130:1  <b>branches</b> <sup>[1]</sup> 87:12  <b>breaches</b> <sup>[1]</sup> 9:14  <b>brief</b> <sup>[18]</sup> 11:7 14:3 37:19 40:13,15,19,20,23,25 41:17 63:25 64:5,6,12 71:25 77:25 78:19 122:25  <b>briefing</b> <sup>[1]</sup> 36:1  <b>briefly</b> <sup>[1]</sup> 13:1  <b>briefs</b> <sup>[4]</sup> 59:19 70:4 104:4 134:11  <b>bring</b> <sup>[6]</sup> 13:22 32:7 56:22 109:14 128:7,8  <b>bringing</b> <sup>[2]</sup> 73:6 85:12  <b>broad</b> <sup>[12]</sup> 55:25 66:7 71:22,23 72:9 73:20 80:15 85:13,13 106:20 119:7 129:13  <b>broader</b> <sup>[4]</sup> 17:24 106:3,4,7  <b>broken</b> <sup>[1]</sup> 115:15  <b>brought</b> <sup>[6]</sup> 56:4 57:9,10 95:2 127:9 128:6  <b>buckle</b> <sup>[1]</sup> 77:17  <b>bug</b> <sup>[1]</sup> 134:19  <b>built</b> <sup>[1]</sup> 101:15  <b>Bush</b> <sup>[1]</sup> 73:19</p>	<p>15,16 84:25 85:1 89:11,13,14,16 103:10 104:25 105:17 117:15 123:21 124:6,19 125:1,14,19,21,23,25 126:6,9,23 127:4 129:5 130:6,11,15,16 133:24 134:15 135:20 138:8,10  <b>candidate's</b> <sup>[1]</sup> 127:10  <b>candidates</b> <sup>[27]</sup> 23:21 67:8,8,9,19 68:11,14 69:7,11,17,24 73:18 102:3 103:17 104:24 105:3,7 107:5 114:24 118:19 125:11,16 130:19 134:5,13 137:22 138:18  <b>cannot</b> <sup>[9]</sup> 4:2,7 8:6 13:15 43:1 48:25 83:19 137:20 138:1  <b>capably</b> <sup>[1]</sup> 124:10  <b>capacity</b> <sup>[3]</sup> 110:3,6,11  <b>capitol</b> <sup>[1]</sup> 65:15  <b>careful</b> <sup>[1]</sup> 11:7  <b>carry</b> <sup>[2]</sup> 42:11 43:10  <b>cascading</b> <sup>[1]</sup> 134:1  <b>Case</b> <sup>[103]</sup> 3:4 5:7,19,24 6:2 11:8,13 12:1,10,12,14 13:13,14,24 14:10,11,17 15:1,7,12,16,24 16:1,1,4,19 17:7,11 23:4 26:18 30:13,14,21 31:16 32:1,14 33:11 34:15 35:4,10,24 36:10 37:9 45:4,5 49:13,14 52:18 53:22 54:5,7,8 55:6,15,20,21,24 56:3,4,8,9 63:10,23 66:12 68:17 70:4 78:7,22,23 82:10 86:25 92:4 98:18,22 99:6 100:8,22 101:10 104:23 105:8,16 111:11 112:7,13 114:12 115:23 116:13 122:12,16 124:10 127:9,16 128:4 130:9 132:2 133:5,7,12 136:6 139:3,17 140:6,8  <b>cases</b> <sup>[5]</sup> 69:13 99:25 100:5 112:21 138:14  <b>cast</b> <sup>[3]</sup> 104:1 122:22 123:22  <b>catch-all</b> <sup>[1]</sup> 40:7  <b>categorical</b> <sup>[6]</sup> 24:17 27:21,24,25 28:1,11  <b>categorizing</b> <sup>[1]</sup> 133:2  <b>category</b> <sup>[2]</sup> 28:8,10  <b>cause</b> <sup>[5]</sup> 9:13,19 56:5 59:7 102:20  <b>caveat</b> <sup>[2]</sup> 18:17 54:20  <b>Celebrezze</b> <sup>[2]</sup> 104:21 105:11  <b>century</b> <sup>[1]</sup> 124:13  <b>Cert</b> <sup>[1]</sup> 74:17  <b>certain</b> <sup>[8]</sup> 22:8 41:9 106:4,8 116:10,10 117:25 132:17  <b>Certainly</b> <sup>[33]</sup> 22:12,17 31:13 36:15 38:4 40:22 44:1 46:6,22 68:13,22 70:8 71:20 72:15,16 73:12 74:19 75:21 85:6 88:20 89:23 91:</p>	<p>15 92:6 95:8 100:14 103:12 105:9,12 108:16 128:13,17,19 130:17  <b>certainty</b> <sup>[2]</sup> 104:11 131:25  <b>certify</b> <sup>[1]</sup> 67:14  <b>cetera</b> <sup>[1]</sup> 103:10  <b>chains</b> <sup>[1]</sup> 94:15  <b>challenge</b> <sup>[5]</sup> 56:7 127:9,11 128:5,15  <b>challenges</b> <sup>[3]</sup> 95:22 123:21 124:12  <b>chance</b> <sup>[5]</sup> 81:5 97:2 107:13 111:25 116:3  <b>change</b> <sup>[8]</sup> 27:7 28:7 87:15,17 89:21,24 93:22,25  <b>changed</b> <sup>[1]</sup> 138:6  <b>changing</b> <sup>[1]</sup> 25:19  <b>chaotic</b> <sup>[1]</sup> 64:21  <b>characterize</b> <sup>[2]</sup> 35:4 36:10  <b>characterized</b> <sup>[1]</sup> 64:8  <b>charged</b> <sup>[1]</sup> 113:10  <b>charismatic</b> <sup>[2]</sup> 119:10,24  <b>charitably</b> <sup>[1]</sup> 59:22  <b>Chase</b> <sup>[9]</sup> 15:24 16:5 17:12 35:23 52:22 74:8 82:12 87:11 103:5  <b>Chase's</b> <sup>[1]</sup> 86:25  <b>Chiafalo</b> <sup>[2]</sup> 72:11 90:4  <b>CHIEF</b> <sup>[74]</sup> 3:3,8 6:6 7:13,19 8:1,9,13 15:23 16:5 17:11 26:15,20,25 29:9,20 35:9,13 36:2,5,13,16 44:8,22 45:10 47:13 49:17 52:16,21 55:5 58:22 60:12 65:7,9,12 70:20 71:17 72:1 73:7 74:8,12 84:9,23 85:10 86:3,24 87:11 88:7 97:3 102:15 103:5 104:13 107:12 111:6 116:5 117:19 123:9,11,12,16 126:18,21 127:5,15,19 128:9 131:17 132:3 133:6 135:12 136:23 137:5 140:4,6  <b>choice</b> <sup>[1]</sup> 114:25  <b>choice-of-law</b> <sup>[1]</sup> 21:3  <b>choose</b> <sup>[1]</sup> 73:1  <b>chooses</b> <sup>[1]</sup> 5:17  <b>chosen</b> <sup>[1]</sup> 42:17  <b>Christy</b> <sup>[2]</sup> 67:12,15  <b>circle</b> <sup>[3]</sup> 79:2,3 82:18  <b>circuit</b> <sup>[3]</sup> 11:25 45:6 103:5  <b>circumstance</b> <sup>[3]</sup> 27:6 111:1 118:6  <b>circumstances</b> <sup>[3]</sup> 37:2 116:7 118:2  <b>cite</b> <sup>[1]</sup> 40:16  <b>citing</b> <sup>[1]</sup> 90:15  <b>citizen</b> <sup>[4]</sup> 23:24 24:25 25:2 134:18  <b>citizens</b> <sup>[4]</sup> 76:5 106:14 107:6,10  <b>citizens'</b> <sup>[1]</sup> 66:20  <b>Citizenship</b> <sup>[2]</sup> 23:17 82:</p>
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## C

## Official - Subject to Final Review

<p>23  <b>civil</b> [6] 39:7 51:7 69:20  114:13,14 129:20  <b>claim</b> [3] 20:25 40:1 66:6  <b>claimed</b> [1] 66:10  <b>claiming</b> [1] 52:12  <b>Clammers</b> [1] 54:3  <b>clarification</b> [2] 26:16 59:4  <b>clarify</b> [2] 14:2 116:24  <b>class</b> [2] 108:19 109:3  <b>classes</b> [1] 108:23  <b>Clause</b> [47] 3:23,24,24 9:20 13:6 38:8,8,9 41:3,4 42:25 49:20,21 50:1,10 51:2,6,14 58:9 72:6 80:1,22 81:10 97:18 104:16 107:17 108:7,17 109:3,10,11,11 110:13 117:1,10 121:22 123:19 129:12,22,25 130:2,22 135:6 137:10,21,23 138:2  <b>clauses</b> [1] 9:17  <b>clear</b> [14] 3:23 8:21 11:19 42:12 46:11 54:15 77:5,16,23 86:15 114:3 117:12 119:8 120:20  <b>clearly</b> [5] 23:11 38:10 43:3 74:24 114:10  <b>client</b> [4] 46:5 47:8 54:21 60:6  <b>Clinton</b> [1] 88:15  <b>closely</b> [1] 42:11  <b>Code</b> [1] 44:18  <b>coin</b> [1] 66:14  <b>collateral</b> [8] 21:4,5,11 55:7,10 56:3 133:22 135:8  <b>collaterally</b> [2] 82:8,14  <b>colleagues</b> [3] 10:4 82:13 103:4  <b>colloquy</b> [1] 83:2  <b>Coloradans</b> [1] 123:22  <b>Colorado</b> [39] 1:20,23 3:10,13 4:13 9:6,18 18:3 20:25 21:6,11,13 22:2 23:9 25:24 26:5,8 60:8,9 63:21 75:12 77:1,7 106:16 116:16 122:14 123:25 124:3,11,21 125:3 126:6 128:11,14 133:13 134:16 135:18 138:5,23  <b>Colorado's</b> [5] 77:4 84:11 123:19,20 131:3  <b>combination</b> [1] 14:10  <b>come</b> [25] 25:8,11 61:8 62:20 66:12 75:23 79:7,13,21 80:11 81:1 82:19 85:2 89:19 92:22 95:17,18 98:8  102:14 106:2 115:4,11 122:17 129:2 135:8  <b>comes</b> [5] 8:13 41:14 89:9 126:22 127:17  <b>comfort</b> [4] 97:14,17,22 98:4</p>	<p><b>coming</b> [1] 133:4  <b>command</b> [1] 94:16  <b>commander-in-chief</b> [1] 49:9  <b>commanders</b> [1] 90:22  <b>commentators</b> [3] 31:14 97:19,21  <b>commission</b> [5] 50:11,14,15,20 109:13  <b>commissioned</b> [4] 50:23 52:4 107:18 109:9  <b>Commissions</b> [11] 3:23 38:8 50:1,10 51:1 107:17 108:17,24 109:8,10,11  <b>committed</b> [3] 90:17 94:6 114:6  <b>communicate</b> [1] 22:9  <b>comparable</b> [1] 125:16  <b>compel</b> [3] 93:9 94:9,12  <b>compete</b> [1] 19:2  <b>complaining</b> [1] 111:20  <b>complete</b> [2] 10:18 100:15  <b>completely</b> [1] 36:11  <b>complicated</b> [1] 132:22  <b>comport</b> [1] 95:20  <b>compromise</b> [5] 43:25 48:7,13 62:24 68:4  <b>compromises</b> [2] 48:9,10  <b>concede</b> [2] 54:23 64:23  <b>conceded</b> [1] 64:5  <b>conceding</b> [1] 49:12  <b>concept</b> [2] 9:12 11:6  <b>concern</b> [10] 21:16 60:23 61:7,15 62:14 69:2 95:2 113:23 117:21 134:10  <b>concerned</b> [5] 95:9 96:9 119:9 134:7,9  <b>concerning</b> [1] 69:13  <b>concerns</b> [7] 15:25 16:12 111:7,24 117:7 118:10 121:3  <b>concerned</b> [2] 64:17 86:19  <b>conclude</b> [5] 21:22 22:13,14 88:10 102:11  <b>concluded</b> [1] 63:21  <b>concludes</b> [1] 122:13  <b>conclusion</b> [6] 22:11,17 63:11 111:21 112:2 139:16  <b>conclusions</b> [1] 131:19  <b>conduct</b> [2] 93:1 98:3  <b>Confederacy</b> [1] 83:23  <b>Confederate</b> [6] 6:21 49:8 62:14 69:3 71:7 83:22  <b>Confederates</b> [5] 61:3 68:6 87:22 113:17 118:3  <b>confession</b> [1] 102:10  <b>confirmatory</b> [1] 125:24  <b>conflict</b> [2] 68:5 69:20  <b>conflicts</b> [1] 102:1  <b>confront</b> [1] 75:2  <b>confused</b> [2] 25:20 27:4  <b>Congress</b> [9] 3:22 4:5,15,17 5:9,12,22 6:4,18,22 7:</p>	<p>11,17,25 8:3,8 9:5 10:13 12:8,15 13:16,23 14:10,16,22 17:15 18:2,4,7,12,13,25 24:18 28:2,4,19 30:16 31:1,8,11,21,23 32:2,4,5,17 33:18 43:1,5 46:23 48:11 50:22 51:4,16 52:23 53:4,6,21 54:4,10 56:10,12,15,19 58:4,14 61:6 63:13 68:14,19 71:3 74:12,23,25 82:21 83:4,7,15 87:1,3,15,15,17 89:20 91:15 95:8 96:16 102:22 103:13,16,24 110:5 113:3 114:3 115:20 120:3 122:18 124:2 132:18 135:9  <b>Congress's</b> [2] 57:23 103:14  <b>congressional</b> [9] 15:13 17:13 30:15 34:17 63:16 83:22 138:11,14,18  <b>congressionally</b> [1] 15:4  <b>Congressman</b> [1] 67:12  <b>congruence</b> [1] 18:18  <b>congruent</b> [2] 19:20,23  <b>consequence</b> [2] 21:9 85:5  <b>consequences</b> [5] 20:24 23:11 84:11 101:24 139:1  <b>consequential</b> [1] 16:12  <b>consequentialist</b> [2] 22:24 23:7  <b>consider</b> [1] 110:17  <b>considerations</b> [3] 15:22 22:23 23:8  <b>considered</b> [1] 37:11  <b>consistent</b> [2] 6:14 137:15  <b>constitutes</b> [2] 86:5,12  <b>Constitution</b> [53] 3:19 4:16 8:2 14:9 16:15,22 20:7 23:15 24:7,19 27:11 28:18 38:7 41:2,11 42:20 43:3 46:17 62:23 65:21 66:9 67:2 72:13 73:3,16 80:12 81:8 82:3 86:1,16,21 88:23 94:21 106:19 108:1,4,8 109:1,4,20,23 110:22 115:16,21 116:2,9,11 120:20 121:21 122:1,3 124:8 138:4  <b>Constitution's</b> [3] 4:11 7:5 18:10  <b>constitutional</b> [38] 5:16 9:1,14 14:4 26:21 27:17 42:13 43:16 46:2 48:9 56:7 66:17 71:24 75:20 76:10,12 77:25 79:7,21 83:18 85:8 86:14 89:3 104:7 105:10,25 107:3 110:3,4 115:9,17 116:12 129:9,13,24 130:2 137:16,25  <b>constitutionally</b> [7] 3:11 4:20 55:14 59:12,13 66:21 88:25</p>	<p><b>constrained</b> [1] 105:14  <b>constraints</b> [1] 130:2  <b>construction</b> [1] 139:18  <b>construe</b> [2] 50:20 120:16  <b>contemporaneous</b> [2] 67:5,5  <b>contends</b> [1] 123:24  <b>contentions</b> [1] 139:4  <b>contested</b> [1] 132:22  <b>contesting</b> [1] 79:18  <b>context</b> [9] 61:15 78:11 81:8 97:22 103:18 118:13 122:10,11 130:19  <b>contexts</b> [2] 20:19 108:17  <b>contingent</b> [1] 83:10  <b>continue</b> [3] 60:9 68:7 69:3  <b>continues</b> [2] 63:10 139:25  <b>contradict</b> [1] 22:20  <b>contrary</b> [3] 47:25 87:5,6  <b>control</b> [2] 61:9,11  <b>controlling</b> [1] 69:15  <b>controversy</b> [1] 128:2  <b>conversation</b> [1] 121:3  <b>convicted</b> [4] 16:2 54:18 113:7 114:2  <b>conviction</b> [5] 32:21 51:9 58:12 83:9,9  <b>coordinated</b> [1] 89:1  <b>Corp</b> [4] 78:2 99:8 131:12,23  <b>corpus</b> [1] 16:3  <b>Correct</b> [24] 7:18 9:15,23 11:23 28:22 34:15 45:17 46:17 47:9 55:20 59:21 63:19 68:12 83:24 84:21 92:1 99:24 100:12 112:6 123:5 126:20 129:25 130:1 132:12  <b>correctly</b> [2] 5:24 30:21  <b>couldn't</b> [7] 32:22 44:14 57:3 115:16 116:15,16,16  <b>Counsel</b> [11] 6:6 9:10 15:23 44:9 65:7 70:20 84:9 97:3 123:9 137:3 140:4  <b>count</b> [6] 63:23 103:24,25 104:3 122:22,23  <b>counted</b> [1] 64:1  <b>countervailing</b> [1] 62:21  <b>counting</b> [1] 85:19  <b>countries</b> [1] 97:25  <b>country</b> [6] 73:13 97:6,12 100:13 131:25 134:6  <b>couple</b> [1] 88:17  <b>course</b> [9] 10:24 24:15 51:13 69:20 77:22 87:16 90:8 112:10 132:3  <b>COURT</b> [115] 1:1,14 3:9,10 4:23 6:1 9:7 11:5,22,25 12:14 13:12 15:5 17:9,9 19:10,15 20:25 21:7,22,25 22:2,10 23:10 26:6,9,12 28:15 30:13 33:10,12 41:1,18 45:</p>	<p>6 48:20 54:1 55:20 59:19 60:4 63:10,21 65:13,23 66:5 72:11 75:19,24 76:12,13 77:3,22 78:1,15,17 79:8,13,15,18 82:12 86:14,15 88:20,21 89:22 90:5 95:17,18 97:16 98:15,17,25 99:2,22,25 100:3,5,10,17,18,19 101:2 102:6,13 103:5,20 112:14,14 122:4,6,13,24 123:1,17 124:14,22 125:2,3,9 126:6 127:12 131:8,23 134:2,22 136:2,4,21 138:6,15,23 139:2,12,17,24 140:3  <b>Court's</b> [11] 3:14 4:13 5:1 18:18 63:14 67:3 90:4 125:5 132:1 138:16 139:8  <b>courtroom</b> [1] 111:15  <b>courts</b> [14] 8:5 17:1 57:18 76:13 100:15 116:7,8,8 123:20 124:11 136:2,20 138:14,16  <b>cover</b> [1] 66:7  <b>covered</b> [10] 3:17 40:10 41:20 42:19 46:23 48:19 58:6 121:12,25 139:6  <b>covers</b> [1] 56:18  <b>cracks</b> [1] 48:17  <b>create</b> [4] 65:24 74:23 102:20 103:19  <b>created</b> [2] 67:25 115:18  <b>creates</b> [4] 20:8 30:16 31:24 96:19  <b>creating</b> [1] 76:11  <b>credit</b> [1] 13:22  <b>crimes</b> [1] 51:10  <b>criminal</b> [12] 14:21 16:2 32:21,21,23 65:2 83:8 87:17 113:6,18 114:10 123:7  <b>crisis</b> [1] 104:7  <b>criteria</b> [5] 9:4 64:25 126:10,14 138:7  <b>criticized</b> [1] 31:16  <b>cross-examination</b> [1] 131:16  <b>cross-examine</b> [1] 112:9  <b>crucial</b> [1] 53:21  <b>curious</b> [1] 107:19  <b>current</b> [1] 19:14  <b>currently</b> [1] 14:21  <b>cut</b> [1] 41:14  <b>cycle</b> [2] 107:4 115:11</p>
<b>D</b>				
<p><b>D.C</b> [1] 1:10  <b>danger</b> [1] 115:24  <b>date</b> [3] 8:11 82:5 91:9  <b>Daubert</b> [1] 101:2  <b>daunting</b> [1] 85:4  <b>Davis</b> [4] 12:1,2 35:24 61:25  <b>Day</b> [7] 4:16 8:24 25:6 26:1,3,4 138:20</p>				



## Official - Subject to Final Review

<p><b>days</b> [1] 89:25</p> <p><b>de</b> [13] 78:12 82:9 90:15 91:6 92:10,21,24,25 131:20,22 132:4 138:24 139:13</p> <p><b>deadline</b> [4] 4:20 8:7 28:17 138:10</p> <p><b>deadlines</b> [1] 105:17</p> <p><b>Deal</b> [1] 102:19</p> <p><b>dealing</b> [1] 60:22</p> <p><b>debate</b> [9] 9:18 73:17 85:14</p> <p><b>debates</b> [1] 120:2</p> <p><b>decades</b> [1] 88:17</p> <p><b>decide</b> [19] 19:19 21:7 25:13 75:3,19 77:3 78:17 85:3 86:8 98:18,21,23 99:23 100:12,13 103:9 114:25 124:12 131:9</p> <p><b>decided</b> [4] 5:25 30:21 45:8 112:22</p> <p><b>decides</b> [8] 52:20 54:10 74:3,4,15 76:12 127:6 133:23</p> <p><b>deciding</b> [6] 77:1 85:16 106:14,16,18 123:6</p> <p><b>decision</b> [32] 3:14 4:13,23 11:22,25 13:19 21:6,13,17 22:2 25:12 26:17 44:19 45:7 63:14 76:14 78:14 79:19 85:15 90:4 99:5 100:10,16,18 104:25 105:5 117:5 121:13 134:2,2 136:22 139:2</p> <p><b>decision-making</b> [1] 134:21</p> <p><b>decisions</b> [14] 14:23 44:20 54:5 91:8 102:1 112:12 130:25 136:2,21 138:15 139:8,10,12,14</p> <p><b>declaration</b> [1] 8:22</p> <p><b>declared</b> [1] 97:23</p> <p><b>declined</b> [1] 67:14</p> <p><b>defeasible</b> [1] 24:18</p> <p><b>defer</b> [1] 133:19</p> <p><b>deference</b> [5] 78:14 98:24 131:13,18 134:4</p> <p><b>deficiencies</b> [2] 98:16,18</p> <p><b>define</b> [2] 11:4 74:3</p> <p><b>defined</b> [2] 63:24 130:9</p> <p><b>defines</b> [1] 124:18</p> <p><b>definite</b> [1] 132:19</p> <p><b>definitely</b> [2] 37:23 49:13</p> <p><b>definition</b> [1] 74:15</p> <p><b>defund</b> [1] 58:14</p> <p><b>degree</b> [1] 115:2</p> <p><b>degrees</b> [1] 128:17</p> <p><b>deliberately</b> [1] 66:7</p> <p><b>demanding</b> [1] 7:10</p> <p><b>demands</b> [1] 111:17</p> <p><b>democracy</b> [6] 114:23 115:6,10,13,18 120:17</p> <p><b>Democratic</b> [2] 84:25 115:19</p> <p><b>demonstrate</b> [1] 61:15</p> <p><b>demonstrates</b> [1] 43:3</p>	<p><b>Denver</b> [2] 1:20,22</p> <p><b>deny</b> [1] 71:1</p> <p><b>depend</b> [1] 30:12</p> <p><b>depending</b> [1] 131:6</p> <p><b>depends</b> [1] 19:8</p> <p><b>depositions</b> [2] 112:16,18</p> <p><b>deprive</b> [1] 70:25</p> <p><b>deputy</b> [1] 127:1</p> <p><b>described</b> [4] 33:12 42:16 45:20 89:7</p> <p><b>deserves</b> [1] 93:8</p> <p><b>designed</b> [3] 46:4 96:4 115:12</p> <p><b>despite</b> [2] 12:13 123:24</p> <p><b>detail</b> [1] 87:12</p> <p><b>determinant</b> [1] 76:11</p> <p><b>determination</b> [9] 28:7,11 33:20 76:5 122:19 127:13 128:23 129:10 133:23</p> <p><b>determinations</b> [1] 112:21</p> <p><b>determine</b> [9] 6:24 71:16,22 72:9 73:14 76:16 80:15 97:13 129:14</p> <p><b>determined</b> [3] 21:13 31:25 129:24</p> <p><b>determining</b> [4] 67:22 74:21 76:14 103:21</p> <p><b>develop</b> [2] 60:4 86:11</p> <p><b>developed</b> [1] 21:19</p> <p><b>difference</b> [6] 42:3 66:10 75:15 107:22 126:16 132:24</p> <p><b>different</b> [55] 4:14 11:15 13:9 20:13,19 21:19,21 22:17 37:5 42:11 48:11 60:22 61:6,10 74:14 75:23 81:9,13,21 84:15,16 86:5 92:8 93:6 96:6 98:10,12,12,13 99:15,16,17,18,18,19 100:17 101:2 102:2,2 106:7,24,24 111:9,10 113:23 117:22 129:17,18,18,24 130:25 131:1 134:14 135:7,8</p> <p><b>differently</b> [4] 70:12 73:23 101:3 126:2</p> <p><b>differs</b> [1] 21:25</p> <p><b>difficult</b> [5] 7:14 74:10 93:7 103:19 133:3</p> <p><b>diplomatic</b> [1] 97:9</p> <p><b>direct</b> [3] 55:12 124:9 137:12</p> <p><b>directed</b> [1] 123:20</p> <p><b>direction</b> [3] 61:10 91:12 92:14</p> <p><b>directly</b> [1] 20:19</p> <p><b>director</b> [1] 127:1</p> <p><b>disability</b> [12] 4:6 6:18 28:5 31:22 81:20,24,25 82:21 83:6,14,16 124:2</p> <p><b>disagree</b> [3] 5:25 11:3 56:17</p> <p><b>disagreed</b> [1] 79:9</p> <p><b>disagreeing</b> [1] 112:2</p>	<p><b>disapproved</b> [1] 138:17</p> <p><b>discretion</b> [1] 131:9</p> <p><b>discussed</b> [4] 99:7 118:16 121:4 130:22</p> <p><b>discussing</b> [1] 46:11</p> <p><b>discussion</b> [3] 43:9 51:19 107:23</p> <p><b>disenfranchise</b> [1] 116:1</p> <p><b>disenfranchisement</b> [2] 104:7 107:9</p> <p><b>disenfranchising</b> [2] 105:20 115:1</p> <p><b>disillusioned</b> [1] 105:20</p> <p><b>dismantle</b> [1] 115:17</p> <p><b>dismissed</b> [1] 22:23</p> <p><b>disobey</b> [1] 90:23</p> <p><b>disparate</b> [1] 132:4</p> <p><b>disparity</b> [2] 134:13,24</p> <p><b>dispose</b> [1] 23:4</p> <p><b>disputed</b> [1] 78:6</p> <p><b>disqualification</b> [23] 5:10 19:5 27:12 31:2 32:18 33:6,18 34:7,10 37:3,15 41:4 53:10 72:3 84:1,13 91:15,23 92:8 114:14 132:9,10,15</p> <p><b>disqualified</b> [30] 3:12 4:4 6:12 16:4 30:6 37:1 46:12 48:4 54:18 55:16 65:21 67:7,16 68:11,14 75:6 84:6 91:5,9,10,24 92:12 94:5 104:2 113:8 122:21 126:15,23 129:4 139:4</p> <p><b>disqualifies</b> [1] 66:1</p> <p><b>disqualify</b> [9] 9:22 10:6 24:14,16 68:18 69:7,24 80:20 102:2</p> <p><b>disqualifying</b> [4] 17:25 23:20,21,23</p> <p><b>disrupt</b> [2] 65:18 89:2</p> <p><b>disruption</b> [1] 13:21</p> <p><b>dissenting</b> [1] 111:12</p> <p><b>distinction</b> [11] 27:10,19,21 43:10 50:25 108:11 109:18,20,24 119:1 126:11</p> <p><b>distinguish</b> [2] 138:13,22</p> <p><b>distinguishing</b> [1] 108:9</p> <p><b>disuniformity</b> [2] 96:5 117:22</p> <p><b>doctrine</b> [5] 90:16 91:7 92:21 138:25 139:13</p> <p><b>doctrines</b> [1] 35:5</p> <p><b>doing</b> [9] 5:6 7:23 14:8 34:1,14 69:5 70:11 94:1 106:13</p> <p><b>domestic</b> [1] 20:16</p> <p><b>DONALD</b> [2] 1:3 3:11</p> <p><b>done</b> [11] 18:3 26:5,6 44:17 92:13 93:1 98:4 105:19 122:12,17 138:6</p> <p><b>door</b> [1] 60:9</p> <p><b>dormant</b> [4] 85:23 86:23 87:9,21</p> <p><b>doubt</b> [3] 84:19 105:13 121:</p>	<p>24</p> <p><b>down</b> [6] 45:11 66:12 85:2 89:9 127:22,23</p> <p><b>drafted</b> [1] 43:21</p> <p><b>drafting</b> [2] 43:9 60:21</p> <p><b>drafts</b> [2] 44:3 62:1</p> <p><b>dramatic</b> [1] 139:1</p> <p><b>drawing</b> [3] 27:18,20 43:14</p> <p><b>drawn</b> [1] 50:8</p> <p><b>dropped</b> [1] 114:18</p> <p><b>due</b> [12] 59:5,16 60:3,5 71:1 95:21 111:17 129:25 130:3,5,6,11</p> <p><b>during</b> [6] 7:7 26:7 44:20 68:4 90:21 139:20</p>	<p>10,15 90:6,7 104:16 106:18 107:9 117:1,9,13,14 119:21,25 121:8,12,18 123:19 129:12,22 130:2 133:19 135:6 137:10,13,21,22 138:2</p> <p><b>eligibility</b> [6] 75:20 78:18 81:16 103:21 126:10,14</p> <p><b>eligible</b> [1] 96:7</p> <p><b>eliminate</b> [1] 58:21</p> <p><b>Ellipse</b> [2] 78:13,25</p> <p><b>else's</b> [1] 105:1</p> <p><b>elsewhere</b> [1] 109:1</p> <p><b>elusive</b> [2] 35:19 114:22</p> <p><b>embedding</b> [1] 61:1</p> <p><b>emblematic</b> [1] 36:11</p> <p><b>Emoluments</b> [2] 41:3,21</p> <p><b>emphasize</b> [1] 113:16</p> <p><b>emphasized</b> [1] 90:5</p> <p><b>emphasizes</b> [1] 88:22</p> <p><b>employed</b> [2] 131:6,11</p> <p><b>enact</b> [10] 5:18 6:4 18:2,13 19:11 54:10 58:5 63:13 116:16 129:16</p> <p><b>enacted</b> [7] 13:24 43:24 56:12 62:24 84:6 113:4,13</p> <p><b>enacting</b> [2] 63:16 104:17</p> <p><b>enactment</b> [4] 14:23 15:13 62:8,13</p> <p><b>enacts</b> [3] 5:22 32:5 56:19</p> <p><b>encompass</b> [1] 3:21</p> <p><b>encompassed</b> [1] 40:1</p> <p><b>encouraging</b> [1] 101:16</p> <p><b>end</b> [6] 54:8 63:9 73:4,4 82:11 134:13</p> <p><b>enemies</b> [1] 98:6</p> <p><b>enemy</b> [2] 97:8,14</p> <p><b>enforce</b> [34] 5:21 13:2,6,7,8 16:17 19:9,11 20:21 52:24 53:10 63:6 71:4,7,8,24 72:17 73:15 75:8 80:12 81:7 92:7 95:4 96:15,16,20 102:20 105:24 107:8 116:9 117:23 122:9 133:17 136:19</p> <p><b>enforced</b> [4] 5:17 29:25 30:15 47:3</p> <p><b>Enforcement</b> [18] 12:16,17 13:24 14:18,20,24 16:23 17:14 18:16 30:10 31:23 53:5,24 57:10 63:18 87:3 95:16 96:18</p> <p><b>enforces</b> [1] 16:6</p> <p><b>enforcing</b> [8] 6:3 8:25 9:1 17:15 24:18 56:10 118:1,7</p> <p><b>engage</b> [7] 21:24 33:4,5,20 64:7,9 74:7</p> <p><b>engaged</b> [6] 30:5 48:3 67:1 74:4 82:2 133:10</p> <p><b>engages</b> [1] 90:18</p> <p><b>engaging</b> [2] 65:20 98:3</p> <p><b>enormous</b> [1] 134:5</p> <p><b>enough</b> [1] 94:11</p> <p><b>ensure</b> [4] 66:20 70:7 96:</p>
<b>E</b>				
<p><b>each</b> [8] 3:24 6:24 7:1 23:3 32:2,7 50:8 137:11</p> <p><b>earlier</b> [13] 7:11 8:7 19:5 44:3 65:22 81:5 83:3 95:2 99:7 107:23 116:14 117:21 118:17</p> <p><b>easier</b> [1] 27:1</p> <p><b>easy</b> [1] 133:7</p> <p><b>effect</b> [16] 12:8 21:12,17 34:10 44:11 76:16,25 84:4 101:13 106:21 113:4 114:17 115:1 117:6 134:1,5</p> <p><b>effectively</b> [5] 21:7 34:21 58:15 91:2 138:9</p> <p><b>efficiently</b> [1] 124:11</p> <p><b>effort</b> [5] 64:17,21,24 69:4 86:19</p> <p><b>efforts</b> [1] 82:25</p> <p><b>eggs</b> [1] 116:25</p> <p><b>either</b> [11] 9:5 18:3,5 51:17 61:4 63:17 64:24 67:19 68:8 98:17 121:21</p> <p><b>elaborated</b> [1] 54:7</p> <p><b>elect</b> [1] 114:24</p> <p><b>elected</b> [22] 3:21 4:1,7,18 6:22,25 7:8 8:4 23:22 24:24 32:2 51:3 52:14 58:3 61:25 67:12 75:16,16 93:14 98:25 116:14 134:4</p> <p><b>Election</b> [35] 4:16 6:17,19 8:6,12,21,24 25:5 26:2,4,11 28:14 67:15,23 71:9 79:6 80:10 81:8 85:4 89:8,25 90:1 103:17,22 107:4 112:21 115:11 117:6 122:20 124:5 134:14,15 135:24 138:19,20</p> <p><b>elections</b> [19] 61:4 66:18 68:1 69:15 70:12,15 71:14 80:9 95:5 96:6 117:12,24 118:5,8,9,14 124:10 127:1 129:15</p> <p><b>elector</b> [3] 39:4,5 128:6</p> <p><b>electoral</b> [6] 66:20 103:25 104:1,2 122:23 136:19</p> <p><b>electors</b> [34] 71:23 72:10 73:2,5,15 76:8 80:16 89:</p>				

## Official - Subject to Final Review

<p>13 114:1  <b>ensuring</b> [1] 96:10  <b>entered</b> [1] 21:21  <b>entire</b> [1] 61:12  <b>entirely</b> [2] 5:9,11  <b>entitled</b> [3] 59:9,10,13  <b>entity</b> [1] 32:1  <b>enumerated</b> [1] 119:14  <b>enumerates</b> [1] 138:4  <b>enunciation</b> [1] 13:14  <b>envisioned</b> [2] 118:1,7  <b>equal</b> [3] 71:1 130:3 137:23  <b>error</b> [4] 77:5,16,23 102:11  <b>escape</b> [1] 139:16  <b>especially</b> [1] 43:24  <b>ESQ</b> [4] 2:3,6,10,13  <b>ESQUIRE</b> [2] 1:18,20  <b>essence</b> [4] 78:7,23 100:22 101:14  <b>essential</b> [2] 89:3 100:8  <b>essentially</b> [5] 7:10 78:12 87:12,22 96:16  <b>established</b> [3] 13:25 14:17 15:4  <b>estoppel</b> [5] 21:4,5,12 133:22 135:8  <b>ET</b> [5] 1:6,21 2:8 65:11 103:10  <b>even</b> [32] 4:4 5:20 6:15,17 7:3,13 8:9 21:16 22:16 32:15 33:5 43:22 44:7 45:13 48:9 49:4 55:10 56:21,21 84:3 87:11 94:16 102:22 107:3,5 114:14 117:2 127:10,13 128:1 132:5 134:17  <b>event</b> [1] 43:23  <b>events</b> [3] 64:1 65:2 139:5  <b>eventually</b> [1] 85:15  <b>everybody</b> [5] 84:4 104:10 105:1,11 121:17  <b>everyone</b> [4] 48:13 70:17 100:9 124:13  <b>everything</b> [1] 12:13  <b>evidence</b> [22] 36:9 47:16 52:24,25 60:20 61:19,20,23 62:18,18,21 73:8 84:17 95:24 98:13,21 99:16 100:11,11 101:9 129:17 131:16  <b>evidentiary</b> [4] 95:23 99:3,4 104:10  <b>exact</b> [2] 31:11 34:4  <b>exactly</b> [9] 14:14 22:1 33:11 34:16 47:7 51:22 53:19 108:11 121:16  <b>example</b> [13] 25:22 41:20 42:15 67:10,11 68:20 72:18 93:13 100:24 104:21 107:17 108:2 119:21  <b>examples</b> [9] 10:5 67:5,18 68:10 69:9,10 70:2,11 103:13  <b>except</b> [4] 46:13 66:2 81:19 108:21</p>	<p><b>exception</b> [2] 50:19 110:16  <b>exceptional</b> [1] 110:25  <b>exclude</b> [8] 4:3,8 18:14 60:10 73:18 122:14 129:4 135:20  <b>excluded</b> [8] 40:10 41:18 45:20,22 46:20 69:11 73:20 134:16  <b>excludes</b> [1] 38:10  <b>excluding</b> [1] 66:24  <b>exclusive</b> [5] 15:5 54:1 57:19,23 74:24  <b>excuse</b> [1] 138:2  <b>excused</b> [2] 28:9,13  <b>executing</b> [1] 12:7  <b>executive</b> [2] 139:19,23  <b>exemption</b> [2] 65:24 66:5  <b>exercise</b> [3] 105:13 131:12 137:24  <b>exercised</b> [1] 137:15  <b>exercising</b> [2] 87:7 123:18  <b>exist</b> [1] 48:5  <b>existed</b> [2] 82:1 118:20  <b>existing</b> [1] 105:24  <b>exists</b> [6] 81:25 83:6,6,14 91:17 114:4  <b>expand</b> [1] 72:15  <b>expect</b> [2] 84:20,23  <b>expedited</b> [1] 112:11  <b>experience</b> [1] 115:14  <b>expert</b> [7] 22:5,18,20 100:23,25 101:4 112:16  <b>expert's</b> [1] 101:20  <b>explain</b> [2] 41:8 73:10  <b>explicit</b> [1] 54:5  <b>express</b> [5] 15:6 101:4 124:17,21,25  <b>extant</b> [4] 8:25 24:5 27:17 53:24  <b>extend</b> [2] 17:3 47:5  <b>extended</b> [1] 72:5  <b>extensive</b> [1] 104:15  <b>extent</b> [1] 114:21  <b>extracted</b> [1] 57:2  <b>extraordinary</b> [8] 66:6 75:17 81:24 83:5 86:2,17 88:22 90:8  <b>extremists</b> [2] 22:9 101:14</p> <p style="text-align:center"><b>F</b></p> <p><b>fabric</b> [1] 105:25  <b>face</b> [3] 9:8 62:21 126:8  <b>fact</b> [32] 9:16 21:23 27:6 28:9 32:19 33:17 56:5 70:12 78:15 81:23,25 82:15 83:4,7,15,21 85:7 88:9 90:1 91:10 96:20 97:24 99:19 102:10 104:22 111:20 112:17 119:21 124:23 125:15,23,24  <b>facto</b> [9] 82:9 90:15 91:6 92:10,21,24,25 138:24 139:13</p>	<p><b>facts</b> [8] 78:6,12 99:9 100:8,19,20 102:8 128:3  <b>factual</b> [12] 21:19,21 77:5,15,23 78:3,18,21 131:19 132:1 134:3 135:1  <b>failed</b> [1] 70:8  <b>failing</b> [1] 96:18  <b>fair</b> [2] 94:11 110:15  <b>fairly</b> [1] 88:16  <b>fairness</b> [1] 112:3  <b>faith</b> [1] 135:23  <b>fall</b> [3] 28:8 48:17 121:19  <b>far</b> [1] 34:11  <b>far-reaching</b> [1] 123:18  <b>fast</b> [1] 112:12  <b>fatal</b> [1] 31:20  <b>favor</b> [2] 15:23 38:5  <b>feature</b> [1] 134:19  <b>February</b> [1] 1:11  <b>federal</b> [6] 4:8,12 9:5 13:7 16:18,24 17:2,9 18:11 32:7 45:1 51:25 52:11 53:11,25 54:17 56:21 57:12 58:6,19,21 59:1 63:10,17 66:3,8,14 68:24 70:6,8 71:3,24 72:15 75:9,20 76:9,11 79:6,21 80:10,11 82:25 86:20 95:16,18 96:15,21 102:12 106:5,6 107:2 113:3,6,9,25 114:1,4 116:8 123:3,6 139:24  <b>Federalism</b> [3] 96:19 135:5,11  <b>Federalist</b> [1] 53:14  <b>feed</b> [1] 100:21  <b>feel</b> [1] 35:2  <b>fell</b> [1] 111:17  <b>felt</b> [1] 69:21  <b>few</b> [3] 67:18 68:10 122:25  <b>fewer</b> [1] 46:1  <b>figure</b> [2] 35:11 114:20  <b>figuring</b> [1] 74:6  <b>filed</b> [2] 70:4 127:17  <b>final</b> [6] 62:4,8,9,13 63:20 129:10  <b>find</b> [3] 44:14 80:6,7  <b>finding</b> [2] 21:24 78:15  <b>findings</b> [6] 21:21 77:15,23 98:24 99:19 134:3  <b>fine</b> [1] 49:2  <b>finish</b> [1] 36:6  <b>first</b> [40] 3:16 12:16 15:16 29:5 32:22 34:10 36:22,25 37:4,5,22,25 38:17 50:15 65:14,16 71:12 77:6,22 97:21 98:16 99:22 102:17 105:12,14,21,22 106:2,11,12 115:8 118:16 121:17 122:25 125:12 127:6 130:4,18,21 137:18  <b>fit</b> [5] 30:23 51:19 72:11 76:9 80:16  <b>five-day</b> [1] 112:6  <b>flip</b> [1] 102:21</p>	<p><b>flood</b> [1] 84:3  <b>floor</b> [1] 29:2  <b>focus</b> [4] 37:21,24 61:16 62:22  <b>focused</b> [3] 61:22 74:9 121:2  <b>focusing</b> [2] 118:14 119:20  <b>Foley</b> [1] 104:5  <b>follow</b> [2] 135:23 139:1  <b>follow-up</b> [1] 130:24  <b>followed</b> [4] 30:22 87:2,4 131:3  <b>Foner</b> [1] 69:18  <b>Foote</b> [2] 69:19,19  <b>Footnote</b> [1] 41:17  <b>force</b> [3] 16:15,16 20:16  <b>forcefully</b> [2] 45:19 63:5  <b>foreign-born</b> [2] 66:25 73:18  <b>forever</b> [1] 84:7  <b>form</b> [1] 54:2  <b>format</b> [1] 58:15  <b>former</b> [11] 21:5 30:4 61:3 66:2 69:3 75:5 87:22 92:15 93:11,13 98:11  <b>forms</b> [1] 53:5  <b>forth</b> [1] 50:6  <b>fortiori</b> [1] 105:7  <b>forward</b> [2] 90:16 138:10  <b>found</b> [1] 21:25  <b>founding</b> [1] 47:16  <b>Fourteenth</b> [33] 3:13 5:21 6:21 10:23 15:18 19:12 32:11 35:13,14 60:17 67:6 70:5,23 71:11,14 72:4,8,14,18 73:11 74:9,11,22 80:5 83:24 130:21 132:15,16 133:8,11,15,16 136:1  <b>Framers</b> [9] 40:5 60:21 66:6 96:3 114:10 115:13 117:25 118:6 119:9  <b>free</b> [2] 19:4 92:16  <b>frequently</b> [2] 6:20 9:17  <b>friend</b> [2] 66:10 83:2  <b>friends</b> [1] 107:25  <b>frivolous</b> [3] 85:7,11,13  <b>full</b> [2] 95:23 104:9  <b>full-blown</b> [1] 131:14  <b>fulsome</b> [1] 77:11  <b>function</b> [2] 89:2 107:7  <b>functions</b> [2] 86:21 88:25  <b>funds</b> [2] 97:11,11  <b>further</b> [12] 9:19 10:8 19:1 44:2,6,23 76:2 98:5 135:13,15 137:2 139:21  <b>future</b> [2] 83:7 88:12</p> <p style="text-align:center"><b>G</b></p> <p><b>gained</b> [1] 20:18  <b>gap</b> [1] 52:7  <b>gave</b> [1] 68:20  <b>gear</b> [1] 19:25  <b>General</b> [4] 1:22 110:17</p>	<p>116:6 124:5  <b>generally</b> [3] 9:12 10:5,12  <b>generation</b> [2] 47:16,17  <b>generations</b> [1] 115:11  <b>Georgia</b> [2] 67:12,13  <b>gerrymandered</b> [2] 46:4,7  <b>gets</b> [5] 17:8 75:3 89:11 106:14 135:2  <b>getting</b> [2] 16:14 102:3  <b>Ginsburg</b> [1] 104:5  <b>give</b> [14] 12:8 17:15 37:3 56:13 70:1 81:5 98:24 104:20 107:15 111:25 115:20 131:13,18 134:22  <b>given</b> [12] 47:15,22 48:7 51:1 61:14 78:5 81:2 97:14 99:3 116:3 121:25 134:3  <b>gives</b> [10] 6:4 13:16 14:9,13 21:16 71:22 76:7 91:1 132:18 137:11  <b>giving</b> [5] 30:25 39:19,23 61:17 117:4  <b>goals</b> [1] 48:12  <b>goodly</b> [1] 84:24  <b>GORSUCH</b> [55] 17:18,21 41:22,24 42:2,6,10 43:4,7,15,18 49:17,18,24 50:2,5 51:18,22 52:15 79:1,10,17,24 80:10,19,25 81:14,19 82:4,17 90:14 91:4,20,22 92:2,9,20,24 93:16,19,22,25 94:5 107:12,13 108:21,25 109:5,17 110:7,12,21 111:2,4 136:25  <b>got</b> [3] 44:20 105:18 127:20  <b>governing</b> [1] 26:21  <b>government</b> [12] 60:25 61:2,9,12 64:14,18,21,24 70:7,8 87:13 96:15  <b>governor</b> [3] 32:20 67:11,13  <b>granted</b> [2] 33:8 73:2  <b>grants</b> [2] 106:19 109:13  <b>grapple</b> [1] 101:23  <b>great</b> [3] 73:17 77:10 106:6  <b>greater</b> [3] 21:16 72:24 131:24  <b>Griffin</b> [6] 11:18,21 55:9,12 56:4,13  <b>Griffin's</b> [46] 5:19,24 6:2 11:8,13 12:12,14 13:13,14,24 14:10,11,17 15:1,7,12,16,24 16:1 17:7,11 30:13,14,21 31:16 33:10 34:15 35:4,10 36:10 45:4,4 52:18 53:22 54:5,7 55:6,19,21,24 56:3,9 82:10 86:25 139:3,17  <b>Griswold</b> [3] 1:23 2:11 123:15  <b>ground</b> [1] 16:3  <b>grounds</b> [1] 122:16  <b>group</b> [1] 86:19  <b>guess</b> [14] 33:15 39:19 42:</p>
--	---	---	--	--

## Official - Subject to Final Review

6 56:20 57:22 60:14 76:1 95:5 96:3 104:19 106:1 113:19 118:4 119:19 guidance [2] 78:14 134:22 guilty [1] 127:21	28:25 33:10 34:14 37:2 38: 23 44:4 58:2 66:22 69:12 81:3,9 82:15,15,20 91:23, 24 100:12 113:3,8 114:4 121:23 137:25 138:16 139: 5 holds [7] 7:7 56:9 66:15 108:16 110:1 122:3 138:9 Honor [37] 11:1 12:13 13: 15 15:21 23:8 30:12 36:3 37:17 45:19 50:9 53:20 55: 21 68:21 69:10 71:12,20 75:18 77:21 79:23 80:24 85:6 86:13 97:16 99:2 101: 7 106:23 112:4 113:12 114:9 116:22 124:20 126: 20 129:12,21 133:1 134:9 135:22 Honor's [4] 7:9 56:11 57: 11 59:20 House [9] 6:24 7:1 31:11 32:2 34:12 42:15 108:3 110:2,18 Houses [1] 48:11 However [1] 131:22 huge [1] 134:12 hundred [1] 88:15 hybrid [1] 130:20 hypo [1] 24:7 hypothetical [6] 7:9 15:20 56:11 57:11 93:23 94:1	implemented [1] 135:2 implementing [8] 5:23 9: 21 13:17 14:15 18:13 102: 23 103:6 113:14 implication [1] 58:4 implications [2] 41:11 46: 1 implicit [1] 54:3 implicitly [3] 71:8 72:5 83: 17 implied [2] 50:18 54:2 implies [2] 46:7 71:23 imply [1] 41:19 importance [1] 75:23 important [9] 12:12 18:17, 21 24:10 40:6 109:14 121: 11 124:15 125:10 impose [2] 114:13 138:2 imposed [2] 4:20 137:18 inaction [1] 34:17 inadmissible [1] 22:14 Inauguration [2] 25:6 26:4 inch [1] 19:13 incited [2] 65:17 99:10 incitement [1] 21:24 inciting [1] 101:16 include [4] 120:13 121:17 122:1 130:3 included [2] 60:18 120:4 includes [1] 72:24 including [4] 41:3 71:7 113:4 119:11 Incompatibility [4] 42:25 108:7 110:13 121:22 incongruous [1] 126:1 incorrect [1] 128:24 incredibly [1] 78:6 incumbent [1] 32:8 indefinitely [1] 83:6 independent [5] 3:15 78:2 99:8 131:12,24 Indiana [1] 8:16 indisputable [2] 100:20 102:7 individual [7] 7:15 90:11 92:17 94:13 105:4 128:6 131:11 individuals [2] 3:21 69:12 indulge [1] 124:4 ineligible [7] 12:2 25:12 76:15,22 93:15 103:16 124:6 infer [4] 33:17,19 88:9,18 inference [1] 33:21 inferences [2] 43:13 50:8 infiltration [1] 61:1 inform [2] 82:24 127:4 information [3] 127:3,7 128:7 inhabit [6] 4:15,17 8:3,8,20 138:19 initial [2] 14:23 28:7 initially [2] 30:18 113:13 insofar [2] 71:21 100:7	instances [2] 110:23 127: 8 instead [1] 26:24 institutions [2] 136:14,17 instruct [1] 137:21 insulate [1] 93:2 insurgents [1] 118:3 insurmountable [1] 32:13 insurrection [46] 6:9 13:6 14:21 27:13 30:5 33:21 48: 3 52:19 53:25 54:17 63:24 64:1,6,8,16,22 65:1,3,20 67:1 74:1 75:6 82:2 85:13, 16 86:1,6,10,12,16 87:16, 24 88:22 90:19 94:6 98:3, 5 99:10 113:5 114:6 127: 21,22,24 133:2,10 136:1 insurrectionist [20] 6:16, 25 7:4,16 9:9,22 16:4,9,9 27:25 31:25 48:25 49:2 55: 15 61:11 89:14 98:11 119: 25 133:8,25 insurrectionists [16] 6:22 10:6,15 18:15 44:4 49:8 61:1 62:15 66:1 96:10 106: 25 113:2,24 114:2,12 115: 22 intended [1] 72:15 intent [4] 21:23 46:7 98:1,4 intention [1] 8:23 interest [4] 105:3 130:7,10, 12 interests [1] 97:10 interfered [1] 132:19 interim [2] 90:21 96:5 interpret [2] 19:8 62:19 interpretation [1] 125:6 interpreted [2] 94:20 97: 17 interprets [1] 86:14 interrupt [2] 14:2 79:2 intratextualist [1] 43:17 invalid [1] 139:11 invitation [1] 14:16 invoked [1] 138:24 involve [1] 64:13 involved [5] 16:1 20:20 111:13,13 134:23 irregular [1] 59:22 isn't [6] 10:18 33:25 46:4 85:8 118:17 125:18 issue [16] 12:24 17:2 20:9, 10,15 31:25 47:2 60:22 75: 21 80:3 100:13 105:11 125:1 129:23 130:19 133: 2 issued [1] 135:2 issues [14] 13:5 40:25 60:3, 5 70:17 102:14 103:19 104:9,11 117:17 123:1,7 124:15 128:5 It'll [1] 85:2 itself [9] 6:24 12:7 20:8 22: 16 53:4 86:21 109:4 116:	11 132:18 <b>J</b> JACKSON [79] 27:3,5,10, 15,23 28:3,6,20,23 29:1,4, 8,12,15,17 33:25 36:17,18, 21,25 37:8,13,18,21 38:2, 12,14,17,19,22,25 39:3,6, 11,14,18,22 40:4 41:5 48: 24 60:12,13 61:19,20 62:4, 7,11 63:1,4,15,20 64:10,20, 25 65:5 84:8 94:25 95:11, 13,25 96:24 97:1 117:19, 20 118:16,22,24 119:1,4,6, 13 120:8,22 121:10,14 122: 7 123:3,8 137:2 jail [1] 114:15 January [12] 22:3,13,15 28: 14 54:24 63:23 82:1 85:24 89:1 102:8 103:24 139:5 JASON [3] 1:20 2:6 65:10 Jefferson [3] 12:2 35:23 61:25 Jeffersonians [1] 58:17 John [1] 46:20 Johnson [3] 88:14 120:3, 18 JONATHAN [5] 1:18 2:3, 13 3:6 137:7 judge [10] 7:1 16:3,8 21:25 32:3 55:13 83:13 103:15 134:3,4 judges [7] 21:22 58:18,19, 22 98:25 99:19,20 judging [1] 90:17 judicial [5] 91:8 93:3 104:9 128:10,22 jump [1] 74:16 jumps [1] 74:1 jurisprudence [1] 19:14 JUSTICE [468] 3:3,8 5:2,12 6:6 7:13,19 8:1,9,13 9:10, 16,24 10:1,4,11,17,22 11:2, 9,12,14,17,21,24,25 12:1,6, 10,18,22 13:4,18 14:1,7,13, 15 15:2,9,24 16:5,11,13 17: 4,8,12,18,19,21,22 18:7,20, 25 19:8,10,16,19,22 20:5, 17,24 21:15 22:1,7,22 23: 13,17 24:1,4,8,12,23 25:7, 10,17,20,23 26:13,14,15, 20,25 27:3,4,5,10,15,16,23 28:3,6,20,23 29:1,4,7,8,9, 11,12,13,15,16,17,18,20, 23 30:3,9,19,23 31:4,8,14, 17 32:15,25 33:2,13,15,16, 23,24,25 34:2,7,16,19,22, 24 35:1,7,9,10,13,17,21,23 36:2,5,13,16,16,18,21,25 37:8,13,18,21 38:2,12,14, 17,19,22,25 39:3,6,11,14, 18,22 40:4,12,15,18,21 41: 5,22,24 42:2,6,10 43:4,7, 15,18 44:8,22,23,24,25 45:
---	---	--	--	--

## Official - Subject to Final Review

<p>3,9,10,10,11,25 46:3,9,16, 25 47:7,10,12,13,13,14 48: 2,22,23 49:15,17,17,18,24 50:2,5 51:18,22 52:15,16, 16,17,22 53:2,7,13,17 54:6, 12,14,25 55:2,5,5,6,9,18, 23 56:2,16,25 57:13,16,21 58:1,22 59:2,16,23 60:1,11, 12,12,13,15 61:19,20 62:4, 7,11 63:1,4,15,20 64:10,20, 25 65:5,7,9,12 67:4,11 68: 2,16,25 69:14 70:20,21 71: 17 72:1,21,23,24 73:7,8,25 74:5,8,12,18,19 75:1,24 76: 19,21,25 77:18 78:10 79:1, 4,10,17,24 80:10,19,25 81: 14,19 82:4,12,17 83:3,21, 84:8,9,23 85:10 86:3,22,25 87:5,11,20 88:1,3,5,6,7,7,8 89:5,24 90:13,14 91:4,20, 22 92:2,9,20,24 93:5,16,19, 22,25 94:5,25 95:1,11,13, 25 96:24 97:1,3,4,5,6 98:8, 20 99:12 100:1,4,23 101: 18 102:15,15,16 103:1,5,5 104:13,13,14 106:1,21 107: 11,12,12,13 108:21,25 109: 5,17 110:7,12,21 111:2,4,6, 6,7,12,13 112:5,23 113:19, 22 114:16 115:8 116:4,5,5, 6,23 117:18,19,19,20 118: 16,22,24 119:1,4,6,13 120: 8,10,16,22 121:10,14 122: 7 123:3,8,9,11,12,16 124: 17,24 125:7,18 126:3,7,13, 17,18,21 127:5,15,19 128: 9,21 129:3,8,16,23 130:5, 13,23,24 131:17 132:3,8, 13 133:21 135:12,12,14,15 136:7,11,16,23,23,24,25 137:1,2,5,17 140:4,6 <b>Justice's</b> [1] 133:6</p>	<p>97:15 <b>key</b> [2] 9:3 12:11 <b>kind</b> [15] 14:9 16:13,19 59: 5,6,11 68:5 73:9 77:17 82: 21 91:14 96:8 104:6 114: 21 117:8 <b>knowable</b> [3] 43:22 127:3, 6 <b>knowledge</b> [1] 46:19</p> <hr/> <p><b>L</b></p> <p><b>lack</b> [2] 17:1 95:3 <b>Laird</b> [1] 58:17 <b>landed</b> [1] 50:6 <b>language</b> [17] 13:20 35:18, 19 39:1 43:24 51:1 55:25 66:7 97:17 107:19 112:1,5 114:22,22 120:5,6,13 <b>last</b> [6] 17:23 53:20 71:5 88: 17 114:20 139:20 <b>later</b> [5] 12:10,19,20 14:18 88:15 <b>Laughter</b> [4] 29:22 31:18 79:11 84:22 <b>law</b> [19] 4:14 13:14 20:16 21:11,13,14 23:11 45:5,6 62:16 76:17 83:19 86:20 88:25 89:15 102:12 105: 17 123:24 130:9 <b>lawful</b> [1] 90:22 <b>laws</b> [2] 8:2 138:18 <b>lawsuits</b> [1] 21:18 <b>lay</b> [1] 108:9 <b>layer</b> [1] 96:22 <b>lead</b> [3] 21:2,9 117:7 <b>leading</b> [2] 87:7 102:9 <b>leads</b> [1] 82:6 <b>leaning</b> [1] 49:10 <b>least</b> [14] 7:14 23:23 52:25 60:23 68:10 72:20 87:19 97:23 102:13 109:24 111: 11 114:13 118:2 120:9 <b>leave</b> [1] 60:9 <b>leaves</b> [1] 90:20 <b>led</b> [1] 30:5 <b>left</b> [4] 41:9 53:25 79:3 82:5 <b>legal</b> [4] 99:23 124:2 131: 19 134:23 <b>legality</b> [1] 91:2 <b>legislate</b> [1] 53:6 <b>legislated</b> [2] 12:15 53:23 <b>legislating</b> [1] 16:23 <b>legislation</b> [24] 5:18,23 9: 21 12:7 13:17 14:16,20 17: 14 18:14,16 19:12 30:16 31:24 48:8 56:15 63:17 92: 3 95:10,10,16 96:18 102: 23 103:7 113:15 <b>legislation's</b> [1] 103:11 <b>legislative</b> [1] 17:17 <b>legislators</b> [2] 48:12 121:4 <b>legislature</b> [7] 32:1 42:17 73:1 89:13,14 123:19 137: 11</p>	<p><b>legislatures</b> [1] 90:6 <b>legitimately</b> [1] 55:14 <b>lens</b> [1] 61:6 <b>less</b> [1] 34:11 <b>lesser</b> [1] 72:25 <b>letting</b> [1] 114:25 <b>level</b> [2] 70:22 128:2 <b>levels</b> [1] 60:25 <b>liberty</b> [2] 130:7,10 <b>life</b> [1] 8:16 <b>lift</b> [8] 4:6 28:4 31:2,9,22 33: 18 34:5 37:25 <b>lifted</b> [1] 33:7 <b>lifting</b> [1] 32:17 <b>lifts</b> [1] 6:18 <b>light</b> [1] 94:20 <b>likelihood</b> [1] 7:23 <b>limit</b> [2] 25:15 33:16 <b>limited</b> [3] 16:21 24:2 104: 22 <b>Limits</b> [24] 4:10,22,24 6:14 8:5 9:3 18:8,8 23:7,14 24: 5,9 26:2,17,18,21,22,24 79: 20 80:24 104:20 116:10 138:1,17 <b>line</b> [4] 51:21,24 52:1 109: 10 <b>lines</b> [2] 75:25 135:16 <b>liquidation</b> [1] 53:14 <b>list</b> [6] 36:25 38:3,19 39:18 119:14 120:25 <b>listed</b> [3] 39:25 40:11 51: 11 <b>listing</b> [2] 119:17 123:21 <b>litigants</b> [6] 5:25 40:1 41: 16 50:17 52:12 138:13 <b>litigation</b> [4] 21:20 63:9 111:16 123:4 <b>little</b> [14] 15:10 17:23 19:25 25:3 45:19 55:25 60:15 76: 2 77:2 96:14 107:22 108:9 113:22 131:2 <b>local</b> [4] 61:4 118:9,13 121: 2 <b>locate</b> [1] 71:13 <b>locates</b> [1] 79:15 <b>logical</b> [1] 33:23 <b>logically</b> [1] 13:4 <b>long</b> [1] 73:12 <b>look</b> [19] 13:19,20 34:4 36: 21 40:23 44:2 62:17 69:18 70:21 71:6 73:25 74:10,16 90:2,16 100:10 107:2 108: 9 120:6 <b>looked</b> [4] 121:4 124:22,22 125:15 <b>looking</b> [4] 47:17 72:2 107: 1 125:7 <b>looks</b> [1] 44:17 <b>lot</b> [13] 10:1,5 30:24 37:21 42:2 44:20 47:15 98:2 102: 3 106:11,12 130:18 135:16 <b>lots</b> [1] 47:24 <b>lower</b> [6] 8:4 60:25 78:15</p>	<p>93:10 94:12 100:15 <b>Lucia</b> [1] 139:8</p> <hr/> <p><b>M</b></p> <p><b>made</b> [19] 14:22,25 44:21 54:4 59:15,18 60:7 63:5 66:6 77:13,19,24 78:8 104: 6 114:3 130:25 134:10 139:10,14 <b>main</b> [1] 65:23 <b>major</b> [2] 105:19,21 <b>majority</b> [7] 31:10,12 34:12 79:12 89:12 96:17 124:1 <b>mandamus</b> [1] 17:2 <b>mandated</b> [3] 86:21 88:25 89:2 <b>mandatory</b> [2] 50:13 73:24 <b>manner</b> [7] 72:10,10 73:14 80:16 137:12,15,24 <b>many</b> [5] 21:8 64:15 69:11 70:3 106:6 <b>Marshall</b> [1] 58:23 <b>matter</b> [5] 1:13 15:15 21:22 49:5 56:20 <b>McClung</b> [1] 16:25 <b>McPherson</b> [1] 69:19 <b>mean</b> [29] 10:12 14:2 15:18 16:12 26:17 27:8,23 33:9 41:6 45:4 47:15,19 50:21 55:24 58:14 59:6,20 60:19 63:8 67:6 70:22 73:4 74:3 75:16 76:24 77:9,10 85:11 122:12 <b>meaning</b> [11] 22:8 23:5 35: 12,18 40:2 52:25 100:25 101:12,21 108:14,15 <b>meaningful</b> [1] 126:16 <b>means</b> [16] 10:12,13 12:23 19:11 32:21 34:19 48:18 56:10 71:16 73:3,4 75:8, 10 114:21 116:24,25 <b>meant</b> [1] 113:14 <b>mechanism</b> [5] 12:17 16: 23 31:24 129:2,4 <b>mechanisms</b> [1] 53:24 <b>meet</b> [3] 4:20 126:9 133:12 <b>meeting</b> [1] 126:11 <b>member</b> [5] 8:3 32:2 43:1 46:23 103:13 <b>members</b> [18] 3:22 4:15,17 7:2 19:9 32:3 43:5 50:22 51:4,16 79:8 103:13,15,16, 23 122:4,5,18 <b>mentioned</b> [4] 50:9 53:20 62:2 71:25 <b>mere</b> [2] 33:17 66:13 <b>merely</b> [3] 71:16 72:9,12 <b>merits</b> [2] 78:17 123:1 <b>messiness</b> [1] 135:5 <b>met</b> [2] 64:25 138:8 <b>Michigan</b> [2] 75:13,13 <b>Midnight</b> [1] 58:18 <b>midstream</b> [1] 89:21 <b>might</b> [19] 21:22 22:14 36:</p>	<p>9 46:20 55:25 59:9 60:3 61:3 85:11 91:7 108:9 110: 17 117:7 119:10 121:8 130:25 131:10,24 137:18 <b>military</b> [3] 39:7 90:22 91:1 <b>million</b> [1] 116:1 <b>millions</b> [1] 4:25 <b>mind</b> [4] 11:17 13:5,10 60: 20 <b>minor</b> [3] 104:24 105:6,17 <b>minute</b> [2] 9:11 129:6 <b>mirrors</b> [1] 19:12 <b>misdemeanors</b> [1] 51:10 <b>miserable</b> [1] 48:14 <b>misnomer</b> [1] 20:2 <b>mistake</b> [1] 66:6 <b>MITCHELL</b> [202] 1:18 2:3, 13 3:5,6,8 5:2,11 6:13 7: 18,21 8:11,19 9:15,23,25 10:3,10,16,20,24 11:5,11, 13,16,20,23 12:5,11,20 13: 3,11,23 14:1,6,12,14 15:3, 15 16:20 17:6,10 18:6,24 19:7,18,21 20:4,10,23 21: 10 22:6,12 23:2,16,25 24:3, 11,15 25:1,9,16,19,21,24 26:19,22 27:2,9,14,20 28:1, 4,12,22,24 29:3 30:2,8,11, 20 31:3,7,13,19 32:24 33:1, 9,22 34:6,13,17,21,23,25 35:3,16,20 36:3,7,15,20,24 37:7,12,16,20,23 38:4,13, 16,18,21,24 39:2,5,9,13,17, 21,23 40:8,14,17,20,22 41: 10,22,23 42:1,5,9,12 43:5, 12,16,19 44:16 45:3,18 46: 1,6,15,18 47:5,8,11 48:1,6 49:4,16,22,25 50:4,7 51:20, 23 53:1,12,16,19 54:9,13, 20 55:1,4,8,17,19 56:1,9, 24 57:7,14,17,25 58:8 59: 15,18,25 60:2 61:18,23 62: 6,9,12 63:3,12,19 64:4,15, 23 65:6,8 77:19 81:4 107: 15 132:19 137:6,7,9 140:5 <b>mitigate</b> [1] 138:25 <b>Mm-hmm</b> [23] 10:3,10,16 11:16 12:5 18:24 20:23 22: 6 25:23 27:14 36:20,24 37: 12 38:18 39:2 42:1,9 46: 15 53:1 56:1,24 63:3 109: 5 <b>modify</b> [1] 44:12 <b>moment</b> [8] 9:11 84:6 91:5, 11,25 92:12 94:6 124:6 <b>Moore</b> [1] 120:5 <b>moot</b> [1] 70:18 <b>morning</b> [1] 3:4 <b>most</b> [3] 75:1 96:10 113:17 <b>motivation</b> [1] 44:19 <b>motivations</b> [1] 48:12 <b>move</b> [4] 8:6 36:6,14 94:11 <b>mover</b> [1] 77:6 <b>moving</b> [1] 138:9</p>
---	--	--	--	---

## Official - Subject to Final Review

<p><b>Ms</b> <sup>[35]</sup> 123:10,11,12,16 124:20 125:2,9,22 126:5,9, 14,20,25 127:8,18 128:1, 13,25 129:11,21 130:1,8, 17 131:8,21 132:6,12 133: 1 134:8 135:22 136:9,13, 18 137:4,9 <b>much</b> <sup>[10]</sup> 5:3 15:16 44:2 60:6 77:14 83:7 88:8,18 90:5,8 <b>multiple</b> <sup>[2]</sup> 99:20,20 <b>MURRAY</b> <sup>[108]</sup> 1:20 2:6 65: 9,10,12 67:10 68:13,20 69: 10 70:3 71:12,20 72:7 73: 12 74:17,19 75:18 76:7,20 77:21 78:16 79:1,8,12,23 80:7,14,23 81:12,15,23 82: 7 83:2 84:2 85:6,22 86:13 87:20 88:20 89:18 90:3,25 91:13,21 92:1,6,18,21,25 93:12,17,21,24 94:3,14,25 95:8,12,15 96:9,25 97:16 98:15 99:2,22 100:3,5 101: 7 102:6,25 103:12 104:14 105:9 106:16,23 108:13,22 109:2,6,23 110:9,15,25 111:3,5 112:4 113:12,21 114:8 115:7 116:22 117: 11 118:15,23,25 119:3,5,7 120:2,18 121:7,11,16 122: 13 123:5 131:13 137:9 138:24 <b>Murray's</b> <sup>[2]</sup> 139:3,18 <b>must</b> <sup>[9]</sup> 8:3 10:13 19:4 31: 17 83:25 123:25 126:9 137:14 138:8 <b>mutually</b> <sup>[1]</sup> 23:2</p>	<p><b>needing</b> <sup>[1]</sup> 12:7 <b>needs</b> <sup>[5]</sup> 7:11 26:7 64:16 109:12 124:14 <b>nefarious</b> <sup>[1]</sup> 46:7 <b>negate</b> <sup>[3]</sup> 81:25 83:5,16 <b>negating</b> <sup>[1]</sup> 91:18 <b>Neither</b> <sup>[2]</sup> 51:15,16 <b>never</b> <sup>[8]</sup> 64:4 66:2 78:19 84:21 88:11 97:17 112:15 120:1 <b>nevertheless</b> <sup>[3]</sup> 92:1,22 93:17 <b>new</b> <sup>[5]</sup> 7:24 9:2 54:12,14 55:11 <b>next</b> <sup>[6]</sup> 52:21 63:8 115:10 122:11 126:24 139:23 <b>nobody</b> <sup>[1]</sup> 102:22 <b>Nobody's</b> <sup>[1]</sup> 80:1 <b>nominated</b> <sup>[1]</sup> 117:16 <b>non-mutual</b> <sup>[3]</sup> 21:5,11 133:22 <b>non-official</b> <sup>[1]</sup> 110:6 <b>non-precedential</b> <sup>[2]</sup> 12:9 13:18 <b>non-self-executing</b> <sup>[4]</sup> 5: 14,15,16 20:14 <b>non-self-execution</b> <sup>[1]</sup> 11:6 <b>None</b> <sup>[1]</sup> 64:25 <b>nor</b> <sup>[4]</sup> 59:10 73:9 83:17 137:23 <b>NORMA</b> <sup>[1]</sup> 1:6 <b>normal</b> <sup>[1]</sup> 90:10 <b>normally</b> <sup>[2]</sup> 5:16 15:17 <b>note</b> <sup>[1]</sup> 83:11 <b>nothing</b> <sup>[6]</sup> 12:23 19:11 34: 14 72:7 81:17 124:8 <b>notice</b> <sup>[1]</sup> 95:21 <b>nouns</b> <sup>[1]</sup> 108:11 <b>novo</b> <sup>[4]</sup> 78:12 131:20,22 132:4 <b>nuanced</b> <sup>[1]</sup> 25:3 <b>nullify</b> <sup>[1]</sup> 16:7 <b>number</b> <sup>[10]</sup> 68:7 69:12 84: 24 101:8,10 103:19 104:4 132:15,18,21 <b>numerous</b> <sup>[1]</sup> 3:15</p>	<p><b>obvious</b> <sup>[1]</sup> 106:22 <b>obviously</b> <sup>[3]</sup> 50:19 113:3 114:18 <b>occurred</b> <sup>[1]</sup> 64:19 <b>occurs</b> <sup>[1]</sup> 21:20 <b>odd</b> <sup>[3]</sup> 48:16 96:14 108:9 <b>offense</b> <sup>[2]</sup> 32:21,23 <b>office</b> <sup>[114]</sup> 4:7,8,12 6:8,17, 17 7:6,8 8:15,17 9:5,9 10: 15 12:3 18:11,22,23 19:2 26:8 28:21,25 30:6 32:9 37:10 40:2,6 41:1,14,19 42:4 43:2 44:5 45:14,21 47:18 48:4,5,23 49:11,12 51:9 54:19 56:23 57:2,5 58:2,11 62:6,16 65:22 66: 3,11,14,22 69:11 80:11 81: 3,4,9,16,17 82:5,20 83:1, 12,14,24 90:12,20 91:24, 25 93:15,18 94:16,17,18, 22,23 96:11,13 105:4 107: 23 108:5,10,16 109:19 110: 1,8,10,13,24 111:9 113:3,8, 25 114:4 116:19 117:9 120:6,19,21 121:13,15,16, 19,21 122:4,21 124:7 138: 9,9 139:5,20 140:1 <b>office/officer</b> <sup>[1]</sup> 29:6 <b>officeholders</b> <sup>[4]</sup> 13:7 45: 2 52:11 58:6 <b>officer</b> <sup>[42]</sup> 3:18,19,25 23:5 29:19 30:7 36:14 38:6 41: 12 42:4 45:16,23 46:21 47: 18 48:18,21 49:10,14,20 51:24 52:8 56:17 57:14 66: 11 68:24 79:6 82:9,15 90: 15 91:6 92:21 93:1 107:14, 23 108:10,14 109:19,25 110:24 138:25 139:6,13 <b>officers</b> <sup>[37]</sup> 16:18,19,24 39:8 42:13,16,18,20,23 50: 12,21,24 51:2,8,11,17,20 52:2,2,8,9 53:11 58:10 83: 22 90:22 91:1 107:17 108: 3,19,23 109:3 110:8,9,18, 22 139:9,15 <b>offices</b> <sup>[23]</sup> 10:7 37:1,11 38:20 39:8,9,11 40:10 41: 9 42:14,24 43:6 49:1,6 60: 14 61:5 68:8,8 69:12 83: 19 121:19,23 122:5 <b>official</b> <sup>[8]</sup> 8:6 16:7 32:8 59: 1 82:14 93:10 94:12 110: 11 <b>officials</b> <sup>[9]</sup> 3:20 4:1 13:2,8 17:2 48:19 51:3,3 57:10 <b>often</b> <sup>[1]</sup> 20:5 <b>oftentimes</b> <sup>[2]</sup> 114:11 130: 21 <b>Okay</b> <sup>[24]</sup> 25:21 29:13 33: 22 37:8 40:17 44:22 47:12 56:16 59:2 60:11 79:17,24 80:3 81:14 92:11 93:4,23 94:2 111:2,2 112:23 116:</p>	<p>23 126:13 135:9 <b>old</b> <sup>[3]</sup> 25:5 26:1 80:2 <b>once</b> <sup>[3]</sup> 96:11 116:14 117: 13 <b>one</b> <sup>[51]</sup> 11:15 12:25 17:23 23:23 31:10 32:19 33:17 34:12 35:2 37:9,11 44:10 47:20 49:6,7 50:15 53:25 58:2 59:3 60:14 62:1 64: 15 66:15 70:11 73:2 82:8, 10,22 85:17 93:6,7 95:22 96:11 101:8,19 103:3 104: 24 107:24 109:12 110:17 113:2,4 116:13 118:21 128:2 131:2,14 132:15 134:2 135:15 137:17 <b>one-off</b> <sup>[2]</sup> 10:25 11:2 <b>one-offs</b> <sup>[1]</sup> 77:13 <b>ones</b> <sup>[1]</sup> 58:7 <b>only</b> <sup>[44]</sup> 3:20,25 4:16,24 7: 7 9:9 10:20 11:1 14:20 16: 7 17:8 18:8 20:12 28:24 30:14 34:9,22 42:20 46:5, 12,12 48:2 50:25 52:12,23 53:25 54:20 56:10 57:4,12 58:12,21,25 67:10 74:23 76:5 82:22 90:11 91:17 94: 18,22 96:15 97:22 137:22 <b>open</b> <sup>[1]</sup> 60:9 <b>open-and-shut</b> <sup>[1]</sup> 133:11 <b>opening</b> <sup>[4]</sup> 40:25 63:25 64:5,6 <b>opens</b> <sup>[1]</sup> 21:18 <b>operates</b> <sup>[1]</sup> 92:2 <b>opine</b> <sup>[1]</sup> 101:11 <b>opined</b> <sup>[1]</sup> 101:13 <b>opines</b> <sup>[1]</sup> 52:22 <b>opinion</b> <sup>[7]</sup> 17:12 35:23 86: 25 88:21 101:4 102:7 111: 12 <b>opportunity</b> <sup>[11]</sup> 29:19 59: 14 95:21,24 100:7 107:15 112:7,8,9,17,18 <b>opposed</b> <sup>[5]</sup> 58:7 85:17 118:8,14 132:25 <b>opposite</b> <sup>[1]</sup> 22:11 <b>oral</b> <sup>[7]</sup> 1:13 2:2,5,9 3:6 65: 10 123:14 <b>order</b> <sup>[5]</sup> 84:20 88:17 92:7 93:10 94:13 <b>ordering</b> <sup>[1]</sup> 89:15 <b>orders</b> <sup>[1]</sup> 90:23 <b>ordinarily</b> <sup>[1]</sup> 77:22 <b>ordinary</b> <sup>[1]</sup> 86:20 <b>organized</b> <sup>[2]</sup> 64:13,17 <b>original</b> <sup>[5]</sup> 35:12 36:11 42: 7 43:8 52:25 <b>other</b> <sup>[69]</sup> 15:18 21:2,8,8,18, 20,24 22:12 23:3,14 27:15 35:23 36:8 39:7 41:2,11 46:2,13,19 54:4 58:16 60: 6 62:19 66:2,16 68:20 71: 2 73:15 75:4 76:13,13,15 78:21 81:15 84:13 86:4,14,</p>	<p>24 89:16 90:22 94:20 95: 18 101:19 102:11,17 103:3 106:14,17 107:7,25 111:9 112:15 120:11 122:4 124: 3 128:12,17 129:19 130:2 131:20 132:10,25 133:14, 18 134:17 135:17,18 137: 15 140:2 <b>others</b> <sup>[7]</sup> 47:2 49:21 84:18 85:1 128:19 131:4 137:19 <b>otherwise</b> <sup>[6]</sup> 35:19 91:18 102:12 117:7 122:1 126:1 <b>oyster</b> <sup>[1]</sup> 32:9 <b>out</b> <sup>[26]</sup> 15:24 17:8,9 27:16 30:3 31:15 35:11 40:24 41: 16 49:7 54:13 57:5,8,18 74:1,6,16 87:6 94:18 96: 17 114:19,20 116:19 120: 17 134:10 135:4 <b>outcome</b> <sup>[1]</sup> 89:8 <b>outside</b> <sup>[3]</sup> 32:4 57:3 80:21 <b>over</b> <sup>[8]</sup> 79:6 88:17 106:4,6 110:19 111:8 117:15 120: 3 <b>overall</b> <sup>[2]</sup> 73:10,10 <b>overcome</b> <sup>[1]</sup> 117:9 <b>overthrow</b> <sup>[4]</sup> 64:14,17,21, 24 <b>own</b> <sup>[23]</sup> 8:23 13:2,6 16:15, 16,18 22:20 67:8 76:5,8,17 78:7,24,25 90:6,7 99:1 105:5 106:18 107:8,9 116: 17 136:19</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> <sup>[1]</sup> 140:8 <b>PAGE</b> <sup>[3]</sup> 2:2 26:16 78:18 <b>pages</b> <sup>[1]</sup> 122:25 <b>painful</b> <sup>[1]</sup> 115:14 <b>panoply</b> <sup>[1]</sup> 49:1 <b>papers</b> <sup>[2]</sup> 107:2 127:20 <b>paperwork</b> <sup>[3]</sup> 127:10,14 133:9 <b>pardon</b> <sup>[6]</sup> 31:22 32:18,20 33:7 83:8 113:18 <b>part</b> <sup>[6]</sup> 12:7 41:13 44:17 53:20 121:15 124:23 <b>participate</b> <sup>[1]</sup> 125:13 <b>participated</b> <sup>[2]</sup> 6:9 30:5 <b>participation</b> <sup>[2]</sup> 125:20, 21 <b>particular</b> <sup>[13]</sup> 16:8 20:7 27:6 47:24 60:8 73:3 78: 24 82:20 86:18 108:16 109:15 121:13 133:24 <b>particularly</b> <sup>[6]</sup> 12:3 68:3 100:19 107:16 109:21 134: 11 <b>parties</b> <sup>[3]</sup> 99:5 105:19,21 <b>partly</b> <sup>[1]</sup> 35:22 <b>parts</b> <sup>[3]</sup> 36:22 41:2,11 <b>party</b> <sup>[8]</sup> 67:20 94:7 104:24 105:6,17 125:13,20,25 <b>pass</b> <sup>[2]</sup> 48:11 96:18</p>
---	---	---	---	---

## Official - Subject to Final Review

<p><b>passed</b> [1] 17:16  <b>passes</b> [1] 89:15  <b>past</b> [1] 107:1  <b>Paulsen</b> [1] 31:16  <b>peaceful</b> [1] 65:19  <b>penalty</b> [1] 114:14  <b>pending</b> [1] 96:6  <b>people</b> [27] 20:25 22:8 43:20 44:3,6 48:3 58:19 61:8,24 62:14 68:7 69:2,21 70:25 83:23 84:5 85:12 89:20 91:7 101:24 105:20 109:7 114:24,25 117:3 119:17 135:23  <b>perceive</b> [1] 126:11  <b>perfectly</b> [1] 49:2  <b>perhaps</b> [9] 8:22 21:8 22:18 36:9 41:10 98:13 110:17 128:11 129:24  <b>period</b> [3] 68:4 87:5 90:21  <b>permissible</b> [1] 18:21  <b>permit</b> [9] 9:13,21 10:14 21:1 23:19 83:22  <b>permitted</b> [3] 7:22 95:4 111:23  <b>person</b> [24] 8:20 25:4 32:22 33:4,5,20 37:1,13,14 38:22 92:14,15 94:16 97:13,15 101:3 108:15 109:25 119:24,25 120:11 127:21 128:2 133:12  <b>perspective</b> [1] 42:8  <b>persuasive</b> [1] 105:2  <b>Petitioner</b> [8] 1:4,19 2:4,14 3:7 46:12 123:24 137:8  <b>Petitioner's</b> [1] 63:22  <b>phrase</b> [6] 11:7 20:11 40:2,7 41:2 52:8  <b>phrased</b> [2] 39:13 40:24  <b>phrases</b> [2] 22:8 66:13  <b>pick</b> [1] 62:18  <b>picked</b> [2] 90:6 105:21  <b>pin</b> [1] 45:11  <b>place</b> [8] 32:22 34:10 71:5 82:10 91:9,14 111:14 136:14  <b>placed</b> [1] 9:18  <b>plain</b> [2] 84:10 99:10  <b>plausibly</b> [1] 64:8  <b>play</b> [4] 57:8 89:19 92:22 135:4  <b>played</b> [1] 57:18  <b>please</b> [8] 3:9 15:2 17:21 65:13 93:22,25 94:2 123:17  <b>plenary</b> [6] 71:16 72:9,12 80:8 89:7,7  <b>plethora</b> [1] 68:6  <b>plus</b> [3] 14:10 35:2 124:23  <b>point</b> [46] 6:1 12:11 19:5 25:11,14 26:16 29:6 35:22 36:14 37:25 40:13,19,24 41:6,16 48:21 53:3 59:3,7,8 63:15 64:20 70:5,22 77:17,24 78:19 81:4 86:22 87:25 88:4 94:3 101:10 104:6 107:14,24 110:16 114:9 117:24 119:7 120:10,24 121:7 129:3 132:16 133:7  <b>pointed</b> [4] 31:15 87:6 93:6 120:16  <b>points</b> [6] 27:16 77:21 101:8 115:7 118:15 133:20  <b>poked</b> [1] 107:22  <b>police</b> [1] 70:15  <b>policy</b> [4] 13:19 15:25 44:19 49:5  <b>political</b> [6] 101:17 105:6 125:13,20,25 132:23  <b>polis</b> [2] 90:1 104:12  <b>position</b> [20] 17:25 18:1 22:25 30:19 40:13 58:14 64:3 71:10 82:16 84:11,12 101:19 102:17 111:19 112:24,25 113:1 115:1 132:1,8  <b>positions</b> [4] 58:19 66:8 69:16 133:15  <b>possibility</b> [7] 21:2,18 54:13 63:9 99:8 124:1,4  <b>possible</b> [6] 60:25 66:4 101:1 132:7 138:21,25  <b>potential</b> [4] 40:25 85:7 117:22 134:24  <b>potentially</b> [4] 4:25 35:24 134:5 135:19  <b>power</b> [54] 31:23 61:3 65:19 66:8,19 70:13,15,24 71:3,4,15,22,23,24 72:2,2,4,9,12,16,16 73:1,1,13,21 74:25 76:1,8 79:16 80:8,15 83:5,16 89:4,6,17 103:15 105:13 106:4,6,19,20 107:8 109:12 111:8,24 115:16 117:15,17 124:9 129:22 133:17 137:20,24  <b>powerful</b> [1] 112:1  <b>powers</b> [7] 17:17 67:25 79:5,13 104:15 123:18 132:17  <b>practical</b> [1] 15:22  <b>practice</b> [1] 53:8  <b>praising</b> [1] 101:17  <b>precedent</b> [6] 12:12,14 53:2,5 58:16,24  <b>precedential</b> [2] 11:22 13:22  <b>precedents</b> [2] 16:25 18:19  <b>precisely</b> [1] 130:9  <b>preclusive</b> [2] 21:12,17  <b>predict</b> [1] 7:22  <b>predictions</b> [1] 84:21  <b>preempt</b> [1] 95:10  <b>preemption</b> [9] 10:18 14:5 15:6 35:5 54:3,3 59:8 96:21 116:20  <b>preempts</b> [2] 16:16 116:11  <b>preexisting</b> [1] 84:1  <b>prepositions</b> [2] 66:13</p>	<p>108:10  <b>prerogative</b> [1] 137:14  <b>present</b> [5] 78:22 83:17 95:24 97:18 100:7  <b>presented</b> [2] 100:11 128:2  <b>preserve</b> [1] 107:8  <b>preside</b> [1] 110:19  <b>presidency</b> [28] 9:6 12:3 24:6 37:10 40:10 41:18 42:21,22 45:14,20 49:7 60:14,18,20 61:12,16,21 62:2,3,15 91:3 94:19 103:18 118:14 119:11 120:21 122:3 138:3  <b>President</b> [145] 3:11,12,16,17,22 4:5 13:9 19:4 21:6,23 24:13,21 26:7,9 28:13,16 30:4 32:20 38:3,11 39:6,7,14,15,24,25 41:20 42:15 45:13,16,22 46:13,19,19,21,22,24 47:4 48:16 49:3 50:11,14,19,22,23 51:4,5,7,10,11,14,16 52:1,5 56:18 57:4,12 58:9,10 59:5 61:25 64:7 65:18,21,22 66:2,16 73:19 75:4,5,6 76:15,15,22 77:24 78:7,16 82:2 83:8,11,18 85:17 88:14,14 89:9 90:18,19,23 91:16,19 92:15,15 93:11,13,14 97:9 98:11 100:20,25 101:8,12,16,21 102:8 103:21 104:1 106:15,17 107:18 108:2,23,24 109:8,9,13,22 110:1 112:6,14 113:10 115:19,25 116:14,18 117:16 119:14,17,20,22,22 120:4,4,13 121:1 122:5,5,15,20,24 134:6 139:4,22,23,25  <b>president's</b> [1] 109:12  <b>presidential</b> [36] 4:3 20:22 23:14 25:25 37:14 42:19 47:6 54:22 65:19 66:18,25 70:14 71:8,14 73:14 80:16 85:4 89:4 95:4 109:7 117:12,23 118:5,8,19 121:11,18 122:11,15,20 123:22 124:9 129:14 133:18 137:12,21  <b>presidents</b> [2] 48:4 88:16  <b>pressing</b> [1] 60:23  <b>presumably</b> [1] 86:8  <b>pretty</b> [3] 7:14,20 85:4  <b>prevent</b> [2] 69:4 113:2  <b>preventing</b> [1] 118:12  <b>previous</b> [1] 46:24  <b>previously</b> [2] 37:14 44:5  <b>primary</b> [5] 19:2 74:13 123:22 124:5 134:16  <b>principal</b> [2] 45:12,15  <b>principle</b> [6] 17:3 106:3,4,8 115:6 116:20  <b>principles</b> [7] 15:16 89:19</p>	<p>90:10 105:10,15 134:23 135:7  <b>prior</b> [3] 4:15 33:20 138:20  <b>private</b> [1] 20:8  <b>privilege</b> [1] 70:24  <b>Pro</b> [6] 42:16 52:1 108:2,23 109:22 110:1  <b>probably</b> [2] 25:10 90:3  <b>probative</b> [3] 35:17,20 36:8  <b>problem</b> [4] 31:20 105:23 117:4 138:5  <b>problems</b> [2] 50:16 105:22  <b>procedural</b> [1] 122:16  <b>procedure</b> [12] 76:18 83:20 91:14 92:5,7 103:20 123:6 127:12,16 128:4 129:18 131:6  <b>procedures</b> [3] 59:9 106:24 133:23  <b>proceed</b> [1] 136:11  <b>proceeding</b> [6] 55:7 56:4 60:8 78:20 129:19 131:14  <b>proceedings</b> [3] 59:21 84:13 129:20  <b>process</b> [32] 57:3,5 59:6,16 60:3,5 67:22 71:1,9 74:20,23 77:14 95:20,21 104:9 111:17 112:3,11,15,20 124:12 128:16 129:25 130:3,5,6,11 131:2,3,10 134:19 135:24  <b>processes</b> [10] 43:20 52:20 67:24 74:5,6,15 111:21 135:3,24 136:10  <b>proclaims</b> [1] 97:7  <b>produce</b> [1] 22:19  <b>Professor</b> [6] 22:18,20 31:15,15 101:11 104:5  <b>profound</b> [1] 43:11  <b>prohibit</b> [1] 91:7  <b>prohibited</b> [1] 33:4  <b>prohibits</b> [2] 18:8 113:5  <b>proof</b> [6] 84:16 98:14,24 99:18 111:10 129:19  <b>proper</b> [4] 8:1 13:14 22:3 127:12  <b>property</b> [1] 70:25  <b>proportional</b> [2] 19:20,24  <b>proportionality</b> [1] 18:18  <b>proposed</b> [1] 44:3  <b>proposition</b> [1] 20:6  <b>prosecuted</b> [3] 32:22 54:16,23  <b>prosecution</b> [2] 114:2 123:7  <b>prosecutions</b> [2] 97:20 114:11  <b>prosecutor</b> [2] 32:7 56:21  <b>prosecutors</b> [1] 54:17  <b>protect</b> [1] 115:13  <b>protected</b> [1] 59:12  <b>protection</b> [3] 71:2 130:3 137:23</p>	<p><b>protections</b> [1] 131:15  <b>protects</b> [1] 115:21  <b>proved</b> [1] 128:3  <b>proves</b> [1] 10:1  <b>provide</b> [6] 9:13 56:10 95:9 97:11 128:22 131:24  <b>provided</b> [8] 9:18 12:14,16 14:16 15:8 17:13 53:22 95:20  <b>provides</b> [4] 28:18 60:17 96:21 129:17  <b>province</b> [1] 57:24  <b>provision</b> [25] 5:16 9:14 15:18 20:7 26:21 27:11 31:5,21 32:10 43:2 56:19 58:5 61:14 62:24 74:24 81:8,24 85:8 114:17 116:17 122:10 124:18,21 128:10 129:25  <b>provisions</b> [10] 14:25 27:16 30:17 43:21 50:9 86:15 94:20 104:18 125:10 137:16  <b>public</b> [4] 35:12 52:25 65:22 78:8  <b>published</b> [1] 69:13  <b>purport</b> [1] 18:11  <b>purpose</b> [5] 56:21 68:25 69:1 98:5 115:9  <b>pursuant</b> [3] 17:17 51:15 52:5  <b>pursuit</b> [1] 98:6  <b>push</b> [3] 35:25 77:2 132:14  <b>put</b> [14] 34:9 40:5 59:22 75:1 90:11 92:11 93:3,4,18 102:18 104:20 119:14 123:25 127:12  <b>puts</b> [1] 51:25  <b>putting</b> [1] 30:6</p>
<b>Q</b>			
<p><b>qualification</b> [14] 4:21 7:24 9:1,2 18:1,4 19:3 24:9,17 76:10 83:17 105:24 126:4 132:24  <b>qualifications</b> [20] 4:11 7:1,5 18:9,10 23:15 24:6 25:15 32:3 71:25 73:15 79:25 80:22 81:10,15 103:15 130:22 133:13,18 138:3  <b>qualified</b> [11] 63:24 67:23 90:12 124:19,23 125:1,12,14,17,24,25  <b>qualify</b> [7] 7:7 26:7,10 28:17 45:13,14 65:3  <b>question</b> [45] 8:19 11:14 19:8,23 20:21 21:7,15 24:3 25:13 30:12 36:18 44:10 55:2 59:3,8,25 63:2,21 70:21 74:2,21 75:2,5,20 76:12 82:8 86:4 89:6 90:14,24 92:10 93:6 94:10 96:3 98:9,10 99:13 101:5 102:12 105:12 112:23 113:19 114:</p>			

## Official - Subject to Final Review

20 130:23 135:16 <b>questions</b> <sup>[26]</sup> 5:1 13:9,12 22:11 30:25 52:19 67:3 74: 2,10,15,21 75:22 77:25 95: 17,18 99:17 106:9 107:3 111:8,9 116:12 117:3 124: 16 133:14 135:17 140:2 <b>quick</b> <sup>[1]</sup> 84:20 <b>quite</b> <sup>[4]</sup> 21:1 24:3 58:15 75:17 <b>quo</b> <sup>[11]</sup> 14:17,24 30:17 32: 6,8 56:19,25 57:6,8 114:16 116:17	<b>received</b> <sup>[4]</sup> 70:17 84:7 87: 22 113:17 <b>recent</b> <sup>[1]</sup> 139:8 <b>recognition</b> <sup>[1]</sup> 130:10 <b>recognize</b> <sup>[2]</sup> 21:11 133: 22 <b>Reconstruction</b> <sup>[2]</sup> 68:3 85:25 <b>record</b> <sup>[30]</sup> 21:19 60:24 77: 5,7,9,9,10,11 78:3,5,18,21 95:23 98:12,17,19 99:3,4, 24 100:2,4,9,15 104:10 124:14 131:5,19 132:1,5 135:2 <b>records</b> <sup>[2]</sup> 99:16 100:6 <b>red</b> <sup>[1]</sup> 41:17 <b>Redeemers</b> <sup>[1]</sup> 68:4 <b>redefine</b> <sup>[1]</sup> 11:6 <b>reduces</b> <sup>[1]</sup> 134:24 <b>redundancy</b> <sup>[1]</sup> 96:19 <b>reelected</b> <sup>[1]</sup> 139:22 <b>refer</b> <sup>[2]</sup> 3:25 52:10 <b>referring</b> <sup>[4]</sup> 20:6 66:14 108:18,18 <b>refers</b> <sup>[6]</sup> 3:20 18:22 52:12, 19 109:3 121:22 <b>Reform</b> <sup>[2]</sup> 104:3 122:23 <b>refuse</b> <sup>[1]</sup> 98:17 <b>refused</b> <sup>[1]</sup> 67:14 <b>refusing</b> <sup>[3]</sup> 68:15 103:16 115:24 <b>regard</b> <sup>[1]</sup> 92:17 <b>regardless</b> <sup>[1]</sup> 44:5 <b>regime</b> <sup>[1]</sup> 33:11 <b>regulate</b> <sup>[1]</sup> 82:25 <b>regulating</b> <sup>[1]</sup> 118:18 <b>reinforce</b> <sup>[1]</sup> 23:3 <b>reinforced</b> <sup>[1]</sup> 53:4 <b>reinforces</b> <sup>[2]</sup> 51:6 53:14 <b>reinforcing</b> <sup>[1]</sup> 52:9 <b>reinstating</b> <sup>[1]</sup> 30:17 <b>reject</b> <sup>[3]</sup> 48:20 55:20 66:5 <b>rejects</b> <sup>[2]</sup> 139:2,17 <b>related</b> <sup>[2]</sup> 42:11 113:15 <b>relates</b> <sup>[1]</sup> 27:12 <b>relationship</b> <sup>[1]</sup> 97:24 <b>release</b> <sup>[1]</sup> 97:11 <b>relevant</b> <sup>[6]</sup> 35:11 36:7 43: 23 58:16,24 87:18 <b>reliance</b> <sup>[4]</sup> 8:5 54:5 71:18, 21 <b>relied</b> <sup>[3]</sup> 13:23 53:21 104: 15 <b>relief</b> <sup>[3]</sup> 17:2 55:7,11 <b>relies</b> <sup>[4]</sup> 13:19 53:4 66:10 100:19 <b>relocating</b> <sup>[1]</sup> 8:24 <b>rely</b> <sup>[5]</sup> 11:7 16:25 35:5,21 137:10 <b>relying</b> <sup>[5]</sup> 10:6 11:18 12:9 43:19 71:18 <b>remand</b> <sup>[1]</sup> 60:10 <b>remedies</b> <sup>[5]</sup> 15:4,5 54:2,4 91:8	<b>remedy</b> <sup>[4]</sup> 30:16 57:20 91: 17 92:7 <b>remotely</b> <sup>[1]</sup> 112:19 <b>removal</b> <sup>[3]</sup> 58:16 83:5 91: 18 <b>remove</b> <sup>[6]</sup> 56:22 58:13 68: 23 82:23 83:16 124:2 <b>removed</b> <sup>[5]</sup> 51:8 58:11 81: 20 82:21 94:24 <b>removing</b> <sup>[1]</sup> 81:24 <b>render</b> <sup>[1]</sup> 117:5 <b>reorganization</b> <sup>[1]</sup> 44:17 <b>repeal</b> <sup>[1]</sup> 14:24 <b>repealed</b> <sup>[5]</sup> 14:18 44:13, 15,20 58:17 <b>repeatedly</b> <sup>[1]</sup> 38:7 <b>reply</b> <sup>[5]</sup> 14:3 40:23 64:2, 12 77:24 <b>report</b> <sup>[5]</sup> 22:4,13,15,16 84: 17 <b>repository</b> <sup>[1]</sup> 106:10 <b>represent</b> <sup>[2]</sup> 4:18 126:19 <b>representative</b> <sup>[2]</sup> 39:4 110:5 <b>representatives</b> <sup>[4]</sup> 61:5 118:9 121:20,25 <b>represents</b> <sup>[1]</sup> 8:4 <b>Republican</b> <sup>[1]</sup> 85:1 <b>Republicans</b> <sup>[2]</sup> 44:1 69: 23 <b>requests</b> <sup>[1]</sup> 84:3 <b>require</b> <sup>[5]</sup> 7:17 10:14 44: 12 78:1 116:3 <b>requirement</b> <sup>[1]</sup> 138:7 <b>requirements</b> <sup>[2]</sup> 19:13 27: 18 <b>requires</b> <sup>[7]</sup> 4:14,16 9:8,20 86:18 88:24 125:12 <b>requiring</b> <sup>[4]</sup> 8:7 66:8 94: 15 138:18 <b>resemble</b> <sup>[1]</sup> 111:15 <b>reserved</b> <sup>[1]</sup> 79:15 <b>residence</b> <sup>[1]</sup> 132:10 <b>residency</b> <sup>[3]</sup> 4:14 8:2 138: 14 <b>resident</b> <sup>[2]</sup> 8:14,16 <b>resist</b> <sup>[1]</sup> 86:19 <b>resolution</b> <sup>[2]</sup> 78:1 136:6 <b>resolve</b> <sup>[6]</sup> 96:1 116:12 122:25 123:20 124:14 128: 5 <b>respect</b> <sup>[16]</sup> 5:4 11:4 12:23 20:21 22:17 25:21 38:6 49: 20 109:21 112:5 117:23 118:7 124:18 133:14 134: 20 135:1 <b>respects</b> <sup>[1]</sup> 87:19 <b>respond</b> <sup>[2]</sup> 49:18 81:6 <b>responded</b> <sup>[1]</sup> 90:15 <b>Respondent</b> <sup>[3]</sup> 1:23 2:11 123:15 <b>Respondents</b> <sup>[4]</sup> 1:7,21 2: 7 65:11 <b>responds</b> <sup>[1]</sup> 120:5	<b>response</b> <sup>[6]</sup> 43:8 60:15 63:13 74:18 95:6 107:20 <b>rest</b> <sup>[1]</sup> 76:6 <b>restrain</b> <sup>[1]</sup> 18:11 <b>restrict</b> <sup>[3]</sup> 70:23 72:16 118:19 <b>restrictions</b> <sup>[2]</sup> 137:16,17 <b>result</b> <sup>[3]</sup> 79:14 96:5 117:8 <b>results</b> <sup>[3]</sup> 67:14 132:5 135: 8 <b>retaliate</b> <sup>[1]</sup> 135:19 <b>retaliating</b> <sup>[1]</sup> 69:22 <b>return</b> <sup>[1]</sup> 61:3 <b>Reverdy</b> <sup>[2]</sup> 120:3,18 <b>reversal</b> <sup>[2]</sup> 47:1 66:17 <b>reverse</b> <sup>[1]</sup> 23:9 <b>reversed</b> <sup>[1]</sup> 3:15 <b>reversible</b> <sup>[1]</sup> 102:11 <b>review</b> <sup>[22]</sup> 77:4,6,15,16 78: 3,12 93:3 99:9 125:5 128: 10,23 131:5,10,12,20,21, 24 132:4 136:2,3,20,21 <b>reviewing</b> <sup>[1]</sup> 131:18 <b>reviews</b> <sup>[1]</sup> 77:23 <b>revisit</b> <sup>[1]</sup> 79:19 <b>rhetoric</b> <sup>[2]</sup> 112:24,25 <b>rid</b> <sup>[1]</sup> 59:1 <b>rights</b> <sup>[2]</sup> 70:7 105:1 <b>riot</b> <sup>[2]</sup> 64:19 65:1 <b>rip</b> <sup>[1]</sup> 96:16 <b>rise</b> <sup>[4]</sup> 21:16 37:3 119:10 120:1 <b>rising</b> <sup>[1]</sup> 118:13 <b>risk</b> <sup>[1]</sup> 61:2 <b>risked</b> <sup>[1]</sup> 105:19 <b>ROBERTS</b> <sup>[56]</sup> 3:3 6:6 7: 13,19 8:9,13 26:15,20,25 29:9,20 35:9 36:2,5,13,16 44:8,22 45:10 47:13 49:17 52:16 55:5 60:12 65:7,9 70:20 71:17 72:1 84:9,23 85:10 86:3 88:7 97:3 102: 15 104:13 107:12 111:6 116:5 117:19 123:9,12 126:18,21 127:5,15,19 128: 9 131:17 132:3 135:12 136:23 137:5 140:4,6 <b>role</b> <sup>[7]</sup> 5:8 6:3 17:14 66:17 74:13 104:17 132:19 <b>rule</b> <sup>[15]</sup> 14:9,13 15:14,23 41:1 46:4 47:20,22 48:5 54:13 76:3 98:21 103:1 110:17 116:6 <b>rules</b> <sup>[13]</sup> 21:3,4 77:12 84: 16 86:11 89:21 94:15 118: 19 129:17,18 131:15 136: 19,20 <b>ruling</b> <sup>[3]</sup> 4:22 60:7 96:2 <b>rulings</b> <sup>[2]</sup> 98:12 99:17 <b>run</b> <sup>[20]</sup> 6:17 7:24 8:17 19:1 23:19 67:21 68:1,8 70:14 71:13 73:19 80:8,23 81:3, 10 83:18 117:11 129:14 134:6 135:11	<b>running</b> <sup>[3]</sup> 18:23 66:18,25 <b>runs</b> <sup>[1]</sup> 24:13 <hr/> <b>S</b> <hr/> <b>safeguard</b> <sup>[1]</sup> 66:23 <b>safeguarding</b> <sup>[1]</sup> 115:10 <b>safeguards</b> <sup>[2]</sup> 96:22 115: 9 <b>safety</b> <sup>[1]</sup> 115:19 <b>salvage</b> <sup>[1]</sup> 139:14 <b>same</b> <sup>[21]</sup> 24:22,23,24 25:1, 2 26:16 31:11 34:4 58:15 66:14 67:19,21 73:23 79: 14 95:17 108:15 118:17 129:22 132:5,9 135:16 <b>Samour</b> <sup>[2]</sup> 111:12 112:5 <b>saw</b> <sup>[1]</sup> 89:1 <b>saying</b> <sup>[24]</sup> 5:13,20 14:8 23: 14 26:9 28:15 34:9 35:2 48:25 61:24 69:6 71:19 72: 4 75:25 76:2 78:10 86:7 96:7 117:2 160:120,12,12 121:5 127:20 <b>says</b> <sup>[30]</sup> 7:15 8:3,14,15 17: 1 24:19 25:25 40:13 42:25 50:11 53:7 58:9 64:12 65: 25 73:7 74:25 87:1 103:4, 20 108:4,7,21 109:1 110: 13,22 113:7 120:20 122:3 126:23 132:19 <b>Scalia</b> <sup>[1]</sup> 19:10 <b>scenario</b> <sup>[2]</sup> 7:20 25:4 <b>schedule</b> <sup>[1]</sup> 112:12 <b>scholars</b> <sup>[1]</sup> 46:10 <b>Sea</b> <sup>[1]</sup> 54:3 <b>seat</b> <sup>[6]</sup> 6:25 68:15,19 103: 9,9,16 <b>seats</b> <sup>[1]</sup> 121:23 <b>second</b> <sup>[13]</sup> 4:2 23:19 33:5 37:2,22,24 38:14 41:13 98: 1 101:10 112:23 115:12 121:20 <b>secretary</b> <sup>[22]</sup> 6:7,10,13 7: 9,22 8:14,17,25 75:14 77: 14 116:18 126:19,22 127:3, 5,13 128:8,10,14,23 129:9 131:1 <b>Section</b> <sup>[138]</sup> 3:13,17 4:2,5, 9 5:4,10,13,21 6:3,8,16 7: 6 9:7,8,24 10:6 12:6,17,23 13:2 14:22 15:22 16:5,6, 10,15,17,24 17:15 18:16, 22 19:6,9 20:21 24:2 26:7, 10 28:17,24 29:25 30:15 32:9,11 35:12 36:21,22 40: 11 41:7,8,13 43:24 45:1,8, 12 47:2,3 48:20 51:19 52: 19 53:10 55:10 56:11,18 58:6 60:21 62:1,24 63:6, 24 65:4,24,25 66:7 69:1 71:3,18,21 72:18 73:6,9,22, 23 74:1,11,16,24 80:5,13, 17,17,20 81:1,2,20 82:19 84:4,6 85:22 87:16 91:23
--	---	--	---	---



## Official - Subject to Final Review

<p>93:20 94:20 95:4 96:17,23 98:2 103:17 104:2 105:10 109:15,24 113:5,13,14,15, 16 114:10,21 115:4,12,14, 24 117:23 118:1,7,12 119: 15 120:3 121:6 125:11 126:3 132:18 133:17 138: 7 139:6,18 140:1</p> <p>see [25] 6:18 20:18 32:15 33:2,13 36:22 37:18,21 39: 3 50:6 51:1 59:11 60:19, 23 63:12 72:11,19 73:22 76:9 78:9 80:16 88:11 99: 11 126:15 130:18</p> <p>seeing [1] 37:4 seek [2] 32:9 138:19 seeking [4] 16:2 80:12 91: 8 138:8</p> <p>seem [11] 27:17 47:23 48: 16 68:2,9 77:19 84:10 103: 8 111:11,22 120:13</p> <p>seemed [2] 64:2 117:24</p> <p>seems [14] 16:13 35:15 38: 2 60:2 61:10,15 71:9 75: 16 81:6 86:3 102:14 107: 18 111:23 113:1</p> <p>seen [6] 85:24 87:23 88:9 101:24 111:15 114:19</p> <p>seize [1] 61:11</p> <p>select [1] 80:15</p> <p>selected [2] 71:23 117:13</p> <p>selecting [2] 72:10 73:14</p> <p>selection [1] 105:3</p> <p>self-executing [11] 5:5,7 9:12 11:4 15:19 19:13 20: 2,11,14 92:13 102:18</p> <p>self-execution [1] 10:12</p> <p>Senate [3] 84:17 108:3 110: 18</p> <p>senator [3] 39:4 110:4 120: 5</p> <p>senatorial [1] 118:8</p> <p>senators [3] 121:8,20,24</p> <p>send [1] 128:4</p> <p>sending [1] 69:2</p> <p>sense [3] 13:1 20:13 48:17</p> <p>sensible [2] 47:20 50:25</p> <p>sentence [3] 36:6,22 37:6</p> <p>separate [6] 13:5 23:18 33: 3 82:8 92:10 110:5</p> <p>separately [1] 51:11</p> <p>serious [2] 136:8,12</p> <p>seriously [1] 136:5</p> <p>serve [2] 42:21 81:11</p> <p>served [1] 24:20</p> <p>serving [3] 3:12 4:5 19:3</p> <p>set [3] 48:10 99:23 128:3</p> <p>sets [1] 99:18</p> <p>setting [1] 24:12</p> <p>settle [1] 75:21</p> <p>settled [4] 45:7 48:15 87: 10,13</p> <p>several [2] 59:20 60:4</p> <p>severe [1] 21:1</p>	<p>shall [8] 50:11,12 51:8 54: 18 58:11 70:24 74:25 113: 7</p> <p>shameful [1] 65:2</p> <p>SHANNON [3] 1:22 2:10 123:14</p> <p>share [1] 116:8</p> <p>sharply [1] 31:16</p> <p>Sheffey [2] 55:13,13</p> <p>Sheffey's [1] 56:7</p> <p>Shelby [1] 69:19</p> <p>shift [1] 19:25</p> <p>short [3] 88:16 111:17 123: 7</p> <p>shortly [1] 67:6</p> <p>shouldn't [3] 45:5 125:5</p> <p>show [5] 26:10 28:16 62:13 125:11 138:18</p> <p>showing [1] 58:25</p> <p>shows [1] 83:14</p> <p>side [6] 23:12 62:20 84:13 86:24 103:3 107:25</p> <p>side's [1] 102:17</p> <p>sides [3] 66:13 100:7 102: 16</p> <p>sight [1] 99:11</p> <p>significant [2] 40:6 115:2</p> <p>Simi [3] 22:18,21 101:11</p> <p>similar [2] 15:23 26:6</p> <p>similarly [2] 72:19 81:16</p> <p>simple [4] 31:12 34:12 90: 9 96:17</p> <p>simply [2] 22:23 57:4</p> <p>simultaneously [1] 43:1</p> <p>since [7] 45:8 53:11 65:15 82:1 85:24 87:24 114:19</p> <p>single [7] 75:3 76:4 89:9, 10 112:15 117:4 134:3</p> <p>sit [2] 55:14,14</p> <p>sitting [4] 65:17 68:23 91: 16,19</p> <p>situation [12] 4:22 6:11 9:6 10:25 16:6 32:4 93:12 102: 5,21 105:8 135:21 138:22</p> <p>situations [2] 4:19 116:10</p> <p>six [1] 113:13</p> <p>slightly [2] 9:7 44:12</p> <p>smuggled [1] 40:6</p> <p>sociology [1] 22:20</p> <p>sole [1] 7:1</p> <p>Solicitor [1] 1:22</p> <p>somebody [9] 6:7 8:9 30:3 80:20 83:8 85:18 86:8 127: 17 132:20</p> <p>somehow [4] 50:18 83:9, 10 103:6</p> <p>someone [11] 17:25 23:23 32:20 54:16 74:4,7 94:18 114:6,15 117:9 126:22</p> <p>someone's [1] 111:20</p> <p>sometimes [6] 6:23,23 20: 11,13 48:8 77:25</p> <p>somewhat [2] 37:25 41:14</p>	<p>somewhere [1] 126:22</p> <p>soon [1] 105:18</p> <p>sorry [12] 17:20 26:19 27:2 29:8 40:12,14 59:25 62:12 79:2 88:6 123:13 131:17</p> <p>sort [10] 40:6 70:21,21 85: 20 96:12 107:3 118:9,13 120:9 130:20</p> <p>SOTOMAYOR [57] 9:10,16, 24 10:1,4,11,17,22 11:2,9, 12,14,17,21,24 12:6,18,22 13:4,18 23:13,17 24:1,4,8, 12,23 25:7,10,17,20,23 26: 13 27:4,16 40:12,15,18,21 45:10,11,25 46:3,9,16,25 47:7,10,12 83:21 88:3,6 102:15,16 103:1 129:23 136:23</p> <p>sounds [3] 14:2,3 75:7</p> <p>South [5] 61:4 69:22,24 118:12 121:3</p> <p>Speaker [5] 42:15 51:25 108:3 109:21 110:2</p> <p>speaks [4] 73:23 81:3,9 91: 23</p> <p>special [1] 65:24</p> <p>specific [5] 16:24 37:2 49: 19 60:7 72:3</p> <p>specifically [5] 39:16,25 62:2 121:8 123:20</p> <p>specified [1] 6:8</p> <p>specifies [1] 19:6</p> <p>specify [1] 121:18</p> <p>spelled [1] 15:24</p> <p>spend [1] 5:3</p> <p>stack [1] 127:20</p> <p>stakes [1] 78:11</p> <p>standard [7] 77:5 98:1,23 99:23 127:24 131:5,9</p> <p>standards [5] 84:15 98:14 99:18 111:10 129:18</p> <p>standing [1] 125:4</p> <p>start [5] 25:22 49:23,25 87: 1 108:13</p> <p>started [2] 12:25 82:18</p> <p>state [114] 4:7,9,14,15,17, 19 5:8,17,20 6:7,11,13 7:3, 9,22 8:2,3,6,8,17,20,24,25 9:4,21 10:7,15 13:15 15:5 16:23 17:1,9 18:25 21:14, 21 22:10,19 23:23 24:4,14, 15,18 25:9,11,24 26:12 53: 9 54:1 56:20 57:10 58:7 60:8 61:2,8 63:17 66:3 68: 8 69:11,12,15,16 70:23 72: 16 75:3,14 76:1,4,17 77:7, 14,20 83:13,19,20 86:20 89:9,10,12,17,20 90:2,6,10 95:10,19,19 97:13 98:25 101:2 102:11 105:17,23 106:13 111:22,24 116:7,8, 15,18 117:4 124:4 126:19, 22 129:16 131:1,2,7,11 133:21 134:2 137:11,20</p>	<p>138:17,19</p> <p>state's [10] 6:7 8:15 76:17 79:5 82:25 104:25 105:4 128:11,23 129:9</p> <p>state-imposed [1] 9:2</p> <p>state-level [1] 61:4</p> <p>statement [1] 15:6</p> <p>statements [6] 8:23 22:15 78:8,24,25 101:15</p> <p>STATES [166] 1:1,15 3:18, 20,25 6:3 9:13 10:5,14,14 13:1,5 17:14 18:9,14 21:2, 8,8,20 22:12 23:6,20 35:14 38:6 39:10,12 40:3 41:13, 15,19 42:14,24 43:2 45:1, 15,16,21,23 47:3,18 48:18 49:1,14 50:12,21,24 51:2,8, 12 52:3,9,10,22 57:15 58: 10 61:5 63:4,6 64:18 65: 18 66:12,17,19,23 67:7,20, 24 68:17,22 69:2,3,7,11,13, 15 70:6,7,11,13,24 71:6,7, 22 72:5,8,13,17,19,25 73: 13,17 75:4,23 76:13,16,23 84:24 85:3,20,21 86:4 87: 2,7 95:3 96:6,14,20 97:8,9, 11 98:7,10 99:20 102:1,2, 19 103:2 104:16,22 106:6, 10,10,17,24,25 107:5,7 108:4,6 109:25 110:23 111:8,10 113:1 117:11,13, 14,16,23 118:1,7,17 119: 12 120:7 122:9 124:9 128: 12,16,17,22 129:1,3,13 131:1,25 132:17,20 133:17 134:14,17,25 135:3,7,18 136:18 139:7</p> <p>states' [7] 16:16 71:13 80: 8 104:15 105:13 107:8 116:11</p> <p>statute [18] 6:4 14:22 17: 16 18:2 20:8 44:11 51:25 54:1,10,14 56:12 58:23 63: 13 87:17 113:6,9 125:8 129:17</p> <p>statutes [3] 15:6 94:15 113:4</p> <p>statutory [3] 14:5 48:9 125: 6</p> <p>step [2] 9:19 70:9</p> <p>stepping [1] 41:24</p> <p>steps [1] 10:8</p> <p>STEVENSON [38] 1:22 2: 10 123:10,11,13,14,16 124: 20 125:2,9,22 126:5,9,14, 20,25 127:8,18 128:1,13, 25 129:11,21 130:1,8,17 131:8,21 132:6,12 133:1 134:8 135:22 136:9,13,18 137:4,10</p> <p>still [13] 5:17 6:16 32:10 40: 9 44:11 68:6 76:16 91:13 113:4 127:23 138:12,21 139:12</p>	<p>stomach [1] 114:15</p> <p>stop [2] 9:10 10:14</p> <p>street [1] 127:23</p> <p>strikes [1] 104:19</p> <p>strips [1] 124:8</p> <p>stronger [2] 45:23 49:13</p> <p>strongest [1] 50:10</p> <p>strongly [1] 69:21</p> <p>structural [4] 22:25 49:14 116:20 117:7</p> <p>structure [3] 43:17 72:14 73:10</p> <p>Stuart [1] 58:16</p> <p>stuck [2] 77:6,7</p> <p>stuff [1] 29:19</p> <p>style [1] 78:2</p> <p>subject [3] 32:10 37:15 52: 3</p> <p>submitted [3] 127:10 140: 7,9</p> <p>subsequent [1] 15:13</p> <p>succeed [1] 84:14</p> <p>Succession [4] 42:19 51: 21,24 52:1</p> <p>suddenly [1] 96:6</p> <p>sufficient [6] 23:4 95:20 99:5 100:6,9 114:11</p> <p>suggest [9] 47:19 60:2 61: 19,21 64:2 68:9 75:9 113: 1 120:9</p> <p>suggested [7] 13:16 15:21 23:8 78:20 97:19,21 117:3</p> <p>suggesting [6] 16:21 48: 24 55:22 59:21,23 80:14</p> <p>suggestion [1] 131:23</p> <p>suggests [3] 119:22 121:2 122:1</p> <p>suit [1] 13:21</p> <p>sum [2] 29:24 30:9</p> <p>super [1] 124:1</p> <p>support [4] 22:24 46:17 70: 4 73:9</p> <p>supported [1] 83:23</p> <p>supporters [1] 63:22</p> <p>supports [2] 22:25 96:25</p> <p>suppose [11] 15:10,11 75: 24 85:14 89:8,11 90:16 97: 6,8 99:15 133:21</p> <p>SUPREME [21] 1:1,14 3:10, 14 4:13 9:7 11:22 20:25 21:7 23:9 26:6,9,12 63:21 82:12 100:18 124:21 125: 3 126:6 138:6,23</p> <p>surely [3] 31:10 32:19 84: 12</p> <p>surprised [2] 60:15 61:13</p> <p>surprising [2] 67:17 68:21</p> <p>sustained [1] 135:18</p> <p>swear [3] 110:2,3,10</p> <p>swears [1] 109:25</p> <p>swore [1] 44:5</p> <p>sworn [4] 8:22 28:14 124:7 139:22</p> <p>system [5] 96:4 106:5,6</p>
---	--	---	---	---



## Official - Subject to Final Review

<p>111:14 135:23</p> <p style="text-align: center;"><b>T</b></p> <p><b>takings</b> [1] 9:17  <b>talked</b> [6] 82:12 104:14,16 105:2,4 131:13  <b>talks</b> [1] 15:25  <b>Tarble's</b> [2] 16:19 116:13  <b>technical</b> [1] 44:10  <b>tells</b> [4] 70:18 72:13 74:12 121:21  <b>Tem</b> [4] 108:2,23 109:22 110:2  <b>Tempore</b> [2] 42:16 52:1  <b>tendentiously</b> [1] 62:19  <b>tens</b> [1] 4:25  <b>tension</b> [8] 31:6,14 32:12,16 33:3,14 34:3 57:1  <b>Tenth</b> [3] 66:19 70:14 79:16  <b>term</b> [37] 3:18 4:10,22,24 6:14 8:5 9:3 18:8,8 20:2,6,18 23:7,14,19 24:5,9,13 25:15 26:2,17,18,21,22,24 42:4 52:7,10 65:4 66:25 73:20 74:1 79:20 80:23 85:13 137:25 138:17  <b>terms</b> [6] 24:20 42:10 73:24 76:20 89:19 108:1  <b>testified</b> [2] 22:7 127:1  <b>testify</b> [3] 100:25 112:10,10  <b>testimony</b> [4] 22:4,18 101:15,20  <b>Texas</b> [1] 1:18  <b>text</b> [4] 42:13 48:15 61:14 62:22  <b>textual</b> [4] 43:13 49:13,19 50:7  <b>textualist</b> [2] 36:19 42:8  <b>textually</b> [1] 45:24  <b>Thanks</b> [2] 49:16 65:6  <b>themselves</b> [2] 89:1 90:7  <b>theory</b> [10] 29:24 38:25 42:7 55:3 73:9 82:6 91:22 92:4 93:9 124:3  <b>there's</b> [42] 9:17 10:5 15:5 21:4 23:17 32:16,16 33:13,16 42:21 47:23 48:10,19 50:18 55:24 73:2,4,7,8,16 81:17,23 85:14,22 87:4,6,10 92:3 97:6 99:8 102:16 103:20 105:12,22 106:3,7 117:4 120:15,24 124:20 130:15 134:15  <b>thereby</b> [1] 4:21  <b>therefore</b> [4] 88:10 97:15 105:19 119:25  <b>thereof</b> [1] 95:3  <b>they've</b> [1] 127:19  <b>thinking</b> [2] 47:17 132:24  <b>thinks</b> [3] 30:12 89:13 135:10  <b>third</b> [4] 24:13 66:25 73:19</p>	<p>115:23  <b>THOMAS</b> [21] 5:2,12 44:23 67:4,11 68:2,16,25 69:14 73:8 87:5 97:4 124:17,24 125:7,18 126:3,7,13,17 135:12  <b>Thomas's</b> [1] 70:21  <b>Thornton</b> [5] 26:23,23 47:2 79:19 138:1  <b>though</b> [8] 7:13 16:12 45:13 47:23 107:6 109:18 117:2 134:17  <b>thoughts</b> [3] 81:21 82:24 108:12  <b>threat</b> [2] 136:8,12  <b>threats</b> [1] 136:5  <b>three</b> [10] 10:9 13:9,12 50:7 77:21 88:18 89:25 115:7 125:10 132:21  <b>throughout</b> [1] 3:19  <b>throw</b> [2] 62:20 114:15  <b>thrust</b> [1] 71:10  <b>Thursday</b> [1] 1:11  <b>ties</b> [1] 120:9  <b>Title</b> [1] 113:5  <b>today</b> [8] 28:16 50:6 82:1 83:6,12 87:19 108:8,15  <b>together</b> [1] 130:22  <b>took</b> [8] 6:8 14:16 15:11 37:14 46:20,23 106:11 111:14  <b>tool</b> [2] 113:25 114:4  <b>top</b> [1] 60:20  <b>total</b> [2] 29:24 30:9  <b>totally</b> [1] 119:16  <b>tougher</b> [1] 49:5  <b>transfer</b> [2] 65:19 89:4  <b>transpired</b> [1] 111:16  <b>Treason</b> [2] 97:18,20  <b>treated</b> [3] 12:4 15:19 73:22  <b>treaties</b> [2] 20:14,15  <b>treaty</b> [3] 5:15 9:20 20:15  <b>tremendous</b> [1] 131:9  <b>trial</b> [11] 21:22,25 22:2 55:12 56:6,14 99:1 112:6,13,20 134:4  <b>tried</b> [5] 16:3 35:3 44:14 57:19 116:1  <b>trouble</b> [1] 133:2  <b>troubling</b> [2] 117:22 119:15  <b>true</b> [5] 46:24,25 77:1 81:2 103:8  <b>truly</b> [1] 135:10  <b>TRUMP</b> [41] 1:3 3:4,11,16 21:6,23 26:7,9 28:13,16 48:16 56:18 57:4 59:5 64:7 65:21 76:15 77:24 78:17 82:2 83:12,18 98:11 100:20 101:1,8,16 102:8 104:1 112:6,14 113:10 115:19,25 122:15,20,24 139:4,19,22,25  <b>Trump's</b> [6] 65:23 66:16</p>	<p>78:7 101:12,22 103:21  <b>trusted</b> [1] 115:16  <b>try</b> [1] 94:10  <b>trying</b> [11] 27:8 35:11 36:10 39:19 50:17 61:7 81:18 94:4 101:23 105:23 114:20  <b>turns</b> [3] 13:12 25:5 26:4  <b>Twelfth</b> [1] 89:3  <b>Twenty-Second</b> [1] 23:18  <b>Twitter</b> [2] 100:21 102:10  <b>two</b> [27] 10:8 13:5 24:20 33:3 36:22 37:5 42:10 45:24 66:13,13 97:25 99:15,16,16,17,18,19,25 100:5 101:8,10 102:16 113:12 118:15 126:16 132:18 139:20  <b>two-thirds</b> [9] 7:17 28:5 31:1,9,21 32:18 34:8,11 115:20  <b>type</b> [3] 62:17 129:19 131:24  <b>types</b> [2] 56:13 136:14  <b>typical</b> [1] 104:17</p> <p style="text-align: center;"><b>U</b></p> <p><b>U.S</b> [8] 23:24 24:25 25:2 26:22 44:18 100:18 137:25 138:17  <b>ultimate</b> [1] 96:2  <b>ultimately</b> [9] 62:23 75:19 78:16 91:13 94:14 98:15 99:9 122:18 136:21  <b>ultra</b> [1] 82:5  <b>unanimously</b> [2] 82:13 138:17  <b>unconstitutional</b> [2] 58:20 81:17  <b>unconstitutionally</b> [2] 139:9,15  <b>under</b> [93] 3:12 4:5 5:24 7:6,8 9:3,24 10:22 15:1 16:4,9,22 18:16,18 24:24 26:6,10 28:17 32:9 38:25 39:1,9,11 40:2 41:1,15,19 42:14,20,24 43:2 45:14,21 46:11 48:20 49:11,12 53:10 54:15,24 56:11 57:9 65:16 66:11,18,24 67:25 70:13 71:3 72:5 73:20 79:16 80:4 81:20 82:16 83:20 87:13 90:4 98:2 99:25 103:14,14,17 104:2,2,15 105:13 106:18 108:6 110:10,13 120:6 121:19,22 122:22 123:18 124:3,11 125:12 126:5 129:11,22,24 133:7,16 134:12 136:1 137:14,20 139:10,11,21 140:1  <b>underaged</b> [1] 73:18  <b>undercut</b> [1] 36:9  <b>underlying</b> [1] 98:3  <b>underscore</b> [1] 111:23  <b>underscored</b> [1] 111:11</p>	<p><b>understand</b> [23] 11:18 15:10 26:13 27:8 28:9 29:23 38:12 39:19 47:14 52:18 61:17 68:16,19 69:14,15,18 91:6 93:7 95:6,25 96:1 113:24 119:16  <b>understanding</b> [8] 15:3 35:18 36:12 42:8 45:7 87:4,10,14  <b>understands</b> [1] 96:12  <b>Understood</b> [4] 54:25 84:5 114:10 119:5  <b>undertake</b> [1] 131:20  <b>uniform</b> [2] 78:1 96:2  <b>uniformity</b> [3] 95:3,9 117:21  <b>unique</b> [2] 15:22 41:7  <b>UNITED</b> [51] 1:1,14 3:18,20,25 23:5 35:14 38:6 39:10,11 40:3 41:12,15,19 42:14,24 43:2 45:15,16,21,23 47:18 48:18 49:1,14 50:12,21,24 51:2,8,12 52:3,8,10 57:14 58:10 64:18 65:18 66:12 75:4 97:8,9,11 98:7 108:4,6 109:25 110:22 119:11 120:7 139:7  <b>unknowable</b> [1] 43:22  <b>unlawful</b> [1] 98:5  <b>unless</b> [11] 5:22 6:3 13:16 17:15 26:1 54:9 63:13 72:12 84:7 113:1 115:21  <b>unlike</b> [1] 67:23  <b>unlikely</b> [5] 7:14,20,21 100:16 102:14  <b>unmanageable</b> [1] 102:5  <b>unpunished</b> [1] 114:12  <b>until</b> [7] 5:22 70:16 85:19 88:14 103:21 114:18 117:16  <b>unusual</b> [2] 75:22 78:15  <b>up</b> [27] 5:9,11 9:11 14:16 24:12 25:8,11 39:19,23 46:10 61:17 75:23 87:2,7 95:2,17,18 102:9,14 106:2 112:14 119:11 120:2 124:6 133:4 134:13 136:21  <b>upheld</b> [2] 58:23 84:12  <b>urges</b> [2] 78:17 122:24  <b>usefulness</b> [1] 36:10  <b>uses</b> [3] 3:25 66:7 108:1  <b>using</b> [7] 20:18 21:3 45:1 52:18 73:13 98:12 133:23</p> <p style="text-align: center;"><b>V</b></p> <p><b>vacancy</b> [1] 42:21  <b>vacated</b> [1] 139:12  <b>vague</b> [1] 114:22  <b>valid</b> [2] 18:16 85:20  <b>validate</b> [1] 94:22  <b>validity</b> [1] 90:17  <b>valve</b> [1] 115:19  <b>variant</b> [1] 139:13  <b>vary</b> [1] 131:6</p>	<p><b>varying</b> [1] 128:16  <b>vengeance</b> [1] 122:18  <b>versions</b> [1] 128:18  <b>versus</b> [3] 3:4 47:18 104:21  <b>VI</b> [1] 110:11  <b>via</b> [1] 61:4  <b>vice</b> [14] 39:7,15,24 42:22 46:21 51:4,7,11,15 58:9 62:2 119:21 120:4 122:5  <b>video</b> [2] 78:13 100:21  <b>videotaped</b> [2] 78:25 101:15  <b>view</b> [8] 78:8 92:15 93:10 99:24 100:1,1 118:4 138:21  <b>views</b> [2] 86:5 135:25  <b>violate</b> [3] 4:24 137:23,25  <b>violating</b> [3] 4:10,21 24:4  <b>violation</b> [4] 26:2 67:2 83:19 133:10  <b>violence</b> [3] 64:18 86:19 101:17  <b>violent</b> [4] 63:22 65:2,16 101:14  <b>violently</b> [1] 115:15  <b>vires</b> [1] 82:5  <b>virtual</b> [1] 102:9  <b>virtually</b> [1] 46:13  <b>virtue</b> [1] 28:20  <b>vote</b> [16] 7:17 28:5 31:1,9 32:18 34:8 89:9,10,11,15 106:15,17 115:20 121:13 137:22  <b>voted</b> [3] 89:20 116:2 117:14  <b>voters</b> [2] 115:2 130:14  <b>votes</b> [7] 4:24 66:20 89:12 103:25 104:1 122:22 123:23  <b>voting</b> [1] 44:7  <b>vulnerable</b> [1] 139:21</p> <p style="text-align: center;"><b>W</b></p> <p><b>wait</b> [1] 85:19  <b>waiver</b> [6] 6:23 7:11,12,23 28:19 138:11  <b>wake</b> [1] 6:20  <b>wanted</b> [16] 44:2,4,6 50:6 62:22 63:8 73:19 78:22 79:3,3 80:21 81:5 111:25 112:8,10,16  <b>wants</b> [2] 125:13 128:15  <b>War</b> [7] 65:15 69:20 71:10 97:23,24 98:6 114:13  <b>warranto</b> [11] 14:18,25 30:17 32:6,8 56:19,25 57:6,8 114:17 116:17  <b>Washington</b> [2] 1:10 46:14  <b>wasted</b> [1] 66:21  <b>watch</b> [1] 78:13  <b>way</b> [38] 9:4 10:18 14:10 15:11 16:19 20:12 30:14 35:4</p>
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## Official - Subject to Final Review

<p><b>38:10 45:1 48:13,19 49:22</b>  <b>53:8 56:25 57:4 58:12,21,</b>  <b>25 67:19,21 94:18,22 95:</b>  <b>17 96:5 101:19 107:21</b>  <b>112:14 115:5,5,13 117:25</b>  <b>118:21 124:10 138:6,22,25</b>  <b>139:16</b>  <b>ways</b> <sup>[4]</sup> <b>29:25 30:10 72:17</b>  <b>130:25</b>  <b>weeks</b> <sup>[2]</sup> <b>102:9 139:20</b>  <b>weight</b> <sup>[2]</sup> <b>42:11 43:11</b>  <b>welcome</b> <sup>[4]</sup> <b>5:1 67:3 111:</b>  <b>5 124:16</b>  <b>whatever</b> <sup>[9]</sup> <b>32:5 75:8 79:</b>  <b>20 80:2,21 84:19 98:2 122:</b>  <b>10 133:23</b>  <b>whatnot</b> <sup>[1]</sup> <b>41:9</b>  <b>whatsoever</b> <sup>[1]</sup> <b>20:16</b>  <b>Whereupon</b> <sup>[1]</sup> <b>140:8</b>  <b>whether</b> <sup>[38]</sup> <b>5:4 6:18,25</b>  <b>13:12 19:19,23 20:15 24:4</b>  <b>27:24 28:8,13 44:5 47:3</b>  <b>53:13 57:18 58:3 60:13 67:</b>  <b>23 73:17 74:4,6 75:5,15</b>  <b>77:9 79:14 80:1 82:8 85:</b>  <b>16 89:6 98:11 101:19 111:</b>  <b>18 118:5 122:21,22 127:6</b>  <b>128:19 133:12</b>  <b>whichever</b> <sup>[1]</sup> <b>94:7</b>  <b>white</b> <sup>[1]</sup> <b>137:22</b>  <b>who's</b> <sup>[2]</sup> <b>82:15,15</b>  <b>whoever</b> <sup>[2]</sup> <b>84:25 94:6</b>  <b>whole</b> <sup>[8]</sup> <b>10:5 49:1 70:22</b>  <b>71:10 92:4,9 102:3 112:13</b>  <b>whom</b> <sup>[1]</sup> <b>98:25</b>  <b>will</b> <sup>[19]</sup> <b>28:13 29:18 34:20</b>  <b>61:11 77:3 84:12,14,15,16,</b>  <b>24 85:14 100:15 102:1,2</b>  <b>135:6,23,25 136:2,20</b>  <b>win</b> <sup>[1]</sup> <b>6:17</b>  <b>Winning</b> <sup>[1]</sup> <b>60:5</b>  <b>wins</b> <sup>[2]</sup> <b>28:14 122:20</b>  <b>Wisconsin</b> <sup>[1]</sup> <b>75:12</b>  <b>wishes</b> <sup>[1]</sup> <b>92:16</b>  <b>within</b> <sup>[4]</sup> <b>22:15 40:2 106:5</b>  <b>115:18</b>  <b>without</b> <sup>[6]</sup> <b>15:16 71:1 77:</b>  <b>14 78:14 80:19 92:16</b>  <b>witness</b> <sup>[1]</sup> <b>112:17</b>  <b>witnesses</b> <sup>[4]</sup> <b>78:22 112:8,</b>  <b>9,19</b>  <b>woefully</b> <sup>[1]</sup> <b>111:17</b>  <b>won</b> <sup>[2]</sup> <b>55:16 103:17</b>  <b>wondering</b> <sup>[4]</sup> <b>24:9 42:7</b>  <b>59:6 118:5</b>  <b>word</b> <sup>[3]</sup> <b>19:9 39:14 119:14</b>  <b>words</b> <sup>[9]</sup> <b>12:4 22:8 48:10</b>  <b>75:4 101:12,13,22 120:11</b>  <b>131:20</b>  <b>work</b> <sup>[5]</sup> <b>56:6 81:2 92:11,</b>  <b>25 98:2</b>  <b>worked</b> <sup>[1]</sup> <b>70:12</b>  <b>works</b> <sup>[1]</sup> <b>108:12</b>  <b>worried</b> <sup>[1]</sup> <b>119:23</b></p>	<p><b>worry</b> <sup>[2]</sup> <b>61:10 119:19</b>  <b>writ</b> <sup>[2]</sup> <b>16:2 32:8</b>  <b>write</b> <sup>[1]</sup> <b>88:21</b>  <b>write-in</b> <sup>[4]</sup> <b>67:20 125:16,</b>  <b>19,23</b>  <b>writes</b> <sup>[2]</sup> <b>12:1 102:6</b>  <b>writs</b> <sup>[2]</sup> <b>14:17 32:6</b>  <b>written</b> <sup>[1]</sup> <b>115:24</b>  <b>wrote</b> <sup>[1]</sup> <b>133:9</b></p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> <sup>[3]</sup> <b>35:14 52:21 74:9</b>  <b>years</b> <sup>[14]</sup> <b>25:4 26:1 53:8,</b>  <b>11 80:2 85:23 86:23 87:7,</b>  <b>14,18 88:15 109:15 111:14</b>  <b>113:13</b></p>
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