

# 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, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A884  
CASA, INC., ET AL., )  
Respondents. )  
- - - - -

DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A885  
WASHINGTON, ET AL., )  
Respondents. )  
- - - - -

DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A886  
NEW JERSEY, ET AL., )  
Respondents. )  
- - - - -

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23   - - - - -  
24                               Washington, D.C.  
25                               Thursday, May 15, 2025

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 a.m.

APPEARANCES:

GEN. D. JOHN SAUER, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Applicants.

JEREMY M. FEIGENBAUM, Solicitor General, Trenton, New Jersey; on behalf of the State and City Respondents.

KELSI B. CORKRAN, ESQUIRE, Washington, D.C.; on behalf of the Private Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GEN. D. JOHN SAUER, ESQ.	
4	On behalf of the Applicants	4
5	ORAL ARGUMENT OF:	
6	JEREMY M. FEIGENBAUM, ESQ.	
7	On behalf of the State and	
8	City Respondents	77
9	ORAL ARGUMENT OF:	
10	KELSI B. CORKRAN, ESQ.	
11	On behalf of the Private Respondents	125
12	REBUTTAL ARGUMENT OF:	
13	GEN. D. JOHN SAUER, ESQ.	
14	On behalf of the Applicants	159
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 24A884, Trump  
5 versus CASA, Incorporated, and the consolidated  
6 cases.

7 General Sauer.

8 ORAL ARGUMENT OF GEN. D. JOHN SAUER

9 ON BEHALF OF THE APPLICANTS

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

12 On January 20, 2025, President Trump  
13 issued Executive Order 14,160, Protecting the  
14 Meaning and Value of American Citizenship. This  
15 order reflects the original meaning of the  
16 Fourteenth Amendment, which guaranteed  
17 citizenship to the children of former slaves,  
18 not to illegal aliens or temporary visitors.

19 Multiple district courts promptly  
20 issued nationwide or universal injunctions  
21 blocking this order, and a cascade of such  
22 universal injunctions followed. Since  
23 January 20, district courts have now issued 40  
24 universal injunctions against the federal  
25 government, including 35 from the same five

1     judicial districts. This is a bipartisan  
2     problem that has now spanned the last five  
3     presidential administrations.

4             Universal injunctions exceed the  
5     judicial power granted in Article III, which  
6     exists only to address the injury to the  
7     complaining party. They transgress the  
8     traditional bounds of equitable authority, and  
9     they create a host of practical problems.

10            Such injunctions prevent the  
11    percolation of novel and difficult legal  
12    questions. They encourage rampant forum  
13    shopping. They require judges to make rushed,  
14    high-stakes, low-information decisions. They  
15    circumvent Rule 23 by offering all the benefits  
16    but none of the burdens of class certification.  
17    They operate asymmetrically, forcing the  
18    government to win everywhere while the  
19    plaintiffs can win anywhere. They invert --  
20    invert the ordinary hierarchy of appellate  
21    review. They create the ongoing risk of  
22    conflicting judgments. They increase the  
23    pressures on this Court's emergency docket.  
24    They create what Justice Powell described as  
25    repeated and essentially head-on confrontations

1     between the life-tenured and representative  
2     branches of government. And they disrupt the  
3     Constitution's careful balancing of the  
4     separation of powers.

5                 I welcome the Court's questions.

6                 JUSTICE THOMAS: General Sauer, the --  
7     these universal injunctions, as you say, have  
8     proliferated over the last three decades or so.  
9     Would you discuss, though, the origins of  
10    universal injunctions? In particular, I'm  
11    interested in sort of historical analogues or  
12    the historical pedigree, particularly the bill  
13    of peace that was proffered by Respondents.

14                GENERAL SAUER: Yes, Justice Thomas.  
15    As you, I think, first pointed out in your  
16    separate opinion in Trump against Hawaii, the  
17    bill of peace is something very distinct from a  
18    universal injunction. So the bill of peace  
19    involved a -- a resolution of a small, discrete  
20    set of claims of a small discrete group. And,  
21    even more fundamentally, it was binding on the  
22    members of that class and those represented by  
23    the class. So it's much more analogous to a  
24    modern class action under Rule 23.

25                And, in fact, as we've argued in other

1 cases and as this Court has described in  
2 opinions like Ortiz, the bill of peace evolved  
3 into and has directly developed into, so to  
4 speak, the modern class action that has all  
5 the -- the same features of a bill of peace.

6 So, in the words of Chief Judge Sutton  
7 in the Sixth Circuit, the bill of peace was a  
8 domesticated animal that looks nothing like the  
9 dragon of a universal junction.

10 JUSTICE SOTOMAYOR: I'm sorry.

11 CHIEF JUSTICE ROBERTS: You --

12 JUSTICE SOTOMAYOR: Here --

13 CHIEF JUSTICE ROBERTS: Go ahead.

14 JUSTICE SOTOMAYOR: Here, there's a  
15 discrete identified group on one issue: Does  
16 citizenship mean are you born in the territory  
17 of the United States, or does it mean are you  
18 loyal to someone else, which is your claim, or  
19 are your parents loyal to someone else?

20 So that's no different than what  
21 happened in a peace -- in a bill of peace. The  
22 United States is bigger, so it extends more  
23 broadly, but it's still an identifiable group on  
24 a discrete, singular question.

25 GENERAL SAUER: Your Honor, I'd say



1 three things in response to that.

2 First of all, our primary contention  
3 is that the Citizenship Clause related to the  
4 children of former slaves, not to illegal aliens  
5 who weren't even present as a discrete class at  
6 that time.

7 But, more fundamentally here, as to  
8 the issue of the bill of peace, there are  
9 critical differences. The bill of peace was a  
10 binding judgment that would bind absent class  
11 members. Here, we have the (a)(C)(3) --

12 JUSTICE SOTOMAYOR: Well, here, class  
13 actions don't bind anyone who opts out, so class  
14 actions are not like bills of peace.

15 GENERAL SAUER: I would think that a  
16 Rule 23(b)(2) class action, which would be the  
17 relevant analogue here, would be one that would  
18 be binding on absent class members and would not  
19 have the same notice and opt-out procedures.

20 And, more fundamentally, that sort of  
21 argument that there's a commonality here among,  
22 you know, all the people who purport to be  
23 affected by this is the sort of argument that's  
24 made in class certification motions that were  
25 never presented.

1 JUSTICE SOTOMAYOR: So can I ask you a  
2 question? Your theory here is argue -- arguing  
3 that Article III and principles of equity both  
4 prohibit federal courts from issuing universal  
5 injunctions. Do I have your argument correct?

6 GENERAL SAUER: We argue both of those  
7 and there are independent reasons.

8 JUSTICE SOTOMAYOR: You argue both of  
9 those?

10 GENERAL SAUER: Yeah.

11 JUSTICE SOTOMAYOR: If that's true,  
12 that means even the Supreme Court doesn't have  
13 that power.

14 GENERAL SAUER: The Supreme Court  
15 would have the authority to issue binding  
16 precedent nationwide, but as this Court --

17 JUSTICE SOTOMAYOR: But we couldn't  
18 enforce it against -- universally, is your  
19 argument?

20 GENERAL SAUER: If there was a -- a --  
21 a decision that violated the precedent of the  
22 Court, then the affected plaintiffs could get a  
23 separate judgment.

24 JUSTICE SOTOMAYOR: And that means --

25 GENERAL SAUER: So -- and that is what

1     this Court --

2                   JUSTICE SOTOMAYOR:  -- you're --  
3     you're talking about the hundreds and thousands  
4     of people who weren't part of the judgment of  
5     the court.  They would all have to file  
6     individual actions?

7                   GENERAL SAUER:  Not necessarily.  
8     There are other --

9                   JUSTICE SOTOMAYOR:  Or -- or -- or a  
10    class action.

11                  GENERAL SAUER:  A class action would  
12    be --

13                  JUSTICE SOTOMAYOR:  Isn't that -- that  
14    makes no sense whatsoever.

15                  GENERAL SAUER:  Respectfully, we  
16    believe that --

17                  JUSTICE SOTOMAYOR:  Well, what was the  
18    purpose of the bill of peace if not to settle a  
19    legal question finally?

20                  GENERAL SAUER:  In --

21                  JUSTICE SOTOMAYOR:  And if even the  
22    Supreme Court doesn't have that right and must  
23    invite hundreds of thousands of lawsuits, what  
24    are we buying into?

25                  GENERAL SAUER:  If a set of claims

1 satisfies the rigorous criteria of Rule 23, Rule  
2 23 is the modern analogue of a bill of peace.  
3 We have something very different here.

4 JUSTICE SOTOMAYOR: So what -- what --

5 CHIEF JUSTICE ROBERTS: Did it --

6 JUSTICE SOTOMAYOR: No, we don't,  
7 because the argument here is that the president  
8 is violating an established -- not just one but,  
9 by my count, four established Supreme Court  
10 precedents.

11 We have the Wong Ark case, where we  
12 said fealty to a foreign sovereign doesn't  
13 defeat your entitlement -- your parents' fealty  
14 to a foreign sovereign doesn't defeat your  
15 entitlement to citizenship as a child. We have  
16 another case where we said that even if your  
17 parents are here illegally, if you're born here,  
18 you're a citizen. We have yet another case that  
19 says, even if your parents came here and were  
20 stopped at the border and -- but you were born  
21 in our territory, you're still a citizen. And  
22 we have another case that says, even if your  
23 parents secured citizenship illegally, you're  
24 still a citizen.

25 So, as far as I see it, this order

1 violates four Supreme Court precedents.

2 GENERAL SAUER: Yeah. We --

3 JUSTICE SOTOMAYOR: And you are -- and  
4 you are claiming that not just the Supreme  
5 Court -- that both the Supreme Court and no  
6 lower court can stop an executive from --  
7 universally -- from violating that holding --  
8 those holdings by this Court.

9 GENERAL SAUER: We are not claiming  
10 that because we're conceding that there could be  
11 a -- in an appropriate case, a Rule 23 class  
12 action.

13 JUSTICE SOTOMAYOR: Only a class --  
14 only by a class action.

15 CHIEF JUSTICE ROBERTS: Can I hear  
16 the -- can I hear the rest of his answer?

17 GENERAL SAUER: A Rule 23 class  
18 action. And then the more fundamental point as  
19 to all those Supreme Court decisions you  
20 referred to --

21 JUSTICE SOTOMAYOR: So what do we do  
22 temporarily?

23 GENERAL SAUER: Temporarily, the  
24 court may issue -- the lower courts may issue  
25 injunctions that remediate the injuries to the

1 plaintiffs that appear before them. Lower  
2 courts in appropriate cases may certify class  
3 actions --

4 JUSTICE SOTOMAYOR: So, when a new  
5 president --

6 CHIEF JUSTICE ROBERTS: Could I,  
7 counsel?

8 JUSTICE SOTOMAYOR: -- so, when a new  
9 president orders that because there's so much  
10 gun violence going on in the country and he  
11 comes in and he says, I have the right to take  
12 away the guns from everyone, then people -- and  
13 he sends out the military to seize everyone's  
14 guns -- we and the courts have to sit back and  
15 wait until every named plaintiff gets -- or  
16 every plaintiff whose gun is taken comes into  
17 court?

18 GENERAL SAUER: In appropriate cases,  
19 courts have certified class actions on an  
20 emergency basis. We found at least four cases  
21 in recent years where that was done.

22 But, more fundamentally, we profoundly  
23 disagree with the characterization of the  
24 merits. This is now fully briefed in the Ninth  
25 Circuit in Case Number 25-807, where we describe

1     how that characterization of the holding of Wong  
2     Kim Ark and the other decisions is profoundly  
3     incorrect. And that is --

4                 JUSTICE SOTOMAYOR: You still  
5     haven't --

6                 CHIEF JUSTICE ROBERTS: Counsel, could  
7     I ask you about a different type of -- of case  
8     that has broader impact than on the particular  
9     claimant, like a claimant who's alleging that  
10    the districting in a particular case has  
11    resulted in racial discrimination against him or  
12    her based on how the district is drawn.

13                Now a judicial decision about that one  
14    plaintiff would implicate the redistricting  
15    throughout the whole case, so -- so --  
16    throughout the whole state.

17                How -- how does your theory address  
18    that situation?

19                GENERAL SAUER: That would be what you  
20    might call an indivisible remedy, where what the  
21    Court is doing there by, for example, redrawing  
22    the district lines is, as this Court said in  
23    Gill against Whitford, the only way to remediate  
24    the injury of voting in an unconstitutionally  
25    drawn district, that is similar to abatement of

1 a public nuisance or, for example, in the school  
2 desegregation cases, where remediating the  
3 injury to the plaintiff before the court  
4 necessarily has collateral consequences to many  
5 others.

6 Certain environmental cases might have  
7 a similar thing. For example, you stop the  
8 local plant from pouring, you know, water  
9 pollution into the water. That benefits the  
10 plaintiff. It happens to benefit a bunch of  
11 other people.

12 Now that's very different than what we  
13 have in these universal injunctions where it is  
14 a divisible remedy. I mean, I point to the  
15 holding of the District of Massachusetts in this  
16 case looking at the individual plaintiffs. That  
17 court said: Well, obviously, I don't have to  
18 give a universal injunction to -- to protect  
19 individuals other than the individual  
20 plaintiffs. They are given complete relief by  
21 an injunction that tells federal officials only  
22 to treat their children as citizens.

23 JUSTICE JACKSON: But why -- I guess  
24 the question is: Why -- why does the law  
25 require that? I mean, I appreciate that a court



1     could in a divisible remedy kind of case narrow  
2     in to the plaintiff. But you seem to be  
3     suggesting that Article III or Rule 23 or  
4     something requires that, and I -- I guess I  
5     don't really understand it.

6                 GENERAL SAUER: Yeah. If I may offer  
7     two responses to that.

8                 JUSTICE JACKSON: Yes. Yes.

9                 GENERAL SAUER: In the Article III  
10    context, that is the principle announced in  
11    Warth against Seldin, announced in Gill against  
12    Whitford, in Lewis against Casey, where this  
13    Court has said again and again: What we do in  
14    the Article III context is grant remedy that is  
15    tailored to -- grant remedies that are tailored  
16    to remove the injury to the complaining  
17    plaintiff.

18                Sometimes they have very broad  
19    collateral consequences. But, in the Article  
20    III context, what the Court has not done and  
21    every time it's focused on this in national  
22    treasuries union, employees unions, in the --  
23    the Perkins against Lukens --

24                JUSTICE JACKSON: But I guess I -- I  
25    don't see why then the divisible remedies or

1     indivisible remedies is an argument. I mean, if  
2     Article III is suggesting that the Court has to  
3     focus in on the plaintiff only, then it would  
4     seem to me that that would be the power  
5     requirement across the board.

6             I thought Article III was really about  
7     limiting the Court's power with respect to  
8     jurisdiction, that we say the Court has to  
9     determine whether or not there's subject matter  
10    jurisdiction over the issue and whether or not  
11    there's personal jurisdiction over the  
12    defendant, and once you have those things, the  
13    Court can evaluate the merits of the legal issue  
14    and issue, especially in equity, appropriate  
15    relief.

16            Now I appreciate that there are some  
17    prudential concerns that the Court considers,  
18    but it seems to me that in many, many, many  
19    circumstances we have not required the Court to  
20    limit their relief to the particular plaintiff  
21    as a matter of constitutional Article III  
22    requirement.

23            GENERAL SAUER: I disagree with that.  
24    And I offer a response both, first, as to  
25    Article III and then as to the -- the scope of

1 equitable authority.

2 In the Article III context, this Court  
3 said in Warth against Seldin, for example, that  
4 the Article III judicial power exists only to  
5 redress the injury to the complaining parties.

6 Again, in Gill against Whitford and  
7 Lewis against Casey --

8 JUSTICE JACKSON: All right. So let  
9 me give you a hypothetical. So suppose we have  
10 a manufacturing plant that unlawfully releases  
11 environmental toxins into the air, and we have a  
12 plaintiff who live -- lives near the plant,  
13 brings a nuisance lawsuit and says they're being  
14 harmed by unlawful release.

15 Your argument suggests that the  
16 judgment for the plaintiff has to narrow in on  
17 preventing -- to the extent possible, preventing  
18 harm to the plaintiff. But it seems to me that  
19 that's not necessarily the case.

20 You -- you suggest with the Chief  
21 Justice in response to him that there can be  
22 incidental beneficiaries, that the Court could  
23 say no more toxins if it's unlawful for the --  
24 the defendant to do that, correct?

25 GENERAL SAUER: Yes, we -- that -

1 JUSTICE JACKSON: So why -- why if  
2 your Article III principle is correct?

3 GENERAL SAUER: Because, again, the  
4 Article III principle is remedying the injury to  
5 the plaintiff or set of plaintiffs -- it could  
6 be many -- who are before the court --

7 JUSTICE JACKSON: Right.

8 GENERAL SAUER: -- and that has  
9 collateral consequences that could help.

10 JUSTICE BARRETT: Counsel, let me --  
11 let me ask you on that point: Would one  
12 distinction be who is bound by the judgment?

13 Like, I'm wondering whether if the  
14 plaintiff needs -- you can only -- I think Judge  
15 Strauss said in the Eighth Circuit when  
16 addressing this issue you can't peel off part of  
17 a nuisance, so the whole thing has to be shut  
18 down.

19 Could a neighbor sue affirmatively to  
20 hold the nuisance-maker in contempt if he  
21 started to re-begin, you know, begin again the  
22 nuisance?

23 GENERAL SAUER: That's a great point.  
24 It would not be binding on those collaterally  
25 benefitted parties, so to speak. I don't want

1 to call them parties because they're not parties  
2 before the court. And that, of course,  
3 highlights one of the deep problems with the  
4 universal --

5 JUSTICE JACKSON: No, but why isn't  
6 that the answer, though?

7 JUSTICE BARRETT: Could you do that --

8 JUSTICE JACKSON: I mean, yeah.

9 JUSTICE BARRETT: Could you -- well,  
10 could you do that now for the universal  
11 injunction? Could another -- could a -- could a  
12 plaintiff, for example, who has the protection  
13 of the universal injunction but was not named in  
14 the suit bring a contempt action of the sort I  
15 just described?

16 GENERAL SAUER: They could not do  
17 that, but what they could do is run to any of 93  
18 other judicial districts and bring their own  
19 lawsuit if they -- if they --

20 JUSTICE BARRETT: No, no, no, no.  
21 Under the -- under the injunction as it  
22 stands -- under the injunctions as they stand,  
23 could a non-named plaintiff who has the benefit  
24 of the universal injunction that's currently in  
25 place, could that plaintiff bring a contempt

1 proceeding?

2 GENERAL SAUER: We would --

3 JUSTICE BARRETT: Or I guess I  
4 shouldn't call them a plaintiff. Could that --  
5 could that non-party?

6 GENERAL SAUER: Yeah, we would -- we  
7 would dispute that they would have the standing  
8 to do that because it goes to the heart of the  
9 problem.

10 JUSTICE BARRETT: Well, no, no, no,  
11 I -- I -- let's see. Maybe I'm not being clear.

12 Assume the universal injunction is --  
13 is good. Like, drop your argument right now.

14 GENERAL SAUER: Oh, I see.

15 JUSTICE BARRETT: As they currently  
16 stand, could someone who is not named in this  
17 suit but a beneficiary bring a contempt  
18 proceeding?

19 GENERAL SAUER: I think that that is  
20 what the Respondents --

21 JUSTICE BARRETT: You think they  
22 could?

23 GENERAL SAUER: -- would certainly  
24 contend.

25 JUSTICE BARRETT: Do you concede that

1 the plaintiffs could bring a Rule 23, like the  
2 individual plaintiffs?

3 GENERAL SAUER: We -- we would  
4 dispute -- I mean, we'd have to address the Rule  
5 23 issues, kind of all the criteria as they come  
6 up.

7 JUSTICE BARRETT: Okay. But you  
8 could -- they could seek it. Okay. And then  
9 last question.

10 GENERAL SAUER: And have done that in  
11 Western District of Washington. It's just never  
12 been briefed because the -- they laughed at it.

13 JUSTICE BARRETT: Okay. Just last  
14 question on this point. The states have a  
15 different kind of claim for financial harm, and  
16 they've pointed out that it would be very  
17 difficult to remedy that without some sort of  
18 broader relief.

19 I know you contest their standing. I  
20 want you to assume that I think they have  
21 standing. Why wouldn't they be entitled to an  
22 junction of the scope of the one that has  
23 currently been entered?

24 GENERAL SAUER: I would say two  
25 reasons.

1           First of all, it's not necessary to  
2     provide complete relief to the plaintiffs. What  
3     we offered, for example, in the District of  
4     Massachusetts in the Second or the First Circuit  
5     was an injunction that would enjoin the federal  
6     officials and order them to treat the people who  
7     would otherwise be covered by the Executive  
8     Order as eligible for the services that result  
9     in the pocketbook injuries to the states.

10           And there's really no response to  
11    that. That is obviously -- would fully  
12    remediate their injuries and does not require  
13    the injunction to be applied in all other 50  
14    states. One state comes in and says, well,  
15    people are going to move across state lines;  
16    therefore, we've got 21 states in this case who  
17    don't want this relief. Sorry, you've got to  
18    impose it on everybody because it has to be --  
19    it has to be offered to this one particular  
20    state. So that's -- that's one response.

21           The other response is this notion that  
22    the states have to be provided complete relief  
23    because of interstate travel and patchwork. I  
24    think that's very effectively responded to by  
25    Chief Judge Sutton's opinion in the Second



1 Circuit, where he says this is a problem. If we  
2 adopt this logic, it justifies a universal  
3 injunction in every single case, and that can't  
4 be the case. The Fifth Circuit's recent docket  
5 decision comes to the same conclusion.

6 JUSTICE GORSUCH: Well, what do you  
7 say, though, to the suggestion, General, that in  
8 this particular case, those patchwork problems  
9 for, frankly, the government, as well as for  
10 plaintiffs, justify broader relief?

11 GENERAL SAUER: As to the government,  
12 again, Chief Judge Sutton addressed that  
13 directly as well when he said that's the federal  
14 government's problem. In other words, the  
15 federal government -- for example, in the First  
16 Circuit, we offered that as a narrower scope of  
17 injunction, and the decision was: Well, that  
18 would cause you too many administrative  
19 problems. And I think Chief Judge Sutton  
20 directly addresses that when he says that's a  
21 problem for the Executive Branch in the first  
22 instance.

23 JUSTICE GORSUCH: That's your problem.  
24 All right.

25 GENERAL SAUER: Yeah.

1 JUSTICE GORSUCH: And then, with  
2 respect to class certification, your -- your  
3 friends on the other side point out that that  
4 takes time, and there are, as you've emphasized,  
5 hurdles that have to be met to achieve class  
6 certification.

7 And the argument, of course, is that  
8 the injury is immediate and ongoing and, as  
9 Justice Sotomayor suggested, might be seriously  
10 questioned as to its compliance with this  
11 Court's precedents. Your thoughts?

12 GENERAL SAUER: I would offer a couple  
13 things in response to that.

14 First of all, there are tools to --  
15 for -- the courts have tools to achieve sort of  
16 class-wide universal relief. I referred earlier  
17 that we found four recent district court  
18 decisions where class-wide relief was given on  
19 kind of an emergency basis.

20 However, more fundamentally than  
21 that --

22 JUSTICE GORSUCH: And you agree that  
23 that's appropriate in -- in certain cases?

24 GENERAL SAUER: It may be  
25 appropriate -- we do not concede that it's

1 appropriate in this case, but it may be  
2 appropriate in other cases. Certainly, it's an  
3 equitable tool that is consistent with, for  
4 example, the grant of equitable authority in the  
5 1789 Judiciary Act, as this Court interpreted in  
6 the Grupo Mexicano decision and -- and,  
7 honestly, a line of decisions going all the way  
8 back to the early 19th century. So there are  
9 tools to address emergency situations.

10 But, more fundamentally than that, it  
11 is a feature, not a bug, of Article III that  
12 courts grant relief to the people who sue in  
13 front of them. So the notion that relief has to  
14 be given to the whole world because others who  
15 have not taken the time to sue are not before  
16 the courts --

17 JUSTICE GORSUCH: Last -- last --

18 GENERAL SAUER: -- is something that  
19 results in all of these problems.

20 JUSTICE GORSUCH: -- last question.

21 Do we need to reach the Article III question? I  
22 mean, shouldn't we -- wouldn't it be wise, even  
23 if you were to prevail, for the Court to reserve  
24 that question rather than decide that Congress,  
25 for example, could never endow this Court with

1     that authority?

2                 GENERAL SAUER: All the -- that's  
3     exactly correct. The Court does not have to  
4     rest on Article III because the Court could say,  
5     and as we've argued and as Justice Thomas's  
6     separate opinion in Trump against Hawaii says,  
7     the 1789 Judiciary Act, when it said suits in  
8     equity are what the federal courts can do, had  
9     nothing like this in mind.

10                And then I'd point to the language in  
11     Grupo Mexicano, where the Court said -- there,  
12     what was at issue was a preliminary injunction  
13     that froze a likely insolvent debtor's assets so  
14     that the plaintiff could collect at the end of  
15     the case, and the Court said that's a nuclear  
16     weapon in the law and we're not -- that -- that  
17     had no analogue in 1789 in the practices of the  
18     Court of Chancery.

19                And if that's a nuclear weapon, I  
20     don't know what this is, where, repeatedly, 40  
21     times in this administration, we're being  
22     enjoined against --

23                JUSTICE KAGAN: General --

24                GENERAL SAUER: -- against the entire  
25     world.

1 JUSTICE KAGAN: -- I'm just going to  
2 ask you to put yourself in a different frame of  
3 mind, hard to do, assume something you won't  
4 want to assume. But the assumption that I want  
5 you to make is that, on the merits, which, of  
6 course, you did not take to this Court, on the  
7 merits you are wrong, that the EO is unlawful.

8 And I want to ask you, if we assume  
9 that, how do we get to that result on your view  
10 of the rules?

11 GENERAL SAUER: It is very difficult  
12 for me to attempt the hypothetical --

13 JUSTICE KAGAN: Yeah. Well --

14 GENERAL SAUER: -- but I will.

15 JUSTICE KAGAN: -- You know, I think  
16 that that's the important question in this case.  
17 Let's just assume you're dead wrong. How do we  
18 get to that result? Does every single person  
19 that is affected by this EO have to bring their  
20 own suit? Are there alternatives? How long  
21 does it take? How do we get to the result that  
22 there is a single rule of citizenship that is  
23 not -- that is -- that is -- the rule that we've  
24 historically applied rather than the rule that  
25 the EO would have us do?

1               GENERAL SAUER: Rule 23 would be one  
2     natural path, assuming that a class could be  
3     certified, which we might dispute in this  
4     particular case.

5               JUSTICE KAGAN: Well, you might  
6     dispute it, and, you know, I mean -- I mean, I  
7     think the question is, is there a class that's  
8     just all children of people who have entered  
9     illegally? You know, is that an appropriate  
10    class? Can the same thing be done under Rule  
11    23, or are you going to tell me that, no, Rule  
12    23 has lots of requirements, and you'll never be  
13    able to certify a class like that?

14              GENERAL SAUER: Rule 23 provides the  
15    equitable tools subject to rigorous criteria,  
16    appropriately rigorous criteria, to obtain that  
17    kind of class-wide and emergency relief.

18              JUSTICE KAGAN: That suggests to me  
19    you're going to be standing up here in the next  
20    case saying that Rule 23 is inapt for this  
21    circumstance with this number of people, maybe  
22    with some questions that are individual, who  
23    knows. So let's put Rule 23 aside, because I  
24    got to tell you that does not fill me with great  
25    confidence.

1                   How else are we going to get to the  
2                   right result here, which is on my assumption  
3                   that the EO is illegal?

4                   GENERAL SAUER: That would be a  
5                   profoundly wrong result. But I think what I  
6                   would offer is that, very similar to Labrador  
7                   against Poe, what the Court should be engaging  
8                   in here is a balancing of the equitable factors  
9                   as to the scope of remedial relief, not as to  
10                  the underlying merits.

11                  And our contention that this exceeds  
12                  the traditional scope of equity that's reflected  
13                  in the 1789 Judiciary Act, we're overwhelmingly  
14                  likely to succeed on those merits for all the  
15                  reasons that I've stated in our briefs and in  
16                  the second --

17                  JUSTICE KAGAN: Yeah. I -- I mean,  
18                  that's a lot of words, and I don't have an  
19                  answer for, if one thinks -- and, you know,  
20                  look, there are all kinds of abuses of  
21                  nationwide injunctions, but I think that the  
22                  question that this case presents is that if one  
23                  thinks that it's quite clear that the EO is  
24                  illegal, how does one get to that result, in  
25                  what time frame on your set of rules without the

1 possibility of a nationwide injunction?

2           GENERAL SAUER: On this case and on  
3 many similar cases, the appropriate way to do it  
4 is for there to be multiple lower courts  
5 considering it, the appropriate percolation that  
6 goes through the lower courts, and then,  
7 ultimately, this Court decides the merits in a  
8 nationwide binding precedent. You have a  
9 complete inversion of that through the  
10 nationwide injunctions with the district  
11 courts --

12           JUSTICE BARRETT: But, General  
13 Sauer --

14           JUSTICE KAGAN: Let's say --

15           JUSTICE BARRETT: -- are you really  
16 going to answer Justice Kagan by saying there's  
17 no way to do this expeditiously?

18           GENERAL SAUER: Well, I'll refer to my  
19 fourth -- former answer, is Rule 23 provides the  
20 tools to do so, multiple injunctions --

21           JUSTICE BARRETT: But you resisted  
22 Justice Kagan when she said could the individual  
23 plaintiffs form a class?

24           GENERAL SAUER: We -- that has never  
25 been briefed in the court below. I do not



1     concede that we wouldn't oppose class  
2     certification in this particular case.  There  
3     may be arguments that this case is or is not  
4     appropriate for class certification.  And if  
5     just --

6             JUSTICE BARRETT:  If there were a  
7     class appropriate for class certification, you  
8     concede that that could resolve the question  
9     quickly?

10            GENERAL SAUER:  Yes, absolutely.

11            JUSTICE BARRETT:  You concede it could  
12    resolve the question quickly through precedent?

13            GENERAL SAUER:  Yes, absolutely, it  
14    could do so.  I mean, we obviously dispute  
15    the --

16            JUSTICE KAGAN:  So just on that --

17            JUSTICE GORSUCH:  And if -- and if the  
18    Court --

19            JUSTICE KAGAN:  -- point.

20            JUSTICE GORSUCH:  Sorry.  Sorry.  
21    Sorry to interrupt.  Go ahead, please.

22            All right.  I got a quick one.  I got  
23    a quick one.  I think it's fair --

24            JUSTICE KAGAN:  Well, I'm going --

25            (Laughter.)

1 JUSTICE KAGAN: -- I'm going to say  
2 just -- I'm just going to say just on that  
3 point, so, you know, let -- let's say that we're  
4 an individual person even, let's say it wasn't a  
5 class, and it goes up and gets a ruling from the  
6 Second Circuit that the EO is illegal.

7 Does the government commit to not  
8 applying its EO in the entire Second Circuit, or  
9 does it say, no, we can continue to apply the  
10 rule as to everybody else in the Second Circuit?

11 GENERAL SAUER: I can't say as to this  
12 individual case. Generally, our practice is to  
13 respect circuit precedent within the circuit,  
14 but there are exceptions to that.

15 JUSTICE KAGAN: Yes, that is generally  
16 your practice --

17 (Laughter.)

18 JUSTICE KAGAN: -- and I'm asking  
19 whether it would be your practice in this case.

20 GENERAL SAUER: I can't answer because  
21 it would depend on what the lower decision said.  
22 So there are circumstances, as I was suggesting,  
23 where we think that we want to continue to  
24 litigate that in other district courts in the  
25 same circuit as well as other circuits.

1 JUSTICE KAGAN: Yeah. So that means  
2 it's not even the normal time it takes for  
3 everything to get up, you know, through the  
4 circuit courts and to the Supreme Court because,  
5 even in those circuits that -- that say that the  
6 EO is illegal, you're going to be saying, no,  
7 you know, we only commit to saying it's illegal  
8 to this one guy who brought the suit.

9 GENERAL SAUER: Article III and the  
10 courts' traditional equitable practices provide  
11 a range of tools to address that, including a  
12 potentially nationwide class action, not --  
13 nationwide -- a universal injunction is not one  
14 of those tools.

15 JUSTICE KAGAN: A nationwide class  
16 action, which you say you're going to oppose  
17 when that gets -- gets challenged --

18 GENERAL SAUER: We are likely to  
19 oppose it on the merits.

20 JUSTICE KAGAN: -- when it gets put --  
21 you know, proposed.

22 GENERAL SAUER: Yes, and if it does  
23 not meet the rigorous criteria of class  
24 certification, the court should not enter that  
25 injunctive relief. That's -- that's a feature,

1 not a bug.

2 JUSTICE KAGAN: Do you think -- like,  
3 suppose -- how about you're not willing to  
4 commit to abiding by the Second Circuit's  
5 precedent in my -- suppose that there's a single  
6 person who brings a suit and it gets all the way  
7 up to us after three or four or five years, and  
8 we say, you know, we really do agree with those  
9 four precedents that Justice Sotomayor started  
10 with and your EO is illegal. Is -- is -- is  
11 that only going to bind the one guy who brought  
12 the suit?

13 GENERAL SAUER: No, that would be a  
14 nationwide precedent that the government would  
15 respect.

16 JUSTICE KAGAN: So, finally, once it  
17 gets to us after four years, you're going to  
18 respect that?

19 GENERAL SAUER: Yes, and in addition,  
20 we may well respect circuit-wide precedent in  
21 the Second Circuit. It just is --

22 JUSTICE KAGAN: And -- and -- and for  
23 four years, there are going to be, like, an  
24 untold number of people who, according to all  
25 the law that this Court has ever made, ought to

1 be citizens who are not being treated as such.

2 GENERAL SAUER: And, in the meantime,  
3 any of those plaintiffs could have come forward  
4 and sought, you know, preliminary injunctive  
5 relief, and they could do so on a class-wide  
6 basis. There are tools to address this, but the  
7 universal injunction which was issued here three  
8 days after the Executive Order was issued is not  
9 one of those tools.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Three -- three years, four years,  
13 we've been able to move much more expeditiously.  
14 I think we did the TikTok case in a month.  
15 Presuming -- I gather an important part of your  
16 answer is that people can litigate differently  
17 and one goes -- one will go to Massachusetts,  
18 the other one will go to Houston, and you'll get  
19 conflicting decisions fairly quickly.

20 Is there any reason why this Court --  
21 and I gather that's your -- your safety net, is  
22 that at the end of the day, whenever -- how long  
23 the day is, this Court can issue a decision and  
24 it will bind everything else.

25 Is there any reason in this particular

1       litigation that we would be unable to act  
2       expeditiously?

3               GENERAL SAUER:  Absolutely not,  
4       Mr. Chief Justice.

5               CHIEF JUSTICE ROBERTS:  Okay.  Thank  
6       you.

7               Justice Thomas?

8               JUSTICE THOMAS:  General, when were  
9       the first universal injunctions used?

10              GENERAL SAUER:  We believe that the  
11       best reading of that is what you said in Trump  
12       against Hawaii, which is that Wirtz in 1963 was  
13       really the first universal injunction.  There's  
14       a dispute about Perkins against Lukens Oil going  
15       back to 1940.  And, of course, we point to the  
16       Court's opinion that reversed that -- that --  
17       that universal injunction issued by the D.C.  
18       Circuit and said it's -- it's profoundly wrong.

19              Now, if you look at the -- the cases  
20       that either parties cite, you see a common  
21       theme.  The cases that we cite, like National  
22       Treasuries, Treasuries Employment Union, Perkins  
23       against Lukens Oil, Frothingham in -- in  
24       Massachusetts against Mellon, going back to  
25       Scott against Donald, in all of those, those are

1 cases where the Court considered and addressed  
2 the sort of universal in that case statewide  
3 issue of provision of injunctive relief.

4 So, when the Court has considered and  
5 addressed this, it has consistently said you  
6 have to limit the remedy to the plaintiffs who  
7 are appearing in court and complaining of that  
8 remedy.

9 JUSTICE THOMAS: So we survived until  
10 the 1960s without universal injunctions?

11 GENERAL SAUER: That's exactly  
12 correct. And, in fact, those are very  
13 limited -- very rare even in the 1960s. It  
14 really exploded in 2007 in our cert petition in  
15 Summers against Earth Island Institute. We  
16 pointed out that the Ninth Circuit had started  
17 doing this in a whole bunch of cases involving  
18 environmental claims.

19 CHIEF JUSTICE ROBERTS: Justice Alito?

20 JUSTICE ALITO: You began by outlining  
21 what you see as the practical problems that have  
22 been created by universal injunctions.

23 If we were to hold that the states  
24 have standing and if it is possible for a  
25 plaintiff to get emergency certification of a

1 class, would we -- suppose we agreed with you on  
2 universal injunctions but allowed those other  
3 two avenues.

4 Would those -- would the practical  
5 problem be rectified to any substantial degree?

6 GENERAL SAUER: Certainly, if there  
7 were an injunction that extended to, you know,  
8 all of the litigating states, that would cover a  
9 very substantial portion of the country, and  
10 also an emergency sort of class certification  
11 decision might also grant very broad relief.

12 JUSTICE ALITO: So the answer is that  
13 the practical problem would not be solved, and,  
14 if that's the case, what is the -- what is the  
15 point of this argument about universal  
16 injunctions?

17 GENERAL SAUER: I think the point is  
18 that universal injunctions exceed traditional  
19 principles of Article III and they exceed the  
20 traditional equitable authority and that's what  
21 yields all these sort of pathologies, so to  
22 speak, of the current practice of issuing them  
23 very, very easily.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice



1 Sotomayor?

2 JUSTICE SOTOMAYOR: You answered  
3 Justice Gorsuch, I think, correctly that if  
4 Article III precludes universal injunctions,  
5 then even class actions are illegal. That's  
6 what you're arguing, isn't it?

7 GENERAL SAUER: I disagree with that  
8 profoundly.

9 JUSTICE SOTOMAYOR: How could it? If  
10 Article III and only prohibits injunctions that  
11 affect nonmembers or non-plaintiffs, how could  
12 Congress give a remedy like a class action?

13 GENERAL SAUER: In an Article -- or in  
14 a Rule 23 class, every member, represented  
15 member of the class, has standing by hypothesis.  
16 So every single one of them has an Article III  
17 injury. And Rule 23, again, provides --

18 JUSTICE SOTOMAYOR: So that would be  
19 the only method?

20 GENERAL SAUER: It would be very  
21 similar to the bill of peace, where all those  
22 parties --

23 JUSTICE SOTOMAYOR: All right. Now  
24 why shouldn't --

25 GENERAL SAUER: -- even are present in

1 a represented capacity are bound.

2 JUSTICE SOTOMAYOR: We can act quickly  
3 if we are worried about those thousands of  
4 children who are going to be born without  
5 citizenship papers that could render them  
6 stateless in some places because some of their  
7 parents' homes don't recognize children of their  
8 nationals unless those children are born in  
9 their countries.

10 They're not going to be receiving  
11 federal benefits because that's the claim of  
12 the -- of the -- of the plaintiffs here that --  
13 of the state plaintiffs, that they're going  
14 to -- they're not going to be able to provide  
15 services to those children.

16 Shouldn't we grant cert before  
17 judgment on that issue?

18 If we're afraid that this is or even  
19 have a thought that this is unlawful executive  
20 action, that it is Congress who decides  
21 citizenship, not the executive, if we believe,  
22 some of us were to believe that, why should we  
23 permit those countless others to be subject to  
24 what we think is an unlawful executive action,  
25 as unlawful as an executive taking the guns away

1 from every citizen?

2 GENERAL SAUER: Cert before judgment  
3 would be another tool through which this Court  
4 could act expeditiously.

5 JUSTICE SOTOMAYOR: Is this the kind  
6 of case where the equities would call for that?  
7 And why wouldn't it? It's a pure legal  
8 question: What does the Constitution mean with  
9 respect to citizenship? There are no individual  
10 facts that would alter our conclusion.

11 If we can't do it by a universal  
12 injunction because you say Article III doesn't  
13 permit that, Article III wouldn't permit us to  
14 give a universal injunction even if we rule, why  
15 don't we grant cert before judgment so that all  
16 of these parents would have a firm Supreme Court  
17 decision that they can take where? Because  
18 you're saying nobody can grant a universal  
19 injunction.

20 GENERAL SAUER: No party has asked for  
21 that in this case, and I think one reason is  
22 that would deny the Court of the benefit of  
23 percolation and multiple lower courts of a novel  
24 and sensitive and important constitutional  
25 question.

1 JUSTICE SOTOMAYOR: Right now, we have  
2 multiple courts -- we have novel courts who have  
3 percolated this issue and said you're violating  
4 precedent. Not only precedent, but the plain  
5 meaning of the Fourteenth -- of the  
6 Constitution.

7 GENERAL SAUER: Respectfully, I think  
8 what we have are lower courts making snap  
9 judgments on the merits that ignore the  
10 fundamental principle of the Fourteenth  
11 Amendment that it was about giving citizenship  
12 to the children of slaves, not to the children  
13 of illegal immigrants who really were not even a  
14 very discrete class at that time.

15 JUSTICE SOTOMAYOR: And there were --

16 GENERAL SAUER: And that's the sort of  
17 argument that deserves percolation.

18 JUSTICE SOTOMAYOR: -- and there were  
19 some people in Congress who argued against the  
20 Thirteenth Amendment just because of that, some  
21 people who argued against passing the amendment  
22 just because of that, because it would give  
23 citizenship to gypsies.

24 GENERAL SAUER: I think the relevant  
25 history of the Fourteenth Amendment is the

1 statements of Senator Trumbull, who emphasized  
2 that domicile was the key criteria, and he said  
3 that in a letter to Andrew Jackson, and there --  
4 we've cited in our Ninth Circuit briefing --

5 JUSTICE SOTOMAYOR: And got  
6 rejected -- and it got --

7 GENERAL SAUER: -- a host of decisions  
8 that back that up.

9 JUSTICE SOTOMAYOR: -- it got rejected  
10 repeatedly. We can go into the history of  
11 citizenship, but I still go back to my question.

12 You claim that there is absolutely no  
13 constitutional way to stop, put this aside, to  
14 stop a president from an unconstitutional act, a  
15 clearly, indisputably unconstitutional act,  
16 taking every gun from every citizen, we couldn't  
17 stop that.

18 GENERAL SAUER: I disagree with that  
19 for the reasons I've said, including the  
20 equitable tools that are --

21 JUSTICE SOTOMAYOR: No, because you  
22 said to us we'd have to wait until there was a  
23 final judgment. You're not sure you would  
24 respect the judgment of every circuit. You're  
25 not sure that you would respect even a final

1 judgment of the Supreme Court because it only  
2 binds the parties before it and, if there's no  
3 class action, that only binds the parties before  
4 the Court.

5 GENERAL SAUER: I don't think there is  
6 a, so to speak, really, really unconstitutional  
7 exception to the strictures of Article III or  
8 the scope of equitable authority, and the Court  
9 should not recognize one because what we see not  
10 just in this case but in the 39 others is that  
11 the district courts who are issuing these  
12 injunctions all passionately disagree with the  
13 thing that's being challenged in that.

14 So that principle that, well, this we  
15 think is really unconstitutional, therefore, we  
16 should ignore the general principles of Article  
17 III, is not a principle the Court ought to  
18 adopt.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: So, General, on this  
21 question of expedition, I mean, it -- it sort of  
22 depends on the government's own actions in a  
23 case like this one, where one can expect that  
24 there is not going to be a great deal of  
25 disagreement among the lower courts.

1                   I mean, let's assume that you lose in  
2     the lower courts pretty uniformly, as you have  
3     been losing on this issue, and that you never  
4     take this question to us.

5                   I mean, I notice that you didn't take  
6     the substantive question to us. You only took  
7     the nationwide injunction question to us. I  
8     mean, why would you take the substantive  
9     question to us?

10                  You're losing a bunch of cases. This  
11     guy over here, this woman over here, you know,  
12     they'll have to be treated as citizens, but  
13     nobody else will.

14                  Why would you ever take this case to  
15     us?

16                  GENERAL SAUER: Well, in this  
17     particular case, we have deliberately not  
18     presented the merits to this Court on the  
19     question of the scope of remedies because, of  
20     course, that makes it a clean vehicle where the  
21     Court doesn't have to look at the vast --

22                  JUSTICE KAGAN: You're -- you're  
23     ignoring the import of my question. I'm  
24     suggesting that in a case in which the -- the  
25     government is losing constantly, there's nobody

1     else who's going to appeal, they're winning,  
2     it's up to you to decide whether to take this  
3     case to us.  If I were in your shoes, there is  
4     no way I'd approach the Supreme Court with this  
5     case.

6                 So you just keep on losing in the  
7     lower courts, and what's supposed to happen to  
8     prevent that?

9                 GENERAL SAUER:  Again, I respectfully  
10    disagree with that forecast of the merits.  But,  
11    in response to the question, what I would say is  
12    we have an adversarial system.  And if the  
13    government is not -- for example, not respecting  
14    circuit precedent on the Court's hypothetical in  
15    the Second Circuit, someone easier in the Second  
16    Circuit could take the case up and they could  
17    say, look, the government is violating circuit  
18    precedent on the hypothetical of multiple  
19    circuits and so --

20                JUSTICE KAGAN:  That's the case we're  
21    going to take, somebody who says -- who -- who  
22    says, you know, after we've said that -- that  
23    this all has to be done one by one by one, then  
24    we're going to take a case from somebody who  
25    objects to proceeding one by one by one?



1                   GENERAL SAUER: I'm not sure I  
2     understand the question. I understood the  
3     hypothetical to be --

4                   JUSTICE KAGAN: If you win this  
5     challenge and say there is no nationwide  
6     injunction and it all has to be through  
7     individual cases, then I can't see how an  
8     individual who is not, you know, being treated  
9     equivalently to the individual who brought the  
10    case would have any ability to bring the  
11    substantive question to us.

12                  GENERAL SAUER: They would bring a  
13    lawsuit in the federal district courts against  
14    the -- the government for an injunction  
15    protecting them. And if the government wasn't  
16    respecting, you know, on the applicable circuit  
17    precedent --

18                  JUSTICE KAGAN: Yeah, and then -- and  
19    then they win, and, again, I mean, you need  
20    somebody to lose, but nobody's going to lose in  
21    this case. It's just you're --

22                         (Laughter.)

23                  JUSTICE KAGAN: -- you're going to  
24    have, like, individual by individual by  
25    individual, and all of those individuals are

1 going to win, and the ones who can't afford to  
2 go to court, they're the ones who are going to  
3 lose.

4 GENERAL SAUER: The tools that are  
5 provided to address hypotheticals like this,  
6 again, I --

7 JUSTICE KAGAN: This is not a  
8 hypothetical. This is happening out there,  
9 right? Every court has ruled against you.

10 GENERAL SAUER: We've only had snap  
11 judgments on the merits. You know, obviously,  
12 we're fully briefing the merits in the courts of  
13 appeals, and our arguments are compelling. More  
14 fundamentally, in response to the question --

15 JUSTICE KAGAN: I'm suggesting to you,  
16 like, the -- the -- the real brunt of my  
17 question is, in a case like this, the government  
18 has no incentive to bring this case to the  
19 Supreme Court because it's not really losing  
20 anything. It's losing a lot of individual  
21 cases, which still allow it to enforce its EO  
22 against the vast majority of people to whom it  
23 applies.

24 GENERAL SAUER: And, again, Rule 23  
25 provides an avenue to present -- to address

1       those very concerns.

2                   JUSTICE KAGAN:   Thank you.

3                   CHIEF JUSTICE ROBERTS:   Justice  
4       Gorsuch?

5                   JUSTICE GORSUCH:   Well, Justice Kagan  
6       asked my questions better than I could have.

7                   (Laughter.)

8                   JUSTICE GORSUCH:   How do you suggest  
9       we reach this case on the merits expeditiously?

10                  GENERAL SAUER:   There's a number of  
11       tools the Court could do that -- we think this  
12       case is one that cries out for percolation, that  
13       the Court should allow the lower courts to  
14       address -- address the merits issue multiple  
15       times.  It's currently on briefing in three  
16       different cases in the First, Fourth, and Ninth  
17       Circuits, and we think that that's the  
18       appropriate way to do it.  If the Court  
19       disagreed, obviously --

20                  JUSTICE GORSUCH:   When you lose one of  
21       those, do you intend to seek cert?

22                  GENERAL SAUER:   If we lose, yes,  
23       absolutely.

24                  CHIEF JUSTICE ROBERTS:   Justice  
25       Kavanaugh?

1 JUSTICE KAVANAUGH: So the technical  
2 problem here seems to be class-wide relief  
3 without the district courts going through the  
4 steps to assess whether a class should be  
5 certified, correct?

6 GENERAL SAUER: Correct.

7 JUSTICE KAVANAUGH: Okay. And if you  
8 win here on this procedural point, it seems very  
9 likely that the day after there are going to be  
10 suits filed all over the place seeking  
11 class-wide treatment, maybe statewide classes,  
12 circuit-wide classes, maybe nationwide classes.  
13 I'm sure they're being prepared now, right?

14 And on what basis would you oppose a  
15 statewide class?

16 GENERAL SAUER: I could imagine  
17 certain bases, and, again, it hasn't -- we  
18 haven't briefed this in the lower courts yet.  
19 Yes.

20 JUSTICE KAVANAUGH: You've been  
21 prompting everyone here that Rule 23 is the  
22 cure-all. And I want to explore on what basis  
23 you would oppose a statewide class. Just take  
24 that one for -- for now.

25 GENERAL SAUER: For example -- and,

1 again, this is very hypothetical because I'm not  
2 predicting that we will or will not oppose that.  
3 We haven't taken a position on that yet. But --

4 JUSTICE KAVANAUGH: If you were to  
5 oppose it, on what basis would you plausibly  
6 oppose it?

7 GENERAL SAUER: There may be problems  
8 of commonality and typicality, for example. For  
9 -- for example, there's two different sets of  
10 groups that are affected by the executive order.  
11 There are those where the mothers are  
12 temporarily present and those where the mother  
13 are illegally present, and in both cases, the  
14 father is neither a citizen nor a lawful  
15 permanent resident. So there might be issues of  
16 typicality. Adequacy of representation might  
17 very well be an issue. So there would have to  
18 be that rigorous application of those criteria.

19 Now the argument may be this is a case  
20 that is a natural candidate for a Rule 23(b)(2)  
21 certification. That may well be true. The  
22 government hasn't taken a position on that. Our  
23 position is not that class certification will  
24 necessarily be granted. Our position is that  
25 Rule 23 is how these sorts of claims should be

1       channeled.

2                   JUSTICE KAVANAUGH:   And you think, I  
3       think you just said, it's very possible that  
4       class certification may be granted?

5                   GENERAL SAUER:   It is possible.   We  
6       don't know yet because there was a class  
7       certification motion filed at the very beginning  
8       in the Western District of Washington and it was  
9       just never briefed because, obviously, the  
10      pathology here is that the nationwide  
11      injunctions just go blowing past the class  
12      certification procedures.

13                  JUSTICE KAVANAUGH:   And I guess Rule  
14      23(b)(2), for a lot of the cases we've had over  
15      the past 25 years that you talked about where  
16      there have been universal injunctions or the  
17      lower courts have had that, I mean, 23(b)(2)  
18      could have been used in a lot of those  
19      presumably, correct?   Eviction moratorium,  
20      student loans, OSHA vaccine mandate.   Do you see  
21      the possibility that 23(b)(2) could have been  
22      used instead of -- and some of those were APA,  
23      but put aside the APA issue for now.

24                  GENERAL SAUER:   Yeah, we -- we do set  
25      aside that issue if I may.

1 JUSTICE KAVANAUGH: Yes. I got it.

2 (Laughter.)

3 GENERAL SAUER: Right. Yes, I agree  
4 with that as to some but not in the other cases.  
5 It's hard to see how, for example, Biden against  
6 Nebraska might have -- where a state was the  
7 plaintiff, might have been a 23(b)(2) class, and  
8 Alabama Association of Realtors might have been  
9 a much better candidate for that.

10 And, again, we're not taking a  
11 position on the individual merits. Our --  
12 our -- our overarching point is there's a  
13 tradition of equitable -- of equity in this  
14 country that goes back to the English Court of  
15 Chancery. And what's happening in these  
16 universal injunctions, again, 40 times in this  
17 administration, at least 22 times in the last  
18 administration, 64 times in the administration  
19 before that, is just disregarding those  
20 appropriate procedures to -- to seek this kind  
21 of global relief.

22 JUSTICE KAVANAUGH: I want to ask one  
23 thing about something in your brief. You said,  
24 "And, of course, this Court's decisions  
25 constitute controlling precedent throughout the

1 nation. If this Court were to hold a challenged  
2 statute or policy unconstitutional, the  
3 government could not successfully enforce it  
4 against anyone, party or not, in light of stare  
5 decisis." You agree with that?

6 GENERAL SAUER: Yes, we do.

7 JUSTICE KAVANAUGH: Okay. If you  
8 prevail here -- the original executive order had  
9 a 30-day period before it took effect. If you  
10 prevail here, should there be any pause in -- so  
11 that things can happen that need to happen for  
12 30 days or some period of time, or should it  
13 just -- should we not even worry about that?

14 GENERAL SAUER: Yes, we concede that  
15 the 30-day ramp-up period that the executive  
16 order itself calls for never started because the  
17 injunction -- the universal TROs were granted  
18 almost immediately. And we don't dispute that  
19 there should be a 30-day ramp-up period for  
20 another reason as well, which is that we have  
21 been enjoined from even doing guidance, even  
22 formulating a policy, and that itself is another  
23 problem with these injunctions.

24 JUSTICE KAVANAUGH: On the day after  
25 it goes into effect -- this is just a very



1 practical question, how it's going to work --  
2 what do hospitals do with a newborn, what do  
3 states do with a newborn?

4 GENERAL SAUER: I don't think they do  
5 anything different. What the executive order  
6 says in Section 2 is that federal officials do  
7 not accept documents that have the wrong  
8 designation of citizenship from people who are  
9 subject to the executive order.

10 JUSTICE KAVANAUGH: How are they going  
11 to know that?

12 GENERAL SAUER: The states can  
13 continue to -- the federal officials will have  
14 to figure that out essentially.

15 JUSTICE KAVANAUGH: How?

16 GENERAL SAUER: So you can imagine a  
17 number of ways that the federal officials  
18 could --

19 JUSTICE KAVANAUGH: Such as?

20 GENERAL SAUER: Such as they could  
21 require a showing of, you know, documentation  
22 showing legal presence in the country. For a  
23 temporary visitor, for example, they could see  
24 whether they're on a B-1 visa, which would  
25 exclude kind of the birthright citizenship in

1     that kind of --

2                 JUSTICE KAVANAUGH:  For all the  
3     newborns?  Is that how it's going to work?

4                 GENERAL SAUER:  Again, we don't know  
5     because the agencies were never given the  
6     opportunity to formulate the guidance.  They  
7     would have had 30 days --

8                 JUSTICE KAVANAUGH:  They're only going  
9     to have 30 days to do this.  Do you think they  
10    can get it together in time?

11                GENERAL SAUER:  They're under --  
12    that's what the executive order instructs them  
13    to do, and, hopefully, they will do so.  Again,  
14    it's a speculative and hypothetical scenario  
15    because they were enjoined from even starting  
16    that process.

17                JUSTICE KAVANAUGH:  And then last  
18    question.  You mentioned before this has come up  
19    in the last four or five administrations  
20    primarily.  You know, I guess I've thought about  
21    that a lot too.  Why?  It seems why might be  
22    it's harder to get legislation through Congress,  
23    particularly with the filibuster rule.  
24    Presidents want to get things done with good  
25    intentions.  The executive branches that work

1 for those presidents push hard to -- when they  
2 can't get new authority -- to stretch or use  
3 existing authority, and they've been pushing,  
4 understandably, all with good intentions. All  
5 the presidents, both parties, right, with good  
6 intentions, pushing.

7           Is that your understanding of why this  
8 has happened more, that there's less ability to  
9 get legislation? Because I'm trying to figure  
10 out the why to your opening about the last four  
11 or five administrations. I agree with it. I  
12 think that might be the why, but I'm curious  
13 what you think.

14           GENERAL SAUER: I'm speculating about  
15 the motivations of the individual district  
16 judges who grant these, but one explanation  
17 might be this is an extraordinary power. It's a  
18 very strong power for the reasons the questions  
19 have reflected for a district judge --

20           JUSTICE KAVANAUGH: Well, let me --  
21 let me just pause you right there. The -- the  
22 underlying point is that these district judges  
23 are not just doing universal injunctions;  
24 they're finding these actions illegal because  
25 they're exceeding existing authority, and

1 oftentimes we are too when it gets to us,  
2 finding the actions of presidents of both  
3 parties unlawful because they exceeded existing  
4 authority.

5 So is that coming up more often  
6 because of -- why is that coming up more often?

7 GENERAL SAUER: You know, it's hard to  
8 do a historical analysis, but I would draw an  
9 analogy to the -- to the New Deal, and Professor  
10 Bray makes this point in his article, that  
11 actually, there were very, very passionate  
12 challenges to, you know, sort of nationwide  
13 policies during the Roosevelt administration and  
14 they were not addressed by issuing universal  
15 injunctions. He cites an example where, in one  
16 case, a policy had been held illegal, and there  
17 were, like, 1600 injunctions against that policy  
18 all protecting the individual plaintiffs.

19 So if you look at the history, it's  
20 not clear that what we have of disagreement,  
21 difficulty, gridlock, getting things through  
22 Congress and so forth, that's not just  
23 necessarily new.

24 What is new, and is certainly unique  
25 to the last five presidential administrations,

1 is having these given on this widespread basis  
2 and a systematic basis. Forty, again, in the  
3 last four months.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Barrett?

7 JUSTICE BARRETT: General Sauer, I  
8 want to ask you about a potential tension --  
9 well, no, not a potential tension, an actual  
10 tension that I see in answers that you gave to  
11 Justice Kavanaugh and Justice Kagan.

12 You resisted Justice Kagan when she  
13 asked you whether the government would obey,  
14 within the Second Circuit, a precedent --  
15 distinguishing between opinions and judgments  
16 here.

17 Did I understand you correctly to tell  
18 Justice Kagan that the government wanted to  
19 reserve its right to maybe not follow a Second  
20 Circuit precedent, say, in New York because you  
21 might disagree with the opinion?

22 GENERAL SAUER: Our general practice  
23 is to respect those precedents, but there are  
24 circumstances when it is not a categorical  
25 practice. It is -- and that is not a new

1 policy --

2 JUSTICE BARRETT: This  
3 administration's practice or the longstanding  
4 practice of the federal government?

5 And I'm not talking about in the  
6 Fourth Circuit are you going to respect a Second  
7 Circuit. I'm talking about within the Second  
8 Circuit. And can you say is that this  
9 administration's practice or a longstanding one?

10 GENERAL SAUER: As I understand it,  
11 longstanding --

12 JUSTICE BARRETT: Really?

13 GENERAL SAUER: -- policy of the  
14 Department of Justice, yes, that we generally --  
15 as it was phrased to me, generally respect  
16 circuit precedent but not necessarily in every  
17 case. And certain -- some examples might be a  
18 situation where we're litigating to try and get  
19 that circuit precedent overruled and so forth.

20 JUSTICE BARRETT: Well, okay, so I'm  
21 -- I'm not talking about a situation in which,  
22 you know, the Second Circuit has a case from  
23 1955 and you think it's time for it to be  
24 challenged. That's not what I'm talking about.

25 I'm talking about in this kind of

1 situation. I'm talking about this week the  
2 Second Circuit holds that the executive order is  
3 unconstitutional, and then what do you do the  
4 next day or the next week.

5 GENERAL SAUER: Generally we follow  
6 that.

7 JUSTICE BARRETT: So you're still  
8 saying "generally."

9 GENERAL SAUER: Yes.

10 JUSTICE BARRETT: And you still think  
11 that it's generally the policy, longstanding  
12 policy of the federal government to take that  
13 approach?

14 GENERAL SAUER: That is my  
15 understanding.

16 JUSTICE BARRETT: Okay. So -- but it  
17 sounds to me like you accept a Cooper versus  
18 Aaron kind of situation for the Supreme Court,  
19 but not for, say, the Second Circuit?

20 GENERAL SAUER: I --

21 JUSTICE BARRETT: In other words, you  
22 would respect the opinions and the judgments of  
23 the Supreme Court, and you're saying you would  
24 respect the judgment but not necessarily the  
25 opinion of a lower court.

1                   GENERAL SAUER: And, again, and I  
2     think in the vast majority of instances our  
3     practice has been to respect the opinions as  
4     well, in -- in the circuits as well, but my  
5     understanding that has not been a categorical  
6     practice in the way respect for the precedence  
7     and the judgments that the Supreme Court has  
8     been.

9                   JUSTICE BARRETT: So you're not  
10    hedging at all with respect to the precedent of  
11    this Court?

12                  GENERAL SAUER: That is correct. I --  
13    I believe the --

14                  JUSTICE BARRETT: All right.

15                  GENERAL SAUER: -- quotation from our  
16    application directly addresses that.

17                  JUSTICE BARRETT: Okay.

18                  GENERAL SAUER: And we stand by that  
19    completely.

20                  JUSTICE BARRETT: Okay. Next  
21    question. So this is also a follow-up to some  
22    of your -- the questions that others have asked  
23    you about the merits of the order not being  
24    before us.

25                  Did I understand your answer to be



1     because you think percolation is really  
2     important for this one?

3                 GENERAL SAUER:  We do think  
4     percolation is really important for this one.  
5     But the reason the merits are not before us is  
6     because we have only submitted a stay  
7     application on the scope of relief question.

8                 And as Labrador against Powell  
9     indicates, the scope of relief is a separate  
10    question from --

11                JUSTICE BARRETT:  Oh, I understand  
12    it's a separate question, but there are plenty  
13    of times that the government comes to us and  
14    asks for both.

15                GENERAL SAUER:  Absolutely.  For  
16    example, recently in the Wilkinson Cox  
17    application, we did exactly that.

18                JUSTICE BARRETT:  And the reason why  
19    you didn't ask for both here is because you  
20    think that the merits question needs  
21    percolation.

22                GENERAL SAUER:  Yes.  But also, more  
23    fundamentally, it illustrates that the very  
24    problem with these nationwide injunctions is  
25    they -- they -- they force this rushed, you

1 know, fast and furious decisions on the merits.  
2 So I think it would be very inappropriate in  
3 this case to come to a stay application saying  
4 please give us a rushed, you know, decision on  
5 the merits of something that's very, very --

6 JUSTICE BARRETT: But the government's  
7 done that in other cases too, right?

8 GENERAL SAUER: Those cases would be  
9 different than this case. The example I gave  
10 earlier we think it's very clear-cut on the  
11 merits. You know, this one is, we -- we  
12 concede, a novel and --

13 JUSTICE BARRETT: So this one isn't  
14 clear-cut on the merits from the government?

15 GENERAL SAUER: This one -- in this  
16 case, we want the Court to address the remedial  
17 issue. If we offered the merits first, that's a  
18 vehicle problem because the Court has, in many  
19 cases, just addressed the merits and not the  
20 remedial issue.

21 And it's imperative, from the federal  
22 government's perspective, that the remedial  
23 question be addressed.

24 JUSTICE BARRETT: Okay. So last  
25 question is about why that is.

1           Justice Alito asked you well, what's  
2     the point of this? If the same thing could  
3     happen, which is effectively the EO being  
4     enjoined everywhere via class action or because  
5     it's necessary to provide complete relief, say,  
6     to the states, is there any difference, in your  
7     view, between, say, a class is certified of all  
8     individual plaintiffs and they win, and the  
9     executive order classwide -- there's a judgment  
10    saying that it can't be enforced?

11           Do you want to say, you know, follow  
12    up -- is there any practical distinction you  
13    see? Why -- why does the government care?

14           Is it just the rigors of the  
15    certification process, or is it something more?

16           GENERAL SAUER: The -- the rigors of  
17    the certification process. Keep in mind that in  
18    many of these cases we successfully oppose class  
19    action. But we have not --

20           JUSTICE BARRETT: Let's assume I think  
21    you can't successfully oppose it here for  
22    individual plaintiffs.

23           GENERAL SAUER: Well, I mean, that  
24    opportunity to have our day in court on that is  
25    very, very important.

1 JUSTICE BARRETT: I -- I understand.

2 But let's -- let's assume.

3 GENERAL SAUER: Okay.

4 JUSTICE BARRETT: Go with my  
5 assumption.

6 GENERAL SAUER: Assuming that we were  
7 to lose and -- and oppose --

8 JUSTICE BARRETT: Assume the class is  
9 certified. Is there any benefit -- if a class  
10 is certified -- and let's say that you were  
11 pointing out that the executive order targets  
12 two different kinds of people. Let's assume  
13 that it's commonality, because, you know, they  
14 only target one portion of the order, right?

15 In that circumstance, does the  
16 government get anything different -- this is  
17 back to Justice Alito's question about what --  
18 what's it to you, what's the practical  
19 difference to you. Do you want to say anything  
20 about whether there's a practical difference  
21 between a universal injunction and a loss in the  
22 class?

23 GENERAL SAUER: Absolutely.

24 JUSTICE BARRETT: Okay.

25 GENERAL SAUER: Among many others, the

1 represented class members are bound in the class  
2 action context. And that means that, if they  
3 lose, they are bound by that as well. So  
4 they're taking a grave risk, so to speak, by  
5 proceeding through a class action.

6 And it has this symmetry, where the  
7 government is bound if -- if -- if we lose; they  
8 are bound if we don't lose. And that's a very,  
9 very important distinction.

10 JUSTICE BARRETT: And you would  
11 respect that judgment?

12 GENERAL SAUER: If it were -- yes, if  
13 it were a judgment. You know, now, we may try  
14 to litigate in other contexts to try and get a  
15 different judgment from a different --

16 JUSTICE BARRETT: Sure.

17 GENERAL SAUER: -- district court, but  
18 we would be bound by that judgment. As would  
19 they, and that's the crucial point.

20 JUSTICE BARRETT: Okay.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Jackson?

23 JUSTICE JACKSON: So as far as I can  
24 tell, your bottom line seems to be that what you  
25 call universal injunctions give relief to

1 nonparties without going through the necessary  
2 steps, which you identify in Rule 23.

3 Do I have that right? I mean, is that  
4 sort of like boiled to bare essence what you're  
5 saying?

6 GENERAL SAUER: I would say there's a  
7 lot more to it --

8 JUSTICE JACKSON: Yeah.

9 GENERAL SAUER: -- but that's one very  
10 important one.

11 JUSTICE JACKSON: That's a key point  
12 that I want to focus in on for a moment. I  
13 guess I don't understand why you are saying that  
14 these kinds of injunctions are giving relief to  
15 nonparties.

16 First of all, I think they can be also  
17 easily characterized as focusing only on the  
18 defendant pursuant to the court's jurisdiction,  
19 personal jurisdiction, over this person relative  
20 to the subject matter jurisdiction that the  
21 court has, and the relief is telling the  
22 defendant stop doing this thing that the court  
23 has found to be unlawful.

24 So rather than characterizing it as  
25 a, quote/unquote, universal injunction, I think

1     one could easily see that this is just about the  
2     extent to which the court can constrain a  
3     defendant over whom it has personal  
4     jurisdiction, can it do so completely, or just  
5     partially with respect to -- you know, just say  
6     stop, with respect to this plaintiff.

7                 Am I mischarac- -- like, I don't  
8     understand where this idea of universal  
9     injunctions comes from in this context.

10                GENERAL SAUER: I think the relevant  
11     distinction is an order. That order is in this  
12     case the government defendant to cease allegedly  
13     unlawful activity as to the parties who have  
14     come into court and sued and one that says to  
15     the government defendant cease the allegedly  
16     unlawful activity against everyone in the entire  
17     world.

18                JUSTICE JACKSON: No, just cease it,  
19     just stop. This thing, this Executive Order --  
20     I mean, we do this in the APA context all the  
21     time, right? The statute says you hold that  
22     the -- you set aside the conduct, right, that  
23     it's unlawful. And we don't really parse it out  
24     and say, okay, but it's unlawful only as it  
25     applies to the plaintiff, or not.

1                   So it's a very common concept for the  
2     court to enjoin a defendant from doing  
3     particular unlawful behavior.

4                   And what you're now asking us to do is  
5     to require that the court have an additional  
6     limitation in its order that says you only have  
7     to stop doing this with respect to the  
8     plaintiff. And that's the part that I don't  
9     understand.

10                  I -- I guess, I guess, from what I can  
11     read from your papers and what you've said here,  
12     that that limitation, you say, comes from this  
13     principle that, if you don't do that, you would  
14     be somehow giving relief to nonparties.

15                  But I -- I -- I wonder if that's  
16     right. I mean, it seems to me that the relief  
17     is the judgment that you provide to the  
18     plaintiff that says stop doing this conduct.  
19     And you give it only to the plaintiff. That's  
20     where the limitation comes.

21                  The plaintiff is the only person who  
22     can go to court, after you violate this order,  
23     and enforce it. Other people are incidental  
24     beneficiaries of -- of a court ordering you to  
25     follow the law.



1           I mean, that's like everyone in the  
2 world. When a court says follow the law,  
3 anybody who would have been hurt by your not  
4 following the law benefits.

5           Okay. I -- I don't understand why  
6 that would limit the court in its ability to  
7 tell you: Don't do this unlawful conduct.

8           GENERAL SAUER: Two responses to that.

9           JUSTICE JACKSON: Yes.

10          GENERAL SAUER: One is that principle  
11 that your question referred to is the holding of  
12 the Court in Warth against Seldin and it's  
13 reaffirmed in Gill against Whitford and Lewis  
14 against Casey and similar cases, that the  
15 authority of the federal court, whether it's  
16 viewed as arising under Article III or under its  
17 traditional equitably -- scope of equitably  
18 authority, is to remediate the injuries to the  
19 complaining party. And then to address your  
20 question about --

21          JUSTICE JACKSON: Can I just stop you  
22 there? I'm, as the Court, remediating the  
23 injury by telling the defendant to stop doing  
24 this behavior. The plaintiff has brought a  
25 claim that this executive order is unlawful, I

1 look at it, I litigate it, and I say you're  
2 right, stop doing it, you cannot enforce this  
3 order.

4 So I don't understand why that's,  
5 like, outside the scope of Warth versus Seldin.

6 GENERAL SAUER: If the Court in that  
7 case is imposing a -- what we call an  
8 indivisible remedy, for example, vacatur under  
9 the APA -- there's a debate about what "set  
10 aside" means. Assuming it means to vacate, then  
11 the remedy that Congress has provided as a  
12 condition of its delegation to the -- the agency  
13 is, if one part of the, you know -- if the -- if  
14 the regulation is unlawful, then the remedy  
15 granted, which directly remediates the  
16 plaintiff's injury in that hypothetical, is an  
17 indivisible remedy that benefits others.

18 Here in this case and in all the other  
19 40 cases, we see something totally different.

20 JUSTICE JACKSON: Yeah, I understand.

21 GENERAL SAUER: Because it's not  
22 necessary to remediate --

23 JUSTICE JACKSON: Yeah.

24 GENERAL SAUER: -- the injuries of the  
25 plaintiff before them. That is the --

1                   JUSTICE JACKSON: I understand. Let  
2 me just -- let me just turn your attention to  
3 one other thing because the real concern, I  
4 think, is that your argument seems to turn our  
5 justice system, in my view at least, into a  
6 "catch me if you can" kind of regime from the  
7 standpoint of the executive, where everybody has  
8 to have a lawyer and file a lawsuit in order for  
9 the government to stop violating people's  
10 rights.

11                   Justice Kagan says let's assume for  
12 the purpose of this that you're wrong about the  
13 merits, that the government is not allowed to do  
14 this under the Constitution. And yet it seems  
15 to me that your argument says we get to keep on  
16 doing it until everyone who is potentially  
17 harmed by it figures out how to fire -- file a  
18 lawsuit, hire a lawyer, et cetera.

19                   And I don't understand how that is  
20 remotely consistent with the rule of law, you  
21 know, a system -- and I appreciate that you go  
22 back to English common law and the Chancery  
23 Court, but they had a different system. The  
24 fact that the courts back in English Chancery  
25 couldn't enjoin the king I think is not

1 analogous or indicative of what courts can do in  
2 our system where "the king," quote/unquote, the  
3 executive is supposed to be bound by the law.  
4 And the court has the power to say what the law  
5 is. And so one would think that the court could  
6 say this conduct is unlawful and you have to  
7 stop doing it.

8           GENERAL SAUER: I think the "catch me  
9 if you can" problem operates in the opposite  
10 direction where we have the government racing  
11 from jurisdiction to jurisdiction, having to  
12 sort of clear the table in order to implement a  
13 new policy.

14           A great example of this is in the  
15 Shilling litigation where the -- the military  
16 had a military readiness policy. It was  
17 universally enjoined by the DDC. It went up to  
18 the D.C. Circuit. The D.C. Circuit stayed that  
19 injunction to allow that policy to go into  
20 effect, and then one hour later, a district  
21 court on the other side of the country  
22 universally --

23           JUSTICE JACKSON: Can I just ask you  
24 one final thing, because this relates to also  
25 something that Justice Kagan said?

1           I would think we'd want the system to  
2     move as quickly as possible to reach the merits  
3     of the issue, and maybe have this Court decide  
4     whether or not the government is entitled to do  
5     this under the law. Wouldn't having universal  
6     injunctions actually facilitate that?

7           It seems to me that, when the  
8     government is completely enjoined from doing the  
9     thing it wants to do, it moves quickly to appeal  
10    that to get it to the Supreme Court, and that's  
11    actually what we would want.

12          What I worry about is similar to what  
13    Justice Kagan points out, is that, if the  
14    government is saying no lower court can  
15    completely enjoin it, it actually means that the  
16    government just keeps on doing the purportedly  
17    unlawful thing, and it delays the ability for  
18    this Court to reach the underlying issue.

19          GENERAL SAUER: Percolation of novel,  
20    sensitive constitutional issues is a merit of  
21    our system. It is not a -- not -- not a bad  
22    feature of the system.

23          JUSTICE JACKSON: Thank you.

24          CHIEF JUSTICE ROBERTS: Thank you,  
25    counsel.

1                   Mr. Feigenbaum.

2                   ORAL ARGUMENT OF JEREMY M. FEIGENBAUM

3                   ON BEHALF OF THE STATE AND CITY RESPONDENTS

4                   MR. FEIGENBAUM:   Mr. Chief Justice,  
5                   and may it please the Court:

6                   This Court should deny the emergency  
7                   application because this injunction was properly  
8                   designed to ensure that the states would get  
9                   relief for our own Article III injuries as we  
10                  suffer significant pocketbook and sovereign  
11                  harms from implementation of this executive  
12                  order, including from the application of this EO  
13                  to the 6,000 babies born to New Jersey parents  
14                  out of state every year.

15                 The U.S. prefers alternative  
16                 approaches for granting that relief,  
17                 alternatives it never raised in the district  
18                 court below. But its approach would require  
19                 citizenship to vary based on the state in which  
20                 you're born or even turn on or off when someone  
21                 crosses state lines, raising serious and  
22                 unanswered administrability questions, not just  
23                 for the federal government, but also for the  
24                 states.

25                 And it would offend the text in

1 history of the Citizenship Clause itself. Since  
2 the Fourteenth Amendment, our country has never  
3 allowed American citizenship to vary based on  
4 the state in which someone resides, because the  
5 post-Civil War nation wrote into our  
6 Constitution that citizens of the United States  
7 and of the states would be one and the same  
8 without variation across state lines.

9           The U.S. has claimed that Article III  
10 establishes a bright-line rule barring such  
11 injunctions no matter the circumstance, even  
12 where the states do need it to meet their own  
13 harms, finds no support in this Court's cases or  
14 in the history of equity.

15           Its argument that a single district  
16 court cannot decide birthright citizenship or  
17 that we need more percolation on that question  
18 for the nation overlooks that this Court already  
19 settled this exact constitutional question 127  
20 years ago and that this EO is contrary to over a  
21 century of executive practice.

22           Finally, the U.S.'s objection that  
23 nationwide PIs have simply become too common in  
24 the last few months, a complaint about other  
25 injunctions sought by other parties, cannot

1     undermine the extraordinary bases for this one.  
2     The states, who regularly come before this court  
3     as plaintiff and defendant alike, agree that  
4     nationwide relief can be reserved for narrow  
5     circumstances, but it was needed here.

6                 I welcome this Court's questions.

7                 JUSTICE THOMAS: Putting the merits  
8     aside, what -- what do you think is the origin  
9     of or at least the pedigree of universal  
10    injunctions, particularly the bill of peace, if  
11    you would discuss that?

12                MR. FEIGENBAUM: Absolutely,  
13    Your Honor. So there's two categories of these  
14    broad injunctions. So, first, although we use  
15    the term "nationwide injunction," if the  
16    nationwide injunction is actually about meeting  
17    our harm and the alternatives are not legally or  
18    practically workable, then it isn't even a  
19    universal injunction, as I know this Court's  
20    separate writings has used the term, because  
21    it's about meeting our own Article III injury,  
22    which is our basic submission about this case.

23                But we do agree that there's some  
24    space for universal relief. We trace it back  
25    through the history, from the bill of peace



1 through Equity Rule 48, which specifically  
2 clarified that, in the American equitable  
3 traditional, it was not always the case that  
4 universal relief would bind the nonparties even  
5 as it might benefit the nonparties, continuing  
6 on to the tax collection injunctions in the 19th  
7 century and then continuing on as recently as  
8 this Court's order in AARP.

9           So I do think they've always been in  
10 narrow circumstances. They've never been the  
11 reflexive or norm of how relief should be  
12 granted in this country, but they have been  
13 available.

14           I don't think I need that for my case,  
15 but I do think they're available in narrow  
16 circumstances.

17           CHIEF JUSTICE ROBERTS: You say they  
18 should be available only in narrow  
19 circumstances. Why -- why is that?

20           MR. FEIGENBAUM: Yeah, so I could -- I  
21 could offer the three that I think make the most  
22 sense, but we're mindful of some of the concerns  
23 that the United States raises.

24           We are states who've benefited from  
25 federal policies. We are states who have our

1 own statutes and policies. So sometimes we are  
2 on the other side of the "v" in cases involving  
3 universal relief. So we are sympathetic to some  
4 of the concerns the United States has about  
5 percolation, about running the table in  
6 particular cases.

7 We just don't think that that supports  
8 a bright-line rule that says they're never  
9 available. And we've identified, I think, at  
10 least three circumstances where they would make  
11 sense to be available.

12 The first would be in cases where the  
13 alternative ways of remedying the harm for the  
14 parties are not practically or legally workable.  
15 That's this case. And I'll return to that in a  
16 second.

17 The second would be congressional  
18 authorization. So I took my friend on the  
19 another side to try to set aside vacatur, but I  
20 do think their Article III objections would  
21 raise serious questions for remedies like  
22 vacatur, for remedies like the Hobbs Act, even  
23 the Hobbs Act, which could set a nationwide PI  
24 after a multi- -- multi-circuit lottery, might  
25 ultimately have problems under their view of

1 Article III.

2 And then the third thing I would say  
3 is there may be cases in which the alternative  
4 forms of getting nonparty relief are not legally  
5 or practically available. So that might be a  
6 case like AARP or even a case like this one,  
7 where district courts could consider the  
8 availability of the class action device, but if  
9 it couldn't move fast enough because Rule 23  
10 doesn't include TROs and PIs, if it couldn't  
11 move fast enough in those contexts, courts might  
12 need to step in any way.

13 But I think we fit in the first bucket  
14 in this particular case because the alternative  
15 ways of remedying our particular significant  
16 pocketbook harms to the tunes of millions of  
17 dollars can't be remedied, as the district court  
18 found below, without granting us this kind of  
19 relief.

20 CHIEF JUSTICE ROBERTS: Well, I mean,  
21 you could benefit through percolation and a  
22 decision from this Court with reasonable  
23 expedition.

24 MR. FEIGENBAUM: So I have no  
25 objections to reasonable expedition --

1 expedition. We would have no objection to this  
2 Court even setting supplemental briefing on the  
3 merits and hearing the merits directly. I'm  
4 happy to talk about the ways in which I think  
5 the merits do bear on this emergency  
6 application.

7 But, more fundamentally, to your  
8 question, Mr. Chief Justice, I would just note  
9 that I don't think the alternatives actually  
10 fully remedy our injuries in a couple of  
11 different respects.

12 So I heard my friend on the other side  
13 to specifically say today that maybe there can  
14 be an instruction to the federal government that  
15 at least when you're dealing with the Plaintiff  
16 States, you treat these individuals kind of as  
17 though they're citizens even if they're not  
18 really citizens.

19 And that doesn't work, not just for  
20 the federal government. I agree Justice  
21 Gorsuch, it may well be that the federal  
22 government can decide when to take its own  
23 medicine, but I'm talking about administrability  
24 burdens on the states and administrability  
25 burdens on third parties as well.

1 JUSTICE GORSUCH: Can I ask you a  
2 question about that, counsel? Your three  
3 buckets are very thoughtful. The first one  
4 seems to me kind of consistent with traditional  
5 equity, which is if -- if it's required -- if  
6 you got to remedy the claim's harm. That's your  
7 point there and you're saying we fall in that  
8 bucket. I get that argument.

9 The second bucket is possibly Article  
10 III, okay, that Congress could authorize, and  
11 maybe has authorized circumstances, but that  
12 doesn't answer the equity point.

13 So we come to bucket three. And  
14 I'm -- I'm struggling to understand what the  
15 rule is there. You seem to suggest, well, if  
16 it's -- if it's really important, and if you  
17 have to act expeditiously, then go ahead, but I  
18 think every district court who enters one of  
19 these thinks that's what they're doing.

20 So what's the constraint there? If  
21 you share the government's concerns about the  
22 rise of these things in the last few decades,  
23 what -- what teeth does any of that have?

24 MR. FEIGENBAUM: So I do feel like  
25 something of an amicus to this question because

1 nothing in -- in my injunction rises or falls on  
2 this claim bucket --

3 JUSTICE GORSUCH: Exactly. I --

4 MR. FEIGENBAUM: -- so I'm happy to  
5 answer questions on that.

6 JUSTICE GORSUCH: -- I need all the  
7 amici I can get.

8 MR. FEIGENBAUM: Fair enough,  
9 Your Honor.

10 So I would say two things about that.  
11 The first is it does require reading the history  
12 in a way more like I do, which does not create a  
13 single bright-line rule that this is never  
14 available.

15 Obviously if someone reads the  
16 history as saying --

17 JUSTICE GORSUCH: I'm -- I'm spotting  
18 you that --

19 MR. FEIGENBAUM: Great.

20 JUSTICE GORSUCH: -- for the purposes  
21 of my question.

22 MR. FEIGENBAUM: Great.

23 JUSTICE GORSUCH: I'm not granting --  
24 the -- granting the --

25 MR. FEIGENBAUM: I thought you might

1 not, Justice Gorsuch.

2 JUSTICE GORSUCH: I'm spotting it to  
3 you and I'm just saying, well, okay, what would  
4 that look like and how would that be any  
5 different from what we have experienced over the  
6 last few decades.

7 MR. FEIGENBAUM: So this is a way in  
8 which my first bucket and my third bucket are  
9 actually going to relate for a moment, so I  
10 think this --

11 JUSTICE GORSUCH: No, no, no, no, no,  
12 no, no --

13 MR. FEIGENBAUM: No, It's helpful. I  
14 promise.

15 JUSTICE GORSUCH: No, you don't get to  
16 squiggle out into the first bucket, okay. We're  
17 in the third bucket.

18 MR. FEIGENBAUM: I'll answer for the  
19 third bucket which is I think it requires having  
20 district courts consider the availability of the  
21 alternative and explaining why it's not workable  
22 in the case.

23 JUSTICE GORSUCH: I think we've told  
24 them to do that and, you know, gosh, how many  
25 times do we have to tell them to do that. And I

1 think in -- in -- in fairness to them, that's  
2 what they think they have.

3 So let's -- again, would any case over  
4 the last 30 years come out differently under  
5 your -- your view of the -- the -- the rule and  
6 the third bucket and -- and has?

7 MR. FEIGENBAUM: Yeah. So there's a  
8 couple of examples where we don't think  
9 universal relief was appropriate. I'm most  
10 familiar with the state litigation, so most of  
11 my examples will probably come from there, but I  
12 heard my friend on the other side mention the  
13 DACA litigation where Texas sought the  
14 termination of DACA and ultimately the -- the  
15 Fifth Circuit terminated DACA specific to Texas  
16 alone.

17 And we thought that that decision was  
18 exactly right because of the nature of the harms  
19 in that case meant that Texas could get full  
20 relief for its harms.

21 JUSTICE GORSUCH: Well, that -- now  
22 we're back to the first bucket. We're just  
23 satisfying the --

24 MR. FEIGENBAUM: I -- I -- I see the  
25 point. I take the point, Your Honor.



1 JUSTICE GORSUCH: I mean, I get that  
2 we're going to always revert back to the first  
3 bucket but that means the third bucket is empty.

4 MR. FEIGENBAUM: I don't -- I -- I --  
5 I totally take the point. I think AARP is a  
6 good illustration of the third bucket that this  
7 Court confronted recently where it was the case  
8 that there was this rush just a few hours, not  
9 possible to go through class certification.

10 You heard my friend on the other side  
11 talk about the rigors of class certification,  
12 and I don't think my friend on the other side  
13 would agree it could be done in three hours  
14 through the night and so there were a necessity  
15 to step in --

16 JUSTICE KAVANAUGH: Do you -- do you  
17 agree about the riggers of class certification?  
18 It seems to me that 23(b)(2) classes and -- and  
19 you probably, if -- if you have to, are going to  
20 be arguing that they're not so rigorous to meet  
21 for injunctive relief for national policies that  
22 are uniform.

23 MR. FEIGENBAUM: So the most important  
24 thing that hasn't come up in the discussion this  
25 morning yet, is that they're not available for

1 state litigation. It talks about persons. It  
2 talks about appointment of class counsel. It  
3 talks about going through the certification  
4 process.

5 States, and this Court's precedents  
6 are really clear about parents back trying  
7 lawsuits. States can't represent those  
8 individuals in class actions nor would we try  
9 to. They can't represent us and you don't have  
10 classes of states.

11 So the whole framework doesn't apply  
12 to state litigation. So I understood how it  
13 might come up as an alternative for some other  
14 cases you might see in the future, but for the  
15 injunction you have in front of you from the  
16 states, the whole class device doesn't even work  
17 as an alternative.

18 JUSTICE BARRETT: But --

19 MR. FEIGENBAUM: So I don't see how it  
20 can be the answer for us.

21 JUSTICE BARRETT: But why should you  
22 care if the class device doesn't work as an  
23 alternative if you have bucket one.

24 Like you -- you don't really need the  
25 class device. I think what you're saying is

1 will it be frustrating for states not to have  
2 the class device when the individuals have it,  
3 but I don't see why that's true if giving you  
4 complete relief in -- in bucket one solves your  
5 problem.

6 MR. FEIGENBAUM: So I should be very  
7 clear and I'm sorry for the confusion on this.  
8 This goes back to my colloquies with Justice  
9 Gorsuch.

10 When states are seeking the relief,  
11 states are seeking it in bucket one and bucket  
12 two. As an amicus to the other injunction --

13 JUSTICE BARRETT: I see.

14 MR. FEIGENBAUM: -- I recognize courts  
15 are looking at, I think bucket three could be  
16 available.

17 We aren't seeking relief when it falls  
18 into bucket three because as I was saying  
19 earlier, we're not going to be seeking relief  
20 for other parties. This Court's cases like  
21 Brackeen make very clear, we aren't suing to  
22 indicate the injuries that third parties and our  
23 residents are suffering.

24 So when states come before you, the  
25 questions that you would ask are: Are the

1 alternative ways of remedying our injury going  
2 to be practically or legally workable? And  
3 you're going to ask did Congress authorize it,  
4 which gets to the vacatur question which gets to  
5 the Hobbs Act question and so on.

6 And on that first bucket, which I  
7 think describes this case well, I had a hard  
8 time with some of the colloquies earlier today  
9 because I think they were missing some really  
10 serious burdens that the states are still going  
11 to have to bear in this case if we get something  
12 less than a nationwide injunction.

13 I think it's going to hinder the  
14 administration of our benefits programs. I  
15 think it's going to hinder the participation in  
16 our benefits programs. And I think it's going  
17 to produce unprecedented chaos on the ground.

18 And I -- I might offer examples of  
19 each.

20 JUSTICE GORSUCH: Before you do, I'm  
21 sorry. One more.

22 MR. FEIGENBAUM: No, no.

23 JUSTICE GORSUCH: How would you  
24 this -- how would you get the merits of this  
25 case to us promptly.

1                   MR. FEIGENBAUM: So, there's two  
2     different ways that this Court could think about  
3     doing it.

4                   So the first is, I heard a couple  
5     colloquies earlier today to suggest that maybe  
6     the states should sort of have to take some of  
7     that -- the burdens on ourselves because, okay,  
8     some people move in, maybe that's just something  
9     that equity shouldn't care about, and it may be  
10    true, this is Hornbook equity, that in some  
11    cases states don't get complete relief for the  
12    harms they suffer, we just have to eat some of  
13    the administrability burdens.

14                  But the merits have always come into  
15    that because that is just about remedying a  
16    party's own injuries and the strength of the  
17    ability to remedy our injuries is going to turn  
18    on a peek on the merits.

19                  This is partially Ohio versus EPA and  
20    building on Justice Kavanaugh's Labrador  
21    concurrence where this Court said, you might  
22    have some states who really like a policy and  
23    some states who want to get relief from the  
24    policy, and how you reconcile those two things,  
25    who should get relief, who should benefit from

1 the policy, will turn in part on a peek at the  
2 merits because --

3 JUSTICE GORSUCH: Yes.

4 MR. FEIGENBAUM: -- we have a greater  
5 right to relief from it.

6 JUSTICE GORSUCH: I appreciate that.  
7 How do we get to the merits fast?

8 MR. FEIGENBAUM: This Court could set  
9 supplemental briefing on the merits by an order  
10 tomorrow if it wished specifically to say the  
11 federal government has proposed that states get  
12 less than complete relief in this case. We  
13 could not possibly think about giving the states  
14 less than complete relief without looking at the  
15 merits. We want briefing.

16 JUSTICE GORSUCH: Okay. Put that  
17 aside. Assume we've just got the remedial  
18 question before us and we're going to decide the  
19 remedial question one way or the other, then  
20 what?

21 MR. FEIGENBAUM: Oh, then I share some  
22 of Justice Kagan's concerns from earlier that  
23 if --

24 JUSTICE GORSUCH: So I -- I appreciate  
25 you share those concerns. How would you address

1     them?  How -- how -- how would the states plan  
2     to get this case to the Court promptly?

3                 MR. FEIGENBAUM:  I think it's very  
4     hard to think about how the states would lose  
5     this case given the state of Supreme Court  
6     precedent.  It creates very weird incentive on  
7     the certiorari docket when there's already  
8     binding precedent from this Court.

9                 We do suffer harms from the  
10    application of this Executive Order beyond our  
11    borders that we need relief from.  If we don't  
12    get a full remedy from that, I suppose we could  
13    ultimately seek cert before judgment on the  
14    basis that we still have Article III injuries  
15    that we're suffering, but we'd be asking this  
16    Court to grant review from a circuit precedent  
17    we won on the basis that we have continued  
18    injuries.

19                It's not impossible.  This Court knows  
20    best when it grants cert and when it doesn't.  I  
21    would think it's not the cleanest way to tee up  
22    a case historically and so it would raise some  
23    real concerns to the colloquies earlier today  
24    about how this case would ultimately come before  
25    this Court.

1 JUSTICE ALITO: Are -- are you telling  
2 us that we really can't decide the question that  
3 we asked to have briefing and argument on  
4 without taking a -- a peek at the merits?

5 MR. FEIGENBAUM: So I'm not saying  
6 that at all. So there's two different ways to  
7 think about this case, Your Honor.

8 One is to say, absolutely, the states  
9 need to get complete relief for their injuries  
10 and then let's figure out the best way to do it,  
11 and we think the alternatives are not workable  
12 and not legal.

13 If this -- if this Court is going to  
14 entertain giving us anything less than full  
15 redress for all of the Article III injuries we  
16 bring before you, I don't see how that can be  
17 entertained without a peek at the merits,  
18 because you always look at the merits to decide  
19 should we get a hundred percent or 90 percent of  
20 our own injuries redressed.

21 JUSTICE ALITO: Well, would a decision  
22 in -- on the matter that is I understood to be  
23 before us, the narrow question that I understood  
24 to be before us, make any -- be helpful in any  
25 way if we do not peek at the merits and we also



1 do not decide whether you have standing?

2 MR. FEIGENBAUM: So I'm not sure how  
3 you could decide whether or not we got an  
4 appropriate scope of relief without figuring out  
5 what our own injuries are because how you  
6 decide -- this is the United States' own  
7 argument -- how you decide whether or not we  
8 should get relief for our own injuries turns on  
9 what our injuries are that require relief.

10 And so I do think we have pretty  
11 significant pocketbook injuries like in Nebraska  
12 to the tunes of millions of dollars, and whether  
13 we get those remedies or don't get those  
14 remedied is going to turn on the merits, is  
15 going to turn on the nature of the harms, and  
16 then, ultimately, the workability of the  
17 alternatives.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Well, General Sauer  
23 began by outlining problems that he sees being  
24 created by universal injunctions, and he said  
25 that the issue was a -- a nonideological issue

1 and a nonpartisan issue.

2 Do you agree with that?

3 MR. FEIGENBAUM: I do think presidents  
4 of both parties have objected to nationwide  
5 injunctions. I agree.

6 JUSTICE ALITO: So what do you say  
7 about the -- the practical problem? So put out  
8 of -- let's put out of our minds the merits of  
9 this and just look at the abstract question of  
10 universal injunctions.

11 What is your response to what some  
12 people think is the practical problem? And the  
13 practical problem is that there are 680 district  
14 court judges, and they are dedicated and they  
15 are scholarly, and I'm not impugning their  
16 motives in any way. But, you know, sometimes  
17 they're wrong, and all Article III judges are  
18 vulnerable to an occupational disease, which is  
19 the disease of thinking that I am right and I  
20 can do whatever I want.

21 Now, on a multi-member appellate  
22 court, that is restrained by one's colleagues,  
23 but trial judge, the trial judge sitting in the  
24 trial judge's courtroom is the monarch of  
25 that -- of that realm, and there are situations

1 in which trial judges -- the -- the president  
2 does something, it could be President Trump, it  
3 could be President Biden, it could be President  
4 Obama. The trial judge says this is unlawful  
5 and I'm going to -- I'm going to order -- I'm  
6 going to enjoin it, and I'm so -- I'm convinced  
7 I'm right, so I'm not going to stay the  
8 injunction. And then an application is made to  
9 the court of appeals to stay the injunction.  
10 The court of appeals gives it the back of the  
11 hand, and then the case comes immediately to us  
12 in the context of an emergency application.

13 And some of us have said, well, we  
14 don't think we should do anything in those  
15 situations unless the -- unless it is  
16 indisputably clear that the court below was  
17 wrong. So what do you say to that practical  
18 problem?

19 MR. FEIGENBAUM: So we're mindful of  
20 the practical problems. I will say the states  
21 have had a through line as well across  
22 administrations. We have never believed, even  
23 as nationwide injunctions restrained policies  
24 that we favored, that they were categorically  
25 off the table. We've always taken the position

1     that they are sometimes available in narrow  
2     circumstances, whether we like the policy or  
3     don't like the policy.

4             And so you might have some cases where  
5     the nature of the harm -- this is the DACA  
6     example from my friend on the other side --  
7     where the nature of the harm, which was Texas  
8     saying it had to give benefits to residents in  
9     the state, is actually entirely remedied by a  
10    nationwide -- a state-only injunction that  
11    applies just to Texas, because that might  
12    incentivize individuals to leave Texas, and then  
13    Texas doesn't have to give them benefits  
14    anymore. So you might have a case like that.

15            But sometimes you are going to have  
16    cases where it is impossible to remedy the  
17    state's own injuries, and the alternatives are  
18    not practically or legally workable, and that  
19    describes this case perfectly.

20            And so I don't think the answer is a  
21    bright line that means, even in those  
22    situations, it's not possible for the states to  
23    get relief.

24            JUSTICE ALITO: In deciding the -- the  
25    question that is before us here, do you think we

1       should -- never mind. I withdraw that.

2               I have no further questions.

3               CHIEF JUSTICE ROBERTS: Justice  
4       Sotomayor?

5               JUSTICE SOTOMAYOR: Let's start with  
6       an answer you've been trying to give and haven't  
7       completed, which are -- the General suggested  
8       there were two ways that your injuries could be  
9       remedied. He claimed they were both presented  
10      to the court below. I didn't see that, but  
11      that's a matter that we could check on.

12              Do you agree with me that they were  
13      not presented to the courts below?

14              MR. FEIGENBAUM: I do agree with you.  
15      So I want to be very clear because I think  
16      there's some confusion across the briefing here.

17              JUSTICE SOTOMAYOR: Right.

18              MR. FEIGENBAUM: We agree -- and I  
19      don't think the First Circuit disagreed. They  
20      objected to the nationwide injunction --

21              JUSTICE SOTOMAYOR: They did.

22              MR. FEIGENBAUM: -- in the district  
23      court. And we attached the briefing and we  
24      attached the transcript.

25              What they didn't do is provide some of

1 the alternatives they've pressed in two  
2 sentences in their emergency application.

3 JUSTICE SOTOMAYOR: That's what I  
4 mean. Okay.

5 MR. FEIGENBAUM: Yes. They did not  
6 press --

7 JUSTICE SOTOMAYOR: So now go through  
8 why their -- why you question whether their two  
9 suggestions now that they've only raised before  
10 us are inadequate to remedy all of your harms.

11 MR. FEIGENBAUM: Yeah. So -- so --

12 JUSTICE SOTOMAYOR: Because complete  
13 relief, he says that there is situations in  
14 which you grant relief that will benefit third  
15 parties.

16 Why is your relief necessary to give  
17 you complete relief even though it benefits  
18 these parents in other jurisdictions?

19 MR. FEIGENBAUM: So I don't think  
20 there's any serious dispute that if you limit  
21 the relief to babies born in New Jersey, we  
22 won't get complete relief, because 42 U.S.C.  
23 1396a, the Medicaid statute, requires us, the  
24 states, to do the citizenship verification. So  
25 it's not true that they can simply handle it all

1 for themselves. Federal law requires us to  
2 undertake those responsibilities.

3 And we have in New Jersey 6,000 babies  
4 born out of state every year when they come into  
5 the state and they need benefits. The Boyle  
6 declaration from Massachusetts suggests that's  
7 going to cover 40 percent of kids. They come  
8 into our state. They need benefits. We have to  
9 do citizenship verifications, which is a burden  
10 for us.

11 JUSTICE SOTOMAYOR: That's for you in  
12 New Jersey, but there's I think -- how many  
13 states?

14 MR. FEIGENBAUM: That's just an  
15 example. We have --

16 JUSTICE SOTOMAYOR: Yeah.

17 MR. FEIGENBAUM: -- we have 23  
18 attorneys general in this -- exactly right.

19 JUSTICE SOTOMAYOR: Twenty-three  
20 attorney generals, so 23 states are going to  
21 have babies who were born somewhere else without  
22 a birth certificate that you're now, if they  
23 move into your state, going to have to do  
24 checking on.

25 MR. FEIGENBAUM: And that comes to the

1 United States' alternative, Justice Sotomayor,  
2 which is they say, okay, maybe their citizenship  
3 turns on when they enter New Jersey, maybe for  
4 some purposes, maybe for all purposes, depending  
5 on which sentence you're looking at in the  
6 emergency application.

7 And there are three problems either  
8 way. The first is it will undermine the  
9 administration of our benefits programs. So  
10 individuals will move in. When they were born,  
11 they were treated as noncitizens. They didn't  
12 get Social Security numbers because they  
13 wouldn't have been eligible for the enumeration  
14 at birth program in their states, and they're  
15 going to arrive and they're going to seek  
16 benefits that we administer.

17 But federal law requires that they  
18 have Social Security numbers for the  
19 administration of those benefits. This is 7  
20 U.S.C. 2025 for SNAP. This is 42 U.S.C. 1320b-7  
21 for TANF, for Medicaid, and so on. So they're  
22 going to need to have Social Security numbers.  
23 They're going to arrive without them even though  
24 they were under this Court's precedents citizens  
25 who should have been in the enumeration-at-birth



1 program, who should have had Social Security  
2 numbers. And it's going to be a burden on us  
3 either in delaying the benefits, training county  
4 social service workers in having to administer  
5 benefits without the -- without the SSNs on a  
6 provisional basis.

7 So that's the administration of the  
8 benefits.

9 Let me give you an example on  
10 participation, which we have responsibility for  
11 as well. These are babies who were told that  
12 they -- their families were told that the babies  
13 are undocumented, they aren't citizens, they're  
14 not eligible for these federal programs when  
15 they were born.

16 They come into our states, they think  
17 they're now ineligible. They don't realize  
18 their child is a citizen entitled to these  
19 federal benefits. And so what will happen is we  
20 bear the responsibility putting in our own state  
21 Medicaid plans of getting them enrolled, and  
22 that's 42 U.S.C. 1367bb.

23 So we're responsible for putting in  
24 our plan how we're going to enroll them. We  
25 have to incur substantially more costs to get

1     them enrolled in our programs because they think  
2     they're undocumented, they think they're  
3     ineligible because of where they were born, even  
4     though their citizenship has now turned on when  
5     they cross state lines.

6             And then the last point is we've never  
7     in this country's history since the Civil War  
8     had your citizenship turn on when you cross  
9     state lines. So we don't have answers to these  
10    workability questions, not just because it  
11    wasn't presented in the district court, not just  
12    because it's two sentences in an emergency  
13    application, but because, for over a century,  
14    executive practice has been uniformly to the  
15    contrary, building on this Court's decision in  
16    Wong Kim Ark. So we genuinely don't know how  
17    this could possibly work on the ground.

18            And although my friend on the other  
19    side has complained that they weren't able to  
20    give guidance, the states didn't object to  
21    guidance. The states have no quarrel with  
22    internal steps, and if they want to put out  
23    guidance that says, if Wong Kim Ark gets  
24    overruled, this is that we would do, that's  
25    fine. What they can't do is require us to take

1 any steps or issue guidance that requires  
2 everyone to start planning for something that is  
3 so patently against this Court's own settled  
4 precedent.

5 JUSTICE SOTOMAYOR: Now, going back to  
6 the history question that Justice Thomas started  
7 with, you relied on the bill of peace. You  
8 relied on the tax injunction of the 19th century  
9 and not so far in the 19th century -- 1891 --  
10 just about the time that the Fourteenth  
11 Amendment was adopted, okay?

12 At any rate, there are other cases,  
13 one of our amici points out to them, the Pierce  
14 versus Society of Sisters case, the West  
15 Virginia State Board of Education case, those  
16 were earlier than the 1960s. In -- in the  
17 Pierce versus Society of Sisters, the Court  
18 affirmed a universal injunction that wasn't even  
19 sought by the parents, correct?

20 MR. FEIGENBAUM: That's right.

21 JUSTICE SOTOMAYOR: And there, what we  
22 said was -- there, states were imposing criminal  
23 penalties on parents who sent their children to  
24 private school, and just two plaintiff schools  
25 sued against that penalty. They sought and won

1 an injunction that categorically restrained the  
2 state from enforcing the law. That was 1925,  
3 correct?

4 MR. FEIGENBAUM: That's right.

5 JUSTICE SOTOMAYOR: And similarly,  
6 with West Virginia, saluting the flag by Jehovah  
7 Witnesses, the injunction was universal.

8 So, in answer to Justice Gorsuch's  
9 point, we've had universal injunctions in some  
10 form, correct, since the founding?

11 MR. FEIGENBAUM: That's right. If I  
12 can make two points on that, Justice Sotomayor?

13 JUSTICE SOTOMAYOR: In equity,  
14 correct?

15 MR. FEIGENBAUM: Exactly. So  
16 there's -- so I agree with your reading of the  
17 equitable history, that it goes back from the  
18 English Bill of Peace, through Equity Rule 48,  
19 through the tax collection injunctions, through  
20 Equity Rule X, through the Ex Parte Young period  
21 you're referring to, through AARP just a few  
22 weeks ago. So I agree with your read of the  
23 history.

24 But I just want to make one quick  
25 point.

1 JUSTICE SOTOMAYOR: Well, let me -- go  
2 ahead, make your point, but I want to finish  
3 this thought, which is: You started earlier by  
4 saying universal injunctions should not be the  
5 preferred remedy, and it should be limited.  
6 You've suggested three ways to limit it.

7 I agree with you, those three -- and  
8 yours clearly falls within one, that's your  
9 claim. But the point that I think my two other  
10 colleagues are raising is: How do we ensure  
11 district courts are following that?

12 MR. FEIGENBAUM: So -- so if I can  
13 make I point about the history and then make a  
14 point about the guidance.

15 On the history, I understand that the  
16 United States at the podium today tries to make  
17 the history all about what it calls  
18 indivisibility cases, cases where there's just a  
19 unitary on/off switch as it were and either  
20 something happened or it didn't happen. Like a  
21 redistricting plan needs to be completely redone  
22 or a power plant is on or it's off.

23 But if I can give an example that  
24 shows it's not quite so limited and it very much  
25 requires looking more broadly at what's

1 practically or legally workable on the ground.

2 I would point to apportionment as an example.

3           So say that there's an Executive Order  
4 that says: We're just not going to count  
5 minors, people under 18, in apportionment  
6 anymore; we're only going to count people who  
7 are voting age. And the State of New York files  
8 a lawsuit, and it wins its lawsuit, and all of  
9 its 17-and-under-year-olds get counted for  
10 apportionment.

11           That isn't indivisible in any way.  
12 It's not a redistricting plan. It's not a power  
13 plant. But it is going to skew apportionment in  
14 a way that is totally unfair practically and  
15 legally to third parties because now  
16 17-year-olds are being counted in New York, but  
17 they're not being counted in Oklahoma.

18           And you would end up messing up  
19 apportionment between states for that very  
20 reason. And that shows, as just a broader  
21 insight, that we've always looked to the harms  
22 that third parties will suffer as negative  
23 externalities of court orders.

24           And that's our submission here, that  
25 to accept what the United States wants as

1     against our injunction and to say that it turns  
2     on or off when you cross state lines doesn't  
3     just harm the administration of our benefits,  
4     doesn't just even harm enrollment in our  
5     benefits, also puts chaos on the ground where  
6     people's citizenship turns on and off when you  
7     cross state lines.

8                 If ICE has initiated a removal  
9     proceeding when you live in Philly and you move  
10    to Camden, I suppose the ICE removal is supposed  
11    to turn off at that point potentially because  
12    your citizenship status has changed.

13                I don't know if you lose it if you  
14    move back to Philly, whether you were born in  
15    New Jersey or born in Philly, moved to Camden  
16    and moved back. It's a very porous part of the  
17    country. I don't know if the ICE removal turns  
18    back on when you cross state lines again.

19                And that sort of chaos on the ground,  
20    those implementation questions we don't know,  
21    are serious third-party harms we've always taken  
22    into account.

23                This is North Carolina versus  
24    Covington, where courts ask what's workable as  
25    an injunction matter. And it's also the Winter

1 Factors, where Factor 3 looks at the balance of  
2 the equities between the parties and workability  
3 and harm to them, and Winter Factor 4 looks at  
4 public interest and the negative externalities  
5 and workability problems we're imposing on  
6 others.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: General, you've had a  
9 chance to talk about your administrative costs  
10 and the workability problems that New Jersey  
11 would confront, but how about this magnet  
12 problem?

13 I mean, it strikes me as -- as  
14 completely obvious that if you have two states  
15 and they have different rules for citizenship  
16 and one benefits babies and the other doesn't  
17 that everybody moves to the state where the more  
18 favorable rule exists. But why is it that  
19 preventing that harm from happening should count  
20 as providing you with complete relief?

21 MR. FEIGENBAUM: So I think, actually,  
22 my point is somewhat different. I agree with  
23 you that the incentives could potentially factor  
24 into the calculus because we're ultimately  
25 experiencing some harm we might not -- might not



1 otherwise to our benefits programs.

2 But my point is different. Even if  
3 you just take normal migration -- for New  
4 Jersey, 6,000 babies born out of state, 8  
5 percent -- or 8 million every year traveling  
6 across state lines -- without worrying about the  
7 incentives, we're going to be looking at that  
8 problem for how we administer benefits programs  
9 because --

10 JUSTICE KAGAN: I got that. Are  
11 you -- are you saying we shouldn't consider the  
12 fact --

13 MR. FEIGENBAUM: No, I think you can.  
14 I think you can, Your Honor, and it's because of  
15 the nature of three things together.

16 One is it's the movement, but it's not  
17 just the movement. Two is it's the fact that  
18 citizenship historically was something you had  
19 at birth or didn't have at birth, and so you  
20 arrived to our state in theory without  
21 birthright citizenship because you would have  
22 been told when you were born in the hospital  
23 what you have or don't.

24 And then the third, and this is really  
25 important, is the way that citizenship permeates

1     so much not just for individuals but for what  
2     states are obligated to do, whether it's  
3     citizenship verification eligibility, whether  
4     it's enrollment in our own programs.

5             Over and over, you see citizenship in  
6     Congress's own laws as the on-or-off switch for  
7     our own administration of benefits. And that's  
8     actually sort of unique.

9             So I don't think every time people  
10    move between states you automatically need to  
11    have a nationwide injunction. What you need is  
12    a demonstration about how that's going to  
13    contribute to the state's harm.

14            And then -- I think this is really  
15    important to colloquies you were having with the  
16    United States earlier -- a court could, in an  
17    appropriate case, say: Well, sure, state, you  
18    might have to keep some of the harm; we're only  
19    going to remedy 90 percent of your harm because  
20    it's too disruptive to everyone else.

21            But I don't think you can do that in a  
22    case without looking at the merits because  
23    whether we should get to a hundred percent of  
24    our injuries taken care of or 90 percent of our  
25    injuries taken care of will always involve the

1 strength of our merits showing.

2 And I don't see how you could have a  
3 stronger merits showing than we have here: 127  
4 years of Supreme Court precedent, over a century  
5 of executive practice, and congressional  
6 statutes that codified both into law in 1940 and  
7 1952.

8 And given that strength of the merits  
9 and the settled precedent, combined with our  
10 nature of harm, I don't think this is a close  
11 case for why we need national relief to remedy  
12 our injuries.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 JUSTICE BARRETT: I have a question  
19 about the history.

20 So Grupo tells us that we have to look  
21 back to 1789 and the High -- High Court of  
22 Chancery. So I appreciate that there have been  
23 some cases from later, and you were talking  
24 about some of those with Justice Sotomayor from  
25 the early 20th century, maybe the late 19th

1 century.

2 Can you say -- let's say that I think  
3 the bill of peace is more like a  
4 representational suit that is a forerunner to  
5 the class action. What do you think is your  
6 very best example of something that would look  
7 at the period that Grupo tells us is relevant  
8 that would support something that looks like  
9 universal relief?

10 MR. FEIGENBAUM: So I do think from  
11 1789, from English equity, I do think the best  
12 example is the bill of peace, and so I  
13 understand if we see it differently.

14 JUSTICE BARRETT: Right.

15 MR. FEIGENBAUM: It's a fair point.

16 I will just say quickly on Grupo  
17 Mexicano, its own tradition -- and this is sort  
18 of the analogical reasoning you talked about in  
19 Rahimi -- it looks at that period, but at other  
20 times, we've also looked at American tradition  
21 to see analogically how we've liquidated that  
22 tradition or not.

23 And in American equitable tradition,  
24 this is Equity Rule 48, which specifically said  
25 nonparties are not bound by certain relief even

1 as they may benefit from it.

2 And I take that to be the principal  
3 reason my friend on the other side thinks that  
4 bills of peace look much more like class actions  
5 than they ultimately look like universal  
6 injunctions. And Equity Rule 48 was to the  
7 contrary. Tax collection injunctions in  
8 American history were to the contrary.

9 So I just have a hard time with that  
10 reading even though I agree with you that you  
11 would be starting in the founding trying to do  
12 analogical reasoning based on what Grupo  
13 Mexicana says but using American equity to  
14 answer some of the unresolved ambiguities in  
15 this case.

16 JUSTICE BARRETT: Oh, I completely  
17 agree with you need some analogical reasoning,  
18 you know, and I don't think that Grupo  
19 completely rules that out. And, I mean, I  
20 think, even if you talked about the distinction  
21 between a -- a bill of peace and a class action,  
22 you would be looking at something that doesn't  
23 have to be called the same thing.

24 I think the problem is when we have  
25 such a party-centric history, if it has to be

1 reasoning that fits within the confines, then I  
2 think we have a little bit of trouble.

3 Let me -- let me just ask you one  
4 question about relief. So let's say that I  
5 think that the states do need something broader  
6 in order to have complete relief even if the  
7 universal injunction is too broad and  
8 inconsistent with Grupo.

9 That isn't how the court below  
10 approached the question because that isn't what  
11 the court below thought it had to do because the  
12 court below thought it could just enter a  
13 universal injunction.

14 So how would I go about crafting some  
15 sort of holding or to create a language that  
16 would take care of you and the fact that you  
17 need maybe broader complete relief than maybe an  
18 individual plaintiff would, right? Because the  
19 district court didn't go through that analysis,  
20 you know, the kind of -- the analysis that  
21 you're telling us today.

22 So tell me practically what that would  
23 look like.

24 MR. FEIGENBAUM: So I think the  
25 district court in -- in the Massachusetts case

1 did actually do a very good job of this. It  
2 specifically said New -- I'm saying "New Jersey"  
3 as a stand-in --

4 JUSTICE BARRETT: Yeah, yeah.

5 MR. FEIGENBAUM: -- 23 attorneys  
6 general -- the states need this relief. And --  
7 and he didn't grant universal relief to the  
8 individual plaintiffs in that case, so he  
9 did --- he did actually talk different --

10 JUSTICE BARRETT: Make a distinction.

11 MR. FEIGENBAUM: -- relief for  
12 different parties, and he said this is necessary  
13 for us.

14 Part of why we're talking about  
15 alternatives in a different way at the podium  
16 today is because these alternatives were not  
17 presented to the district court.

18 So the district court just had before  
19 him the idea that maybe we have to eat some  
20 harms or maybe we get universal relief. And, of  
21 course, we need universal relief given the  
22 strength of the merits showing as between those  
23 choices.

24 I think what you could say is, here,  
25 there were two sentences in an emergency

1 application that raise new alternative ways to  
2 remedy the harms. Those sorts of things need to  
3 be raised to the district court. And when they  
4 are raised to district courts in appropriate  
5 cases when states file suit, courts should ask  
6 first are those alternatives going to be  
7 practically or legally workable for the  
8 plaintiffs and for third parties? I agree, to  
9 Justice Gorsuch's point, if the federal  
10 government wants to take on its own burdens, it  
11 can do so, but it can't just say that for third  
12 parties --

13 JUSTICE BARRETT: But you're talking  
14 about what would happen in the future. I'm  
15 talking about what would happen to you now.

16 MR. FEIGENBAUM: Oh, so I think, if  
17 the United States seriously wanted to press  
18 these alternative with facts about how they  
19 would work and put that before the district  
20 court, parties can always put new alternatives  
21 in a motion to dissolve an injunction before the  
22 district court. That's something that has  
23 happened regularly when there's changed  
24 circumstances or new alternatives. They're  
25 welcome to do that in -- in this case or in any



1 other. But then they're going to have to put  
2 forward actual facts about how it's practically  
3 or legally workable.

4 I will say, on its face, these two  
5 sentences don't look practically or legally  
6 workable for the reasons I raised. But they'd  
7 have to make that showing in the district court  
8 in the first instance.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: So I guess I'm kind  
13 of hung up on the posture in which we find  
14 ourselves looking at these issues. You know,  
15 Justice Alito, I think, focused on this a little  
16 bit, you know, when he says that the district  
17 court makes this initial determination. It  
18 turns out to be wrong. The remedy, I thought,  
19 was to appeal.

20 And I guess, for me, the question is  
21 whether and under what circumstances the  
22 government keeps on doing the thing that the  
23 court has found unlawful while the litigation is  
24 proceeding to determine whether or not the  
25 government's activity violates the law.

1                   We're sort of in an interim posture.  
2       I -- many of your arguments, and I appreciate  
3       them, are kind of couched in, you know, the  
4       state is going to need complete relief for their  
5       injury, and that -- and that's true definitely  
6       as a final matter. But here we are at the  
7       beginning of this litigation, no one has  
8       determined whether or not the government's  
9       conduct is actually unlawful. We have a  
10      district court, several district courts and now  
11      courts of appeals that say it is, and so, as an  
12      interim matter, we are saying the government has  
13      to stop doing it while we litigate the issue of  
14      the unlawfulness.

15                  To me, that kind of puts the whole  
16      thing in a different frame. It's sort of like  
17      why isn't the question in this posture, in this  
18      circumstance, can the government or has the  
19      government shown that it is going to suffer some  
20      sort of harm from being made to completely stop  
21      this activity while we're litigating the  
22      lawfulness of the conduct.

23                  I don't understand -- and then you  
24      say, yes, we're going to suffer harm. This is  
25      the balance of the equities that -- you know,

1 part of the -- the -- the PI and the stay  
2 showing, but I just don't understand why that's  
3 not the focus here. And I don't know what  
4 the -- and I -- I apologize because I didn't get  
5 a chance to ask Mr. Sauer this, but -- and maybe  
6 he can address this on his rebuttal -- but, you  
7 know, what -- what problem is the government  
8 facing as a harm matter from being completely  
9 told it has to stop doing this while we  
10 determine, we, the court system, determine  
11 whether or not its conduct is lawful?

12 MR. FEIGENBAUM: So we -- I mean, we  
13 included this in our application. We do think  
14 this case is quite unique in that I do think  
15 it's hard for the government to show in this  
16 particular case that it needs to be able to act  
17 contrary to this Court's settled precedent.  
18 That's obviously come up in a couple of  
19 questions today. It's something of I realize  
20 the elephant in the room. I've often been asked  
21 to assume that the merits are put to the side,  
22 and I'm fine assuming that for those questions.

23 But, to your point, you're not wrong.  
24 It is quite striking, obviously, that it's not  
25 just that district courts are saying this looks

1     like it might be unlawful. They're saying Wong  
2     Kim Ark settled this exact issue 127 years ago.  
3     This Court has reaffirmed it since. Over a  
4     century of executive practice has built on that.  
5     And Congress has codified that directly into  
6     law.

7                 So I do think it's a particularly  
8     unusual case for the government to be saying  
9     that it has been quite so harmed and needs this  
10    kind of relief. But, at the end of the day, I'm  
11    happy to join issue on when relief may or may  
12    not be appropriate, and I just think we're  
13    clearly on the positive side.

14                JUSTICE JACKSON: But you're saying  
15    that at least in some circumstances from your  
16    perspective, in order to even decide whether or  
17    not you are entitled to an interim complete  
18    injunction, the Court's now going to have to  
19    peek at the merits while the merits are being  
20    litigated?

21                MR. FEIGENBAUM: I think the Court  
22    always has to peek at the merits in deciding  
23    whether the party itself should be getting  
24    relief from its harms, including complete  
25    relief, as even the United States accepts. So

1     those are all four of the Winter factors.  You  
2     have to figure out what the irreparable harm is  
3     that you're trying to deal with.  You have to  
4     figure out if we have a sufficient merits  
5     showing in order to eliminate that irreparable  
6     harm, and, depending on the strength of the  
7     merits showing, you're also looking at Winters  
8     Factors 3 and 4.

9             So this Court has given four Winter  
10    factors that I think are quite useful in most  
11    cases.  I took my friends on the other side to  
12    be saying, well, beyond the Winter factors,  
13    there's this bright-line rule from Article III  
14    or the history of equity that just says it can  
15    never get to this point.

16            I obviously disagree a bit with them  
17    on the reading of that history, but I just think  
18    it has no bearing on the case that the states  
19    bring to this Court here.

20            JUSTICE JACKSON:  Thank you.

21            CHIEF JUSTICE ROBERTS:  Thank you,  
22    counsel.

23            Ms. Corkran.

24

25

1 ORAL ARGUMENT OF KELSI B. CORKRAN  
2 ON BEHALF OF THE PRIVATE RESPONDENTS  
3 MS. CORKRAN: Mr. Chief Justice, and

4 may it please the Court:

5 The executive order's stripping of  
6 citizenship from U.S.-born children is contrary  
7 not only to the Fourteenth Amendment's plain  
8 text but also our common law history, this  
9 Court's precedent, a federal statute, and over a  
10 century of executive branch practice.

11 Every court to have considered the  
12 issue agrees that the order is blatantly  
13 unlawful, a determination the stay application  
14 does not challenge.

15 The government instead argues that  
16 Article III and equitable tradition  
17 categorically prohibit providing nonparty relief  
18 from the order's enforcement regardless of the  
19 order's illegality or the irreparable harm it  
20 inflicts.

21 The government is wrong. It is well  
22 settled that preliminary injunctions may benefit  
23 nonparties when necessary to provide complete  
24 relief to the plaintiffs or when warranted by  
25 extraordinary circumstances, both of which are

1 true here.

2           The Court should reject the  
3 government's efforts to stay a preliminary  
4 injunction that maintains a status quo all three  
5 branches of government have ratified and  
6 operated under for over a century and that  
7 prevent the catastrophic consequences that will  
8 result for the plaintiffs and our country if the  
9 government is allowed to execute an  
10 unconstitutional citizenship-stripping scheme  
11 simply because legal challenges take time.

12           I welcome the Court's questions.

13           JUSTICE THOMAS: You say the  
14 government is wrong about the availability of  
15 preliminary injunctions. On what do you base  
16 that?

17           MS. CORKRAN: So I -- I think the two  
18 reasons I identified, one, it is well settled,  
19 and I understood General Sauer to agree today,  
20 that universal injunctive relief is appropriate  
21 when necessary to provide complete relief to the  
22 plaintiffs. That is the case here, and I'm  
23 happy to talk about that.

24           But I also -- you know, this Court has  
25 long recognized the availability of universal

1     injunctive relief in extraordinary circumstances  
2     where it's -- it's -- it's justified, I  
3     think focused particularly on the public  
4     interest and -- and equities prongs of the  
5     Winter test. And I'm happy to talk about that  
6     as well, but I think those are the -- the two  
7     reasons the government --

8             JUSTICE THOMAS: Do you think that  
9     if -- even if one considers the history not to  
10    support you, that the pragmatic considerations  
11    and the policy considerations should override  
12    that?

13            MS. CORKRAN: So I -- you know, again,  
14    I would put us in the complete relief bucket.  
15    So I'll -- like Mr. Feigenbaum, I'll put on my  
16    amici hat in answering that question.

17            I understand General Sauer's proposal  
18    to be that we channel all of this through Rule  
19    23. I think that is ahistorical. One, it's  
20    consistent with the Rules Committee's  
21    understanding of the rules, both -- if you look  
22    at Rule 23, Rule 65, and Rule 71 together, they  
23    establish that Rule 23 is not the channeling  
24    mechanism that the government's suggesting.

25            I want to -- I'll start with Rule 71



1     because it's responsive, Justice Barrett, to  
2     your question earlier about whether nonparties  
3     can enforce orders. Rule 71 explicitly  
4     contemplates that and says, if a nonparty  
5     receives relief, they are entitled to enforce  
6     it.

7                 I'd point also to Rule 65, the  
8     preliminary injunction rule. In 2017, the Rules  
9     Committee considered a proposal from Professor  
10    Bray to amend the rule to prohibit relief to  
11    nonparties. The committee rejected that  
12    proposal because it found that it ran afoul of  
13    the Rules-Enabling Committee.

14                And then I'd end by pointing to Rule  
15    23 itself, which says nothing about it being a  
16    channeling mechanism. In *Principi v.*  
17    *Scarborough*, this Court said, you know, we don't  
18    treat the rules as excluding background  
19    equitable practices. And, here, Rule 23 doesn't  
20    even contemplate preliminary relief. It's  
21    focused on permanent injunctive relief, and I  
22    think that's because, you know, as we've been  
23    discussing, it's very difficult to get class  
24    certification in time to have preliminary  
25    relief, so you're doing putative class relief,

1     which is the exact same thing as what's  
2     happening here.

3             JUSTICE KAVANAUGH:   Well, can't --

4             CHIEF JUSTICE ROBERTS:   Is --

5             JUSTICE KAVANAUGH:   -- why can't you  
6     get putative class relief in a preliminary  
7     injunction or TRO posture?

8             MS. CORKRAN:   You mean -- sorry.   In  
9     the multiple state context?

10            JUSTICE KAVANAUGH:   Get relief in a --  
11    for a putative class --

12            MS. CORKRAN:   Yeah.

13            JUSTICE KAVANAUGH:   -- in a TRO or PI  
14    posture.

15            MS. CORKRAN:   Oh, I -- I certainly --  
16    I certainly think you can.   The Court did that  
17    recently in AARP.

18            My point is, when the Court does that,  
19    it's relying on the equitable authority it has  
20    to enter that sort of relief, not on the Rule 23  
21    mechanism, because the class isn't binding until  
22    after certification, until after final judgment.

23            JUSTICE KAVANAUGH:   If that mechanism  
24    is available, whether one way or another,  
25    doesn't that solve a large part of the problem

1 in a way that complies with the -- the rules --

2 MS. CORKRAN: Yeah. So --

3 JUSTICE KAVANAUGH: -- the problems  
4 with universal injunctions that have been  
5 identified by administrations of both parties?

6 Go through Rule 23 and do what's  
7 needed there, and people are bound then, so  
8 that's a wrinkle, but why doesn't that just  
9 solve the problem?

10 MS. CORKRAN: Right. So they're not  
11 going to be bound until after you get past class  
12 certification, so we're talking about the --

13 JUSTICE KAVANAUGH: I understand that.

14 MS. CORKRAN: And for that reason, I  
15 would go to Justice Alito's point earlier that  
16 all you're doing is taking the -- the non-party  
17 injunctions that are happening now outside of  
18 Rule 23 and shoving them into Rule 23. It  
19 doesn't address the forum selection concerns.  
20 It doesn't address the concerns about the --

21 JUSTICE KAVANAUGH: Right, but it --

22 MS. CORKRAN: -- emergency docket.

23 JUSTICE KAVANAUGH: -- it complies  
24 with the rules. I mean, the law -- we -- we  
25 care about technicalities. And this may all be

1 a technicality, but it seems to me the  
2 technicality of Rule 23 and the history of that  
3 provides -- 23(b)(2) provides a mechanism to do  
4 what's -- what's needed here in terms of getting  
5 relief to people, and if you have PIs available  
6 for putative classes, that seems to solve --  
7 solve the issue for preliminary relief and the  
8 timing issue as well.

9 MS. CORKRAN: So (b)(2) provides for  
10 permanent injunctive relief. It does not  
11 provide for preliminary injunctive relief.

12 JUSTICE KAVANAUGH: Right.

13 MS. CORKRAN: Again, Rule 23 does not  
14 purport to be the exclusive channeling  
15 mechanism. And, as I said, the Rules Committee  
16 doesn't think it did, so it would be this Court  
17 kind of projecting its own policy decision to  
18 treat Rule 23 that way.

19 And I would come back again to Justice  
20 Alito's concerns. That is not actually  
21 addressing the Court's emergency docket. It's  
22 just now we're slapping a label of class  
23 certification on it.

24 So I would -- and -- and I'll make a  
25 second point on that and then say what I think

1 the better -- the better way of approaching the  
2 problem is, which is I think that General Sauer  
3 and I are in agreement that the Venn diagram of  
4 cases that are appropriate for class  
5 certification and where injunctive relief I  
6 think would be appropriate is not coterminous.  
7 I think we could pursue successfully class  
8 certification here.

9 I heard General Sauer to disagree, and  
10 I think it's because they're -- they're just  
11 different circumstances. If you look at the  
12 class certification requirements, commonality,  
13 typicality, they were actually added to Rule 23  
14 in 1966 mostly to address the expansion of class  
15 certification to include damages suits. That  
16 makes sense there, but those were never  
17 requirements prior to 1966.

18 JUSTICE GORSUCH: Ms. Corkran, on --  
19 on the class certification point you've been  
20 developing, one response might be -- and I just  
21 want to get your reaction to it -- that by  
22 proceeding through the class mechanism, even a  
23 putative class mechanism, a court is making a  
24 preliminary assessment about who are the parties  
25 going to be before it and issuing interim relief

1 so that it preserves its jurisdiction to issue  
2 final relief with respect to those parties.

3 And that's very different, the  
4 argument would go, than simply saying everybody  
5 everywhere nationwide, universally or perhaps --  
6 perhaps cosmically stands to benefit from this  
7 decision without ever having to suffer being  
8 bound by it. Thoughts?

9 MS. CORKRAN: So I would say again  
10 that's an ahistorical approach. You haven't had  
11 that sort of Rule 20(b)(3) --

12 JUSTICE GORSUCH: Well, assume --  
13 assume for the moment that we read bills of  
14 peace, which I understand to be your -- your --  
15 your best set of cases, to be prototypical of  
16 what is now Rule 23.

17 MS. CORKRAN: Right. And so the --  
18 the bills of peace and kind of going through, as  
19 Mr. Feigenbaum was talking about, Equity Rule 48  
20 and then 38, in none of those circumstances were  
21 we doing this ex ante class certification  
22 determination.

23 So the modern class action device  
24 actually looks quite different than it was for  
25 representative suits historically. So it would

1 be putting on an ahistorical constraint.

2 JUSTICE GORSUCH: I appreciate that  
3 argument, okay, but now we're haggling over the  
4 history, which -- which we have to do, I -- I  
5 accept, but if -- if -- if bills of peace are  
6 understood -- again, accept the premise --

7 MS. CORKRAN: I will.

8 JUSTICE GORSUCH: -- to -- to be  
9 predecessors of Rule 23, then respond to the  
10 point that there is something fundamentally  
11 different about a preliminary injunction to a  
12 putative class that you've found is likely to be  
13 certified and likely to succeed on the merits in  
14 order to preserve that court's jurisdiction to  
15 award ultimate relief to those parties before it  
16 and that that's categorically different than a  
17 universal injunction.

18 MS. CORKRAN: So starting with the  
19 presumption that was different about the bills  
20 of peace is that they were binding, I think  
21 sometimes it's not clear always, at the end when  
22 they were getting to final judgment. I would go  
23 back to Grupo Mexicano to Justice Barrett's  
24 point, although that -- you know, that was a  
25 high watermark of this equitable originalism.

1 The way the Court articulated the test, it -- it  
2 focused on 1789. But the actual analysis in  
3 Grup Mexicano focused on 1890 through 1942.

4 And what the Court found there is that  
5 there were numerous cases expressly rejecting  
6 the Mareva injunction, and that was confirmed in  
7 the 1970s when England adopted it and said, no,  
8 we've never done this before.

9 We are in an entirely different world  
10 here. One, the cases that Justice Sotomayor  
11 laid out earlier all come from between 1890 and  
12 1942, and they suggest that non-party relief was  
13 provided for outside of the class action  
14 context.

15 But the fact that we have, I think,  
16 these very, you know, studied scholars in this  
17 rigorous debate about what the bills of peace  
18 meant, what the railroad cases meant, I think  
19 shows that this is very different in Grupo  
20 Mexicano, and for the Court to kind of delve  
21 into that and adopt the categorical rule that  
22 the government is suggesting, I think, is  
23 certainly an overcorrection. It's a hornet's  
24 nest on Article III, right? It calls into  
25 concern EPA class action, a whole sort of



1 things. I would suggest that the Court instead  
2 focus on providing limiting principles within  
3 the confines of the Nken factors or the Winter  
4 factors.

5 JUSTICE KAVANAUGH: And is there a  
6 practical problem? So I want to put aside the  
7 history, and I take your points on that and why  
8 you don't think Rule 23 fits, and I take your  
9 point on that, but if putative class actions and  
10 preliminary relief are an option, what then is  
11 the practical problem you see as distinct from  
12 the current regime?

13 MS. CORKRAN: Well, if General Sauer  
14 is right and that there are class certification  
15 problems here, then, in this particular case,  
16 you're going to have thousands of individual  
17 suits.

18 JUSTICE KAVANAUGH: Okay. I think you  
19 would be arguing that the class should be  
20 certified here.

21 MS. CORKRAN: Right, but I'm saying  
22 the government is suggesting --

23 JUSTICE KAVANAUGH: So more -- more  
24 generally taking it out of this case if you  
25 could, do you see practical problems?

1 MS. CORKRAN: Yeah. It would  
2 eliminate the associational standing trade  
3 cases, you know, the cases brought by the  
4 Chamber of Commerce, the NRA, other associations  
5 that are suitable for class certification.

6 I think also the questions again that  
7 the --

8 JUSTICE KAVANAUGH: Why? Can you  
9 explain that?

10 MS. CORKRAN: Well, they wouldn't --  
11 so if we -- if we were to seek cert, it would be  
12 on behalf of our individual --

13 JUSTICE KAVANAUGH: Mm-hmm.

14 MS. CORKRAN: -- plaintiffs, you know,  
15 for the same reason that the government would  
16 have difficulty seeking class certification, the  
17 state government I think associations are -- are  
18 not necessarily a good fit for that -- for that  
19 framework.

20 Again, that's also not solving the  
21 Court's problem. It's just channeling the  
22 problems through a different mechanism.

23 JUSTICE KAVANAUGH: I don't think that  
24 can be solved just to be honest, but that's a  
25 separate issue --

1 MS. CORKRAN: Well --

2 JUSTICE KAVANAUGH: -- from what the  
3 right rule is as to how things transpire in the  
4 district courts.

5 MS. CORKRAN: Could I perhaps try to  
6 solve it in a different way?

7 JUSTICE KAVANAUGH: Mm-hmm.

8 MS. CORKRAN: What I would suggest,  
9 you know, we spent some time trying to catalog  
10 the cases in which this Court has approved  
11 universal injunctive relief and the cases in  
12 which it's rejected it, with the aim of giving  
13 the Court maybe a suggestion how it might, you  
14 know, affirmatively articulate some limiting  
15 principles such that you would not be getting  
16 the injunctions that the Court thinks are  
17 inappropriate but the ones that the Court has  
18 approved would still be able to proceed. Again,  
19 that's not the categorical rule that the -- the  
20 government is suggesting.

21 I think roughly what the Court has  
22 been doing is saying that universal injunctions  
23 are appropriate only in facial challenges  
24 involving fundamental constitutional rights  
25 where there are real concerns about whether --

1 just the legal and practical availability of  
2 relief to similarly situated parties who are  
3 also going to experience irreparable harm.

4 I think that maybe explains AARP.  
5 Most recently, IRAP would fall into that  
6 category. Chrysafis, the New York eviction  
7 case, would fall in that category.

8 On the other side of the ledger, the  
9 Court seems to disapprove quite a bit of -- of  
10 nationwide injunctions involving discretionary  
11 benefits. So that's some of the recent ones  
12 that you have undone or stayed.

13 So I think what the Court could do is  
14 kind of identifying limiting principles that  
15 would provide guidance to the lower courts on  
16 when it's appropriate to issue these  
17 injunctions. The natural home for that is the  
18 public interest prong of the Winter test, right?

19 If you're going to issue an injunction  
20 that's going to have an impact on other peoples,  
21 you need to be doing a really muscular public  
22 interest assessment before doing that.

23 So that's -- that's what I would urge  
24 the Court --

25 JUSTICE KAVANAUGH: I mean --

1 JUSTICE KAGAN: Ms. Corkran, are --  
2 are you pushing back on the class certification  
3 idea because you're worried that there are cases  
4 where there will be no certification but in  
5 which broad relief is, in fact, appropriate --

6 MS. CORKRAN: Yes.

7 JUSTICE KAGAN: -- so that the two  
8 categories don't line up?

9 And if that's why you're pushing back,  
10 why are you worried about that? What are the  
11 cases you're worried won't line up properly in  
12 that way?

13 MS. CORKRAN: I mean, the government  
14 has suggested it's going to argue that here --  
15 again, I think the commonality -- so thinking  
16 about questions like common injury make a lot of  
17 sense when you're talking about class-wide  
18 damages, less so when you're talking about a  
19 facial challenge to a constitutional violation.

20 So I just -- I think it's a bit of a  
21 mismatch. And, again, it's not -- it's not what  
22 Rule 23 was ever intended to do and it doesn't  
23 solve any of the Court's policy problems. So I  
24 think it's a -- you know, it's a lose-lose-lose  
25 proposal that the government is offering.

1                   I'm -- I'm a little concerned that I  
2     have focused a lot on my amici hat and haven't  
3     actually explained to the Court why the  
4     injunction is necessary for complete relief  
5     here, but I don't want to pivot too quickly, but  
6     I want to make sure I address our -- our primary  
7     argument as well.

8                   JUSTICE KAGAN: Tell us why it's  
9     necessary for complete relief.

10                  MS. CORKRAN: Yes.

11                  (Laughter.)

12                  MS. CORKRAN: Thank you. For two  
13     reasons. The first is that a plaintiff-specific  
14     injunction would not be administratively  
15     workable. I'll explain that in a second.

16                  But I want to note the second one is  
17     that even if it were workable, it would require  
18     the association members to identify and disclose  
19     to the government an association that puts them  
20     at great risk of adverse consequences, detention  
21     or deportation, even if they're here lawfully.  
22     And so it's not complete relief to require the  
23     plaintiffs to make dangerous disclosures in  
24     order to claim the constitutional right.

25                  And then maybe I'll pivot back to the

1     workability unless there are questions about  
2     that. Yeah. So I'll -- oh, sorry.

3                 CHIEF JUSTICE ROBERTS: Very briefly,  
4     and then we'll move on to the next stage of our  
5     questioning.

6                 MS. CORKRAN: So the government's  
7     workability argument with respect to the -- the  
8     individual plaintiffs, the private plaintiffs,  
9     is wholly tethered to its argument that the  
10    injunction should be limited to the 16 named  
11    plaintiffs. It has offered no argument for how  
12    it would administer -- how state and local  
13    agencies could administer an injunction that was  
14    narrowed to the ASAP and CASA members. So I  
15    think that's probably the end of the road.

16                Mr. Feigenbaum made the point that the  
17    district -- they can always go back to the  
18    district court and ask for the injunction to be  
19    dissolved if they present some sort of workable  
20    proposal. They haven't, and I don't -- I don't  
21    think they can. I don't want to talk for too  
22    long, but I -- if anyone is interested, I'm  
23    happy to answer questions about why I think it's  
24    unworkable.

25                CHIEF JUSTICE ROBERTS: Well, I'm sure

1 someone will be.

2 MS. CORKRAN: Yeah.

3 CHIEF JUSTICE ROBERTS: Thank -- thank  
4 you, though, counsel.

5 Justice Thomas?

6 Justice Alito?

7 JUSTICE ALITO: Should we decide or  
8 make up our -- make up our minds on the  
9 underlying birthright citizenship question  
10 without briefing and argument and deliberation?

11 MS. CORKRAN: I -- I think that we  
12 would be very eager to do supplemental briefing  
13 on that. General Sauer noted that none of the  
14 parties had asked for cert before judgment. We  
15 couldn't because we keep winning. I will ask  
16 right now for cert before judgment.

17 (Laughter.)

18 JUSTICE ALITO: What was the -- what's  
19 the answer to my -- what's the answer to my  
20 question?

21 MS. CORKRAN: Yes, I think you can  
22 grant cert before judgment. I also think --

23 JUSTICE ALITO: No, that wasn't my  
24 question.

25 MS. CORKRAN: Yeah. But I will say I



1 think --

2 JUSTICE ALITO: All right. That's all  
3 right.

4 MS. CORKRAN: Yeah. No --

5 JUSTICE ALITO: That's all right. You  
6 don't want to answer it. That's all right.

7 MS. CORKRAN: Oh, no, no, I will. I  
8 have an -- if I could give an answer, which is  
9 that I think it's very difficult if -- or not  
10 impossible for the Court to do a meaningful Nken  
11 analysis without taking into account the fact  
12 that the government is asking the Court to allow  
13 it to ignore this Court's precedent, to ignore a  
14 duly enacted statute, and to upend a hundred  
15 years of executive branch practice.

16 So I think, you know, although the  
17 Court -- the government has attempted to  
18 separate them, that, really, the merits are  
19 embedded in the Nken factors.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor?

22 JUSTICE SOTOMAYOR: I find it hard to  
23 understand how a district court, in looking at a  
24 preliminary injunction under the Winter factors,  
25 where we said that the likelihood of success on

1 the merits is the keystone, how we could  
2 separate that out and say the keystone of  
3 whether you're entitled to universal injunction  
4 is the only merits question because the other  
5 factors are not eliminated by Winter. You have  
6 to balance the equities, and you can't balance  
7 the equities without the merits, correct?

8 MS. CORKRAN: I think that's right. I  
9 think also I don't -- you know, irreparable harm  
10 is going to be very difficult for the government  
11 to prove if it's not contesting that the -- or  
12 not contesting -- or at least not defending the  
13 constitutionality of the order because the  
14 government has no interest in enforcing an  
15 unconstitutional order.

16 I'd also note there's a -- there's a  
17 quote from Professor Bray in Justice Gorsuch's  
18 Texas concurrence, and it's: "In equity, it all  
19 connects. The broader and deeper the relief the  
20 plaintiff seeks, the stronger the plaintiff's  
21 story has to be." So I think there really is  
22 kind of an equitable consideration here of the  
23 merits as well that just can't be extracted from  
24 the --

25 JUSTICE SOTOMAYOR: Now the state has

1 explained why it can't pursue class actions. So  
2 it really -- it admits it's limited to whether  
3 it's entitled to complete relief.

4 But how about your organization?

5 You --

6 MS. CORKRAN: I -- I --

7 JUSTICE SOTOMAYOR: -- you sort of  
8 answered it, but I wanted to pin you down on  
9 that.

10 MS. CORKRAN: No, I --

11 JUSTICE SOTOMAYOR: Do you believe  
12 that associational organizations can seek class  
13 action?

14 MS. CORKRAN: I believe our individual  
15 plaintiffs certainly can. I am --

16 JUSTICE SOTOMAYOR: Yes, there's no  
17 question there.

18 MS. CORKRAN: Yeah. I am -- I am  
19 nervous about the government's suggestion that  
20 it's going to oppose our class certification  
21 motion if we were to file one. I think class  
22 certification can be -- can be very  
23 discovery-intensive. It could be the sort of  
24 thing that really delays the -- our plaintiffs  
25 from getting the relief that they seek.

1 JUSTICE SOTOMAYOR: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: I guess what I worry  
4 about here, Ms. Corkran, is that this case is  
5 very different from a lot of our nationwide  
6 injunction cases in which many of us have  
7 expressed frustration at the way district courts  
8 are doing their business.

9 And, you know, our -- our -- the  
10 typical way in which that frustration emerges is  
11 that questions, legal questions, are hard, and  
12 they're come complicated, and different courts  
13 would decide them differently. And, instead,  
14 because of the forum selection process, a party  
15 goes to one place. You know, in the first Trump  
16 administration, it was all done in  
17 San Francisco, and then, in the next  
18 administration, it was all done in Texas.

19 MS. CORKRAN: Right.

20 JUSTICE KAGAN: And -- and -- and  
21 there is a big problem that is created by that  
22 mechanism, and that leads to the questions to  
23 you and to General Feigenbaum, which is, like,  
24 you know, your third buckets, which are, oh, if  
25 it's, like, super-important or if it's

1     quintessentially national or whatever the way --  
2     you know, is not going to solve our problem for  
3     that set of cases, which is not this case.

4             This case, what's problematic about it  
5     is that the courts keep deciding the same way,  
6     and nobody really thinks that the lower courts  
7     are going to do anything different.

8             MS. CORKRAN: Right.

9             JUSTICE KAGAN: And it -- you know,  
10    for that reason, it does present the "catch me  
11    if you can" problem that Justice Jackson said  
12    and the problem of how are we ever going to get  
13    a case here.

14            But -- but our general case is not  
15    like that, and I just want you to sort of  
16    comment on it.

17            MS. CORKRAN: Yeah. I'd say first  
18    that the government's proposal of channeling  
19    through Rule 23 does nothing to solve anything  
20    you just described.

21            I think the limiting principles that I  
22    was proposing, which, again, was just me trying  
23    to reflect back to the Court kind of the through  
24    lines that it's been identifying, are  
25    sufficiently concrete that if this Court were to

1 articulate them, it would cut back on the number  
2 of universal injunctions. Is it a facial  
3 challenge? Does it involve a fundamental  
4 constitutional right? Right? Those are --  
5 those are concrete questions.

6 And then I would point to, you know,  
7 Justice Kavanaugh's Poe concurrence. I think,  
8 you know, vertical stare decisis is going to be  
9 important here. When courts enter these sorts  
10 of district -- these sorts of injunctions, they  
11 are immediately appealable to the courts of  
12 appeal. So, if there are any district courts  
13 that are kind of getting over their skis on  
14 these, it's correctable by the courts of  
15 appeals.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: Some of your  
20 concerns about this Court being involved, I  
21 guess I'm not sure I really understand that.  
22 When the -- when a president or an  
23 administration enacts some major new rule, the  
24 question ultimately -- and it's legally  
25 challenged -- ultimately will be a year or two

1 from now, it'll get here and we'll make a final  
2 judgment, but the interim status of that rule,  
3 as this case illustrates and many others --  
4 vaccine mandate, eviction moratorium, go down  
5 the list -- they're really important whether  
6 they're in effect for that year or two.

7 And I guess I don't know why we -- we  
8 -- you should be concerned or we should be  
9 concerned about this Court playing a role in  
10 those.

11 MS. CORKRAN: Oh, I don't have  
12 concerns about that. I was responding to  
13 General Sauer's point that this has become  
14 pathological in the number of universal  
15 injunctions that are making its way onto the  
16 Court's emergency docket, but my --

17 JUSTICE KAVANAUGH: Just because there  
18 are more significant executive actions over the  
19 last three decades --

20 MS. CORKRAN: Yeah. I certainly agree  
21 with that. And I -- you know, I --

22 JUSTICE KAVANAUGH: -- that are --  
23 that are, you know, at the -- Loper Bright and  
24 our West Virginia versus EPA are arguably some  
25 part of that story as well.

1 MS. CORKRAN: I agree completely. And  
2 to answer the question you asked General Sauer  
3 earlier about why we've seen this proliferation  
4 of these universal injunctions, I think it's  
5 directly -- I would say first that the  
6 government, I think, pretty dramatically  
7 overstates them. It's double-counting TROs and  
8 PIs in the same case.

9 But, if you look at the number of  
10 executive actions in the first six weeks of this  
11 administration, it's more than any other  
12 president issued in a year dating back to 1951  
13 during the Korean War.

14 JUSTICE KAVANAUGH: But I don't want  
15 to -- I mean, it's --

16 MS. CORKRAN: Yeah.

17 JUSTICE KAVANAUGH: You know, it's  
18 going back. It's a bipartisan phenomenon --

19 MS. CORKRAN: Agree.

20 JUSTICE KAVANAUGH: -- completely  
21 bipartisan, and completely, in my view, well  
22 intentioned because presidents want to get  
23 things done.

24 MS. CORKRAN: Right.

25 JUSTICE KAVANAUGH: And I -- I get



1       that.

2                   MS. CORKRAN:  Yeah.  I -- I agree with  
3       that.  I think it's -- it's directly correlated  
4       to the number of unilateral executive actions  
5       we've seen over the last few years --  
6       administrations.

7                   CHIEF JUSTICE ROBERTS:  Justice  
8       Barrett?

9                   JUSTICE BARRETT:  Ms. Corkran, I just  
10      have one question.  You said that you're in  
11      bucket one.

12                  MS. CORKRAN:  Yes.

13                  JUSTICE BARRETT:  So you felt like you  
14      were --

15                  MS. CORKRAN:  Oh, yeah.

16                  JUSTICE BARRETT:  -- playing kind of  
17      the amici role.  I understand why you might  
18      think you're in bucket one for the associational  
19      point.  Do you think you're in bucket one for  
20      individual plaintiffs?

21                  MS. CORKRAN:  So I don't know that I  
22      would extract them because the universal --

23                  JUSTICE BARRETT:  What named  
24      plaintiff?  Like, let's imagine you had  
25      individual plaintiffs that are named members of

1 the association. So let's -- I guess what I'm  
2 saying is let's take the association outside of  
3 it and let's just say that we're talking about  
4 individual plaintiffs.

5 MS. CORKRAN: So, there, I --

6 JUSTICE BARRETT: Would you put that  
7 in bucket one?

8 MS. CORKRAN: So, there, I would go to  
9 the second injury I -- I had identified earlier,  
10 which is if you're asking -- our -- our  
11 individual plaintiffs have pseudo names right  
12 now. That would be contemplating a scenario  
13 where they would have to identify themselves to  
14 the federal government and say I am an ace -- or  
15 I am the plaintiff in this case. At which point  
16 they are immediately vulnerable to deportation,  
17 even, again, if they are here lawfully.

18 We've seen the government removing  
19 visa holders and -- and asylum seekers.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Jackson?

22 JUSTICE JACKSON: So I think I  
23 understand your arguments. There is just one  
24 little piece of it that is confusing to me, and  
25 I hope you can clarify.

1           So if we view the relief in this case,  
2   and others like it, to be a judgment ordering  
3   the defendant not to do something that the court  
4   has found to be likely -- because we're in the  
5   interim stage -- unlawful, are nonparties in  
6   that situation actually getting relief or are  
7   they just incidental beneficiaries of an order  
8   requiring the government not to do this harmful  
9   thing?

10           I thought it was the latter.

11           MS. CORKRAN: Yeah.

12           JUSTICE JACKSON: And that just -- you  
13   know, the government is told by the Court:  
14   Don't do X. And, of course, anybody who would  
15   have been harmed by the government doing X is  
16   benefitted by that, but they're not really, I  
17   thought, getting relief.

18           But here -- here's where I get  
19   confused, because I thought they're not getting  
20   relief because they can't come into court  
21   independently and seek a contempt ruling if the  
22   government continues to do the thing.

23           They weren't parties. They don't have  
24   the judgment. That's what differentiates them  
25   from, say, the class action people or the

1 plaintiff people.

2           The reason why we have the rules for  
3 class action, et cetera, is because, at the end  
4 of the day, the members of the class are getting  
5 a judgment that they can then use to enforce  
6 this obligation as against the government,  
7 whereas the people in the universal injunction  
8 world are just benefitting if the government  
9 actually, you know, follows the order.

10           MS. CORKRAN: Yeah, I -- I think that  
11 what you're articulating is consistent with a  
12 long history of precedent and practice. I mean,  
13 it's the classic rem case, right, making a  
14 declaration about property. I think Professor  
15 Pfander's amicus brief is really helpful on  
16 that. He talks about the -- the patent laws.

17           And I think you can see that same  
18 instinct in the Court's cases that Justice  
19 Sotomayor was talking about earlier, right, the  
20 railroad rates, Barnett, Pierce v. Society of  
21 Sisters.

22           JUSTICE JACKSON: And I guess my point  
23 is that's why we don't need Rule 23, because  
24 we're actually doing, conceptually, a different  
25 thing.

1           We're not trying to give all these  
2   people, everyone in the world, some sort of  
3   enforceable right as against the government. We  
4   are simply just doing what courts do, I thought,  
5   which is telling the defendant over whom they  
6   have personal jurisdiction that they have to  
7   stop doing something unlawful. And, of course,  
8   that benefits people.

9           But the thing that confuses me about  
10   your argument is that you alluded at the  
11   beginning to Rule 71 and suggested that the  
12   non -- the nonparties could somehow enforce this  
13   universal injunction. I didn't understand that.

14           MS. CORKRAN: I think Rule 71  
15   contemplates that. It would be very onerous. I  
16   mean, I -- I think when General Sauer, he was  
17   kind of contemplating the idea that, you know,  
18   tens of thousands of people were going to have  
19   to come to court individually --

20           JUSTICE JACKSON: Right. But I think  
21   if you're right about that, it undermines the  
22   point that I'm making because it puts people in  
23   the same place as the class action folks and  
24   the -- the parties in a way that -- that -- that  
25   I think raises legitimate concerns that some of

1 my colleagues have put forward with respect to  
2 universal injunction.

3 So the thing that distinguishes them  
4 is that universal injunctions are not  
5 benefitting or giving relief to nonparties in  
6 any meaningful sense, is my theory.

7 MS. CORKRAN: I think both have always  
8 been true, and maybe they're in tension with  
9 each other. But Rule 71's originated in equity  
10 rule X, which was enacted in -- or was put in  
11 place in 1842, which had the same -- same idea  
12 of, quite apart from representative suits,  
13 nonparties enforcing orders that provided them  
14 with relief.

15 Although maybe this -- as I'm talking,  
16 I think maybe -- I'm talking about under Rule 71  
17 orders that --

18 JUSTICE JACKSON: Let me just --

19 MS. CORKRAN: -- provide relief --

20 JUSTICE JACKSON: But let me just ask  
21 you this --

22 MS. CORKRAN: -- you're talking about  
23 injunctions.

24 JUSTICE JACKSON: Yes, right.

25 MS. CORKRAN: Yes. Those are

1 different things.

2 JUSTICE JACKSON: What I'm asking you  
3 is: In this very case, if we have a -- a series  
4 of non -- of plaintiffs, of actually named  
5 people, and they get an injunction, as the  
6 government says, against -- sorry. If they get  
7 a universal injunction, or what they call a  
8 universal injunction, the -- the government  
9 cannot enforce this executive order, can someone  
10 who is not a nonplaintiff come into court to  
11 enforce that if the government violates it?

12 MS. CORKRAN: So -- so I'm hesitant to  
13 say no, both because Rule 71 exists and those  
14 aren't my -- my -- my clients or my plaintiffs  
15 and we needed this universal injunction --

16 JUSTICE JACKSON: Yes, I understand.

17 MS. CORKRAN: -- for purposes of  
18 our --

19 JUSTICE JACKSON: I'm just trying to  
20 figure this out.

21 MS. CORKRAN: But I think both -- you  
22 know, I -- I think both what you said is true.  
23 If we look at cases like Barnett and Pierce and  
24 we go all the way back -- I would -- I think  
25 Justice Story's dissent that he signed on to in

1 Cherokee Nation v. Georgia is terrific on this  
2 point.

3 He was the preeminent scholar on  
4 equitable remedies, and he certainly thought, in  
5 the way that you're articulating, we're going to  
6 make a declaration about whether Georgia can  
7 enforce its laws on Cherokee Nation property,  
8 and that is just a declaration of the law that  
9 will have an impact on -- on everyone.

10 But I would -- I'm hesitant to say  
11 that Rule 71 doesn't have any application.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Rebuttal, General Sauer?

16 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

17 ON BEHALF OF THE APPLICANTS

18 GENERAL SAUER: Thank you,  
19 Mr. Chief Justice.

20 The original meaning of the  
21 Citizenship Clause extended citizenship to the  
22 children of former slaves, not to people who are  
23 unlawfully or temporarily present in the  
24 United States.

25 The merits arguments we are presenting



1 to the lower courts are compelling. We cite,  
2 for example, a host of 19th century authorities  
3 that point out that domicile was the touchstone  
4 of noncitizens being treated as -- having their  
5 offspring treated as -- as citizens in that  
6 context.

7 That is consistent with Wong Kim Ark  
8 as well as with the slaughterhouse cases in Elk  
9 against Wilkins. And the suggestion that our  
10 position on the merits is weak is profoundly  
11 mistaken.

12 And that kind of snap judgment on the  
13 merits that was presented in the lower courts is  
14 exactly the problem with the issue of racing to  
15 issue these nationwide injunctions.

16 The Chief Justice correctly pointed  
17 out that this Court, if it wishes to address the  
18 merits expeditiously, has many tools to do so.  
19 Cert before judgment is one possible tool.  
20 There are also others.

21 But this Court should also address the  
22 scope of remedy, the remedial question that's  
23 presented in the application. That is an  
24 extremely urgent question.

25 And one of the reasons an extremely

1     urgent question is the limiting principles that  
2     my friends on the other side have been offering  
3     have all proven to be completely ineffective to  
4     slowing the essentially slaughter -- flood or  
5     cascade of universal injunctions that we see in  
6     these cases.

7             The states here have a unique issue  
8     that hasn't come up yet, but for the reasons we  
9     state in our application they lack third-party  
10    standing very clearly under cases like Murthy  
11    and Haaland and Katzenbach and Kowalski. So no  
12    injunctive relief should run to the states in  
13    this particular case anyway.

14            And most fundamentally, the vision of  
15    the district courts that's reflected in the  
16    issuance of these nationwide injunctions is a  
17    vision of them as a roving commission to correct  
18    every legal wrong that they -- that they can  
19    consider and to exercise general legal oversight  
20    over the executive branch, which is what this  
21    Court rejected in TransUnion.

22            And for those reasons, we ask the  
23    Court to grant the applications.

24            CHIEF JUSTICE ROBERTS: Thank you,  
25    counsel. The case is submitted.

1                   (Whereupon, at 12:29 p.m., the case  
2    was submitted.)

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## Official - Subject to Final Review

<p><b>1</b></p> <p><b>10:12</b> [2] 2:4 4:2  <b>12:29</b> [1] 162:1  <b>125</b> [1] 3:11  <b>127</b> [3] 78:19 114:3 123:2  <b>1320b-7</b> [1] 103:20  <b>1367bb</b> [1] 104:22  <b>1396a</b> [1] 101:23  <b>14,160</b> [1] 4:13  <b>15</b> [1] 1:25  <b>159</b> [1] 3:14  <b>16</b> [1] 142:10  <b>1600</b> [1] 59:17  <b>17-and-under-year-olds</b> [1] 109:9  <b>17-year-olds</b> [1] 109:16  <b>1789</b> [7] 26:5 27:7,17 30:13  114:21 115:11 135:2  <b>18</b> [1] 109:5  <b>1842</b> [1] 157:11  <b>1890</b> [2] 135:3,11  <b>1891</b> [1] 106:9  <b>1925</b> [1] 107:2  <b>1940</b> [2] 37:15 114:6  <b>1942</b> [2] 135:3,12  <b>1951</b> [1] 151:12  <b>1952</b> [1] 114:7  <b>1955</b> [1] 61:23  <b>1960s</b> [3] 38:10,13 106:16  <b>1963</b> [1] 37:12  <b>1966</b> [2] 132:14,17  <b>1970s</b> [1] 135:7  <b>19th</b> [6] 26:8 80:6 106:8,9  114:25 160:2</p> <p><b>2</b></p> <p><b>2</b> [1] 56:6  <b>20</b> [2] 4:12,23  <b>20(b)(3)</b> [1] 133:11  <b>2007</b> [1] 38:14  <b>2017</b> [1] 128:8  <b>2025</b> [3] 1:25 4:12 103:20  <b>20th</b> [1] 114:25  <b>21</b> [1] 23:16  <b>22</b> [1] 54:17  <b>23</b> [45] 5:15 6:24 11:1,2 12:11,17 16:3 22:1,5 29:1,11,12,14,20,23 31:19 40:14,17 49:24 51:21 52:25 69:2 82:9 102:17,20 118:5 127:19,22,23 128:15,19 129:20 130:6,18,18 131:2,13,18 132:13 133:16 134:9 136:8 140:22 148:19 155:23  <b>23(b)(2)</b> [8] 8:16 52:20 53:14,17,21 54:7 88:18 131:3  <b>24A884</b> [1] 4:4  <b>25</b> [1] 53:15  <b>25-807</b> [1] 13:25</p> <p><b>3</b></p> <p><b>3</b> [2] 111:1 124:8  <b>30</b> [4] 55:12 57:7,9 87:4  <b>30-day</b> [3] 55:9,15,19</p>	<p><b>35</b> [1] 4:25  <b>38</b> [1] 133:20  <b>39</b> [1] 45:10</p> <p><b>4</b></p> <p><b>4</b> [3] 3:4 111:3 124:8  <b>40</b> [5] 4:23 27:20 54:16 73:19 102:7  <b>42</b> [3] 101:22 103:20 104:22  <b>48</b> [5] 80:1 107:18 115:24  116:6 133:19</p> <p><b>5</b></p> <p><b>50</b> [1] 23:13</p> <p><b>6</b></p> <p><b>6,000</b> [3] 77:13 102:3 112:4  <b>64</b> [1] 54:18  <b>65</b> [2] 127:22 128:7  <b>680</b> [1] 97:13</p> <p><b>7</b></p> <p><b>7</b> [1] 103:19  <b>71</b> [8] 127:22,25 128:3 156:11,14 157:16 158:13 159:11  <b>71's</b> [1] 157:9  <b>77</b> [1] 3:8</p> <p><b>8</b></p> <p><b>8</b> [2] 112:4,5</p> <p><b>9</b></p> <p><b>90</b> [3] 95:19 113:19,24  <b>93</b> [1] 20:17</p> <p><b>A</b></p> <p><b>a)(C)(3)</b> [1] 8:11  <b>a.m</b> [2] 2:4 4:2  <b>Aaron</b> [1] 62:18  <b>AARP</b> [6] 80:8 82:6 88:5  107:21 129:17 139:4  <b>abatement</b> [1] 14:25  <b>abiding</b> [1] 35:4  <b>ability</b> [5] 48:10 58:8 72:6  76:17 92:17  <b>able</b> [6] 29:13 36:13 41:14  105:19 122:16 138:18  <b>above-entitled</b> [1] 2:2  <b>absent</b> [2] 8:10,18  <b>absolutely</b> [9] 32:10,13 37:3 44:12 50:23 64:15 67:23  79:12 95:8  <b>abstract</b> [1] 97:9  <b>abuses</b> [1] 30:20  <b>accept</b> [5] 56:7 62:17 109:25 134:5,6  <b>accepts</b> [1] 123:25  <b>according</b> [1] 35:24  <b>account</b> [2] 110:22 144:11  <b>ace</b> [1] 153:14  <b>achieve</b> [2] 25:5,15  <b>across</b> [6] 17:5 23:15 78:8  98:21 100:16 112:6  <b>Act</b> [13] 26:5 27:7 30:13 37:</p>	<p><b>1 41:2 42:4 44:14,15 81:22,23 84:17 91:5 122:16</b>  <b>action</b> [29] 6:24 7:4 8:16  10:10,11 12:12,14,18 20:14 34:12,16 40:12 41:20,24 45:3 66:4,19 68:2,5 82:8 115:5 116:21 133:23  135:13,25 146:13 154:25  155:3 156:23  <b>actions</b> [16] 8:13,14 10:6  13:3,19 40:5 45:22 58:24  59:2 89:8 116:4 136:9 146:1 150:18 151:10 152:4  <b>activity</b> [4] 70:13,16 120:25 121:21  <b>actual</b> [3] 60:9 120:2 135:2  <b>actually</b> [21] 59:11 76:6,11,15 79:16 83:9 86:9 99:9  111:21 113:8 118:1,9 121:9 131:20 132:13 133:24  141:3 154:6 155:9,24 158:4  <b>added</b> [1] 132:13  <b>addition</b> [1] 35:19  <b>additional</b> [1] 71:5  <b>address</b> [20] 5:6 14:17 22:4 26:9 34:11 36:6 49:5,25  50:14,14 65:16 72:19 93:25 122:6 130:19,20 132:14  141:6 160:17,21  <b>addressed</b> [6] 24:12 38:1,5 59:14 65:19,23  <b>addresses</b> [2] 24:20 63:16  <b>addressing</b> [2] 19:16 131:21  <b>Adequacy</b> [1] 52:16  <b>administer</b> [5] 103:16 104:4 112:8 142:12,13  <b>administrability</b> [4] 77:22  83:23,24 92:13  <b>administration</b> [15] 27:21  54:17,18,18 59:13 91:14  103:9,19 104:7 110:3 113:7 147:16,18 149:23 151:11  <b>administration's</b> [2] 61:3,9  <b>administrations</b> [7] 5:3  57:19 58:11 59:25 98:22  130:5 152:6  <b>administrative</b> [2] 24:18  111:9  <b>administratively</b> [1] 141:14  <b>admits</b> [1] 146:2  <b>adopt</b> [3] 24:2 45:18 135:21  <b>adopted</b> [2] 106:11 135:7  <b>adversarial</b> [1] 47:12  <b>adverse</b> [1] 141:20  <b>affect</b> [1] 40:11  <b>affected</b> [4] 8:23 9:22 28:19 52:10  <b>affirmatively</b> [2] 19:19 138:14</p>	<p><b>affirmed</b> [1] 106:18  <b>afford</b> [1] 49:1  <b>afoul</b> [1] 128:12  <b>afraid</b> [1] 41:18  <b>age</b> [1] 109:7  <b>agencies</b> [2] 57:5 142:13  <b>agency</b> [1] 73:12  <b>ago</b> [3] 78:20 107:22 123:2  <b>agree</b> [27] 25:22 35:8 54:3  55:5 58:11 79:3,23 83:20  88:13,17 97:2,5 100:12,14,18 107:16,22 108:7 111:22  116:10,17 119:8 126:19  150:20 151:1,19 152:2  <b>agreed</b> [1] 39:1  <b>agreement</b> [1] 132:3  <b>agrees</b> [1] 125:12  <b>ahead</b> [4] 7:13 32:21 84:17  108:2  <b>ahistorical</b> [3] 127:19 133:10 134:1  <b>aim</b> [1] 138:12  <b>air</b> [1] 18:11  <b>AL</b> [6] 1:4,7,11,14,18,21  <b>Alabama</b> [1] 54:8  <b>aliens</b> [2] 4:18 8:4  <b>alike</b> [1] 79:3  <b>Alito</b> [18] 38:19,20 39:12,24  66:1 95:1,21 96:21,22 97:6 99:24 120:15 143:6,7,18,  23 144:2,5  <b>Alito's</b> [3] 67:17 130:15  131:20  <b>allegedly</b> [2] 70:12,15  <b>alleging</b> [1] 14:9  <b>allow</b> [4] 49:21 50:13 75:19  144:12  <b>allowed</b> [4] 39:2 74:13 78:3 126:9  <b>alluded</b> [1] 156:10  <b>almost</b> [1] 55:18  <b>alone</b> [1] 87:16  <b>already</b> [2] 78:18 94:7  <b>alter</b> [1] 42:10  <b>alternative</b> [12] 77:15 81:13 82:3,14 86:21 89:13,17,  23 91:1 103:1 119:1,18  <b>alternatives</b> [13] 28:20 77:17 79:17 83:9 95:11 96:17  99:17 101:1 118:15,16  119:6,20,24  <b>although</b> [5] 79:14 105:18  134:24 144:16 157:15  <b>ambiguities</b> [1] 116:14  <b>amend</b> [1] 128:10  <b>Amendment</b> [7] 4:16 43:11,20,21,25 78:2 106:11  <b>Amendment's</b> [1] 125:7  <b>American</b> [7] 4:14 78:3 80:2 115:20,23 116:8,13  <b>amici</b> [5] 85:7 106:13 127:16 141:2 152:17  <b>amicus</b> [3] 84:25 90:12  155:15</p>	<p><b>among</b> [3] 8:21 45:25 67:25  <b>analogical</b> [3] 115:18 116:12,17  <b>analogically</b> [1] 115:21  <b>analogous</b> [2] 6:23 75:1  <b>analogue</b> [3] 8:17 11:2 27:17  <b>analogues</b> [1] 6:11  <b>analogy</b> [1] 59:9  <b>analysis</b> [5] 59:8 117:19,  20 135:2 144:11  <b>Andrew</b> [1] 44:3  <b>animal</b> [1] 7:8  <b>announced</b> [2] 16:10,11  <b>another</b> [9] 11:16,18,22 20:11 42:3 55:20,22 81:19  129:24  <b>answer</b> [23] 12:16 20:6 30:19 31:16,19 33:20 36:16  39:12 63:25 84:12 85:5 86:18 89:20 99:20 100:6 107:8 116:14 142:23 143:19,19  144:6,8 151:2  <b>answered</b> [2] 40:2 146:8  <b>answering</b> [1] 127:16  <b>answers</b> [2] 60:10 105:9  <b>ante</b> [1] 133:21  <b>anybody</b> [2] 72:3 154:14  <b>anyway</b> [1] 161:13  <b>APA</b> [4] 53:22,23 70:20 73:9  <b>apart</b> [1] 157:12  <b>apologize</b> [1] 122:4  <b>appeal</b> [4] 47:1 76:9 120:19 149:12  <b>appealable</b> [1] 149:11  <b>appeals</b> [5] 49:13 98:9,10  121:11 149:15  <b>appear</b> [1] 13:1  <b>APPEARANCES</b> [1] 2:6  <b>appearing</b> [1] 38:7  <b>appellate</b> [2] 5:20 97:21  <b>applicable</b> [1] 48:16  <b>Applicants</b> [8] 1:5,12,19 2:9 3:4,14 4:9 159:17  <b>application</b> [20] 52:18 63:16 64:7,17 65:3 77:7,12  83:6 94:10 98:8,12 101:2  103:6 105:13 119:1 122:13 125:13 159:11 160:23  161:9  <b>applications</b> [1] 161:23  <b>applied</b> [2] 23:13 28:24  <b>applies</b> [3] 49:23 70:25 99:11  <b>apply</b> [2] 33:9 89:11  <b>applying</b> [1] 33:8  <b>appointment</b> [1] 89:2  <b>apportionment</b> [5] 109:2,  5,10,13,19  <b>appreciate</b> [8] 15:25 17:16  74:21 93:6,24 114:22 121:2 134:2</p>
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## Official - Subject to Final Review

<p><b>approach</b> [4] 47:4 62:13 77:18 133:10</p> <p><b>approached</b> [1] 117:10</p> <p><b>approaches</b> [1] 77:16</p> <p><b>approaching</b> [1] 132:1</p> <p><b>appropriate</b> [26] 12:11 13:2,18 17:14 25:23,25 26:1,2 29:9 31:3,5 32:4,7 50:18 54:20 87:9 96:4 113:17 119:4 123:12 126:20 132:4,6 138:23 139:16 140:5</p> <p><b>appropriately</b> [1] 29:16</p> <p><b>approved</b> [2] 138:10,18</p> <p><b>aren't</b> [4] 90:17,21 104:13 158:14</p> <p><b>arguably</b> [1] 150:24</p> <p><b>argue</b> [4] 9:2,6,8 140:14</p> <p><b>argued</b> [4] 6:25 27:5 43:19, 21</p> <p><b>argues</b> [1] 125:15</p> <p><b>arguing</b> [4] 9:2 40:6 88:20 136:19</p> <p><b>argument</b> [36] 2:3 3:2,5,9, 12 4:4,8 8:21,23 9:5,19 11:7 17:1 18:15 21:13 25:7 39:15 43:17 52:19 74:4,15 77:2 78:15 84:8 95:3 96:7 125:1 133:4 134:3 141:7 142:7,9,11 143:10 156:10 159:16</p> <p><b>arguments</b> [5] 32:3 49:13 121:2 153:23 159:25</p> <p><b>arising</b> [1] 72:16</p> <p><b>Ark</b> [6] 11:11 14:2 105:16, 23 123:2 160:7</p> <p><b>arrive</b> [2] 103:15,23</p> <p><b>arrived</b> [1] 112:20</p> <p><b>Article</b> [41] 5:5 9:3 16:3,9, 14,19 17:2,6,21,25 18:2,4 19:2,4 26:11,21 27:4 34:9 39:19 40:4,10,13,16 42:12, 13 45:7,16 59:10 72:16 77:9 78:9 79:21 81:20 82:1 84:9 94:14 95:15 97:17 124:13 125:16 135:24</p> <p><b>articulate</b> [2] 138:14 149:1</p> <p><b>articulated</b> [1] 135:1</p> <p><b>articulating</b> [2] 155:11 159:5</p> <p><b>ASAP</b> [1] 142:14</p> <p><b>aside</b> [10] 29:23 44:13 53:23,25 70:22 73:10 79:8 81:19 93:17 136:6</p> <p><b>asks</b> [1] 64:14</p> <p><b>assess</b> [1] 51:4</p> <p><b>assessment</b> [2] 132:24 139:22</p> <p><b>assets</b> [1] 27:13</p> <p><b>Association</b> [5] 54:8 141:18,19 153:1,2</p> <p><b>associational</b> [3] 137:2 146:12 152:18</p> <p><b>associations</b> [2] 137:4,17</p> <p><b>Assume</b> [16] 21:12 22:20</p>	<p>28:3,4,8,17 46:1 66:20 67:2,8,12 74:11 93:17 122:21 133:12,13</p> <p><b>assuming</b> [4] 29:2 67:6 73:10 122:22</p> <p><b>assumption</b> [3] 28:4 30:2 67:5</p> <p><b>asylum</b> [1] 153:19</p> <p><b>asymmetrically</b> [1] 5:17</p> <p><b>attached</b> [2] 100:23,24</p> <p><b>attempt</b> [1] 28:12</p> <p><b>attempted</b> [1] 144:17</p> <p><b>attention</b> [1] 74:2</p> <p><b>attorney</b> [1] 102:20</p> <p><b>attorneys</b> [2] 102:18 118:5</p> <p><b>authorities</b> [1] 160:2</p> <p><b>authority</b> [14] 5:8 9:15 18:1 26:4 27:1 39:20 45:8 58:2,3,25 59:4 72:15,18 129:19</p> <p><b>authorization</b> [1] 81:18</p> <p><b>authorize</b> [2] 84:10 91:3</p> <p><b>authorized</b> [1] 84:11</p> <p><b>automatically</b> [1] 113:10</p> <p><b>availability</b> [5] 82:8 86:20 126:14,25 139:1</p> <p><b>available</b> [12] 80:13,15,18 81:9,11 82:5 85:14 88:25 90:16 99:1 129:24 131:5</p> <p><b>avenue</b> [1] 49:25</p> <p><b>avenues</b> [1] 39:3</p> <p><b>award</b> [1] 134:15</p> <p><b>away</b> [2] 13:12 41:25</p> <p style="text-align: center;"><b>B</b></p> <p><b>b)(2)</b> [1] 131:9</p> <p><b>B-1</b> [1] 56:24</p> <p><b>babies</b> [8] 77:13 101:21 102:3,21 104:11,12 111:16 112:4</p> <p><b>back</b> [33] 13:14 26:8 37:15, 24 44:8,11 54:14 67:17 74:22,24 79:24 87:22 88:2 89:6 90:8 98:10 106:5 107:17 110:14,16,18 114:21 131:19 134:23 140:2,9 141:25 142:17 148:23 149:1 151:12,18 158:24</p> <p><b>background</b> [1] 128:18</p> <p><b>bad</b> [1] 76:21</p> <p><b>balance</b> [4] 111:1 121:25 145:6,6</p> <p><b>balancing</b> [2] 6:3 30:8</p> <p><b>bare</b> [1] 69:4</p> <p><b>Barnett</b> [2] 155:20 158:23</p> <p><b>BARRETT</b> [60] 19:10 20:7, 9,20 21:3,10,15,21,25 22:7, 13 31:12,15,21 32:6,11 60:6,7 61:2,12,20 62:7,10,16, 21 63:9,14,17,20 64:11,18 65:6,13,24 66:20 67:1,4,8, 24 68:10,16,20 89:18,21 90:13 114:17,18 115:14 116:16 118:4,10 119:13</p>	<p>120:9 128:1 152:8,9,13,16, 23 153:6</p> <p><b>Barrett's</b> [1] 134:23</p> <p><b>barring</b> [1] 78:10</p> <p><b>base</b> [1] 126:15</p> <p><b>based</b> [4] 14:12 77:19 78:3 116:12</p> <p><b>bases</b> [2] 51:17 79:1</p> <p><b>basic</b> [1] 79:22</p> <p><b>basis</b> [11] 13:20 25:19 36:6 51:14,22 52:5 60:1,2 94:14,17 104:6</p> <p><b>bear</b> [3] 83:5 91:11 104:20</p> <p><b>bearing</b> [1] 124:18</p> <p><b>become</b> [2] 78:23 150:13</p> <p><b>began</b> [2] 38:20 96:23</p> <p><b>begin</b> [1] 19:21</p> <p><b>beginning</b> [3] 53:7 121:7 156:11</p> <p><b>behalf</b> [12] 2:8,11,13 3:4,7, 11,14 4:9 77:3 125:2 137:12 159:17</p> <p><b>behavior</b> [2] 71:3 72:24</p> <p><b>believe</b> [7] 10:16 37:10 41:21,22 63:13 146:11,14</p> <p><b>believed</b> [1] 98:22</p> <p><b>below</b> [9] 31:25 77:18 82:18 98:16 100:10,13 117:9, 11,12</p> <p><b>beneficiaries</b> [3] 18:22 71:24 154:7</p> <p><b>beneficiary</b> [1] 21:17</p> <p><b>benefit</b> [11] 15:10 20:23 42:22 67:9 80:5 82:21 92:25 101:14 116:1 125:22 133:6</p> <p><b>benefited</b> [1] 80:24</p> <p><b>benefits</b> [27] 5:15 15:9 41:11 72:4 73:17 91:14,16 99:8,13 101:17 102:5,8 103:9, 16,19 104:3,5,8,19 110:3,5 111:16 112:1,8 113:7 139:11 156:8</p> <p><b>benefitted</b> [2] 19:25 154:16</p> <p><b>benefitting</b> [2] 155:8 157:5</p> <p><b>best</b> [6] 37:11 94:20 95:10 115:6,11 133:15</p> <p><b>better</b> [4] 50:6 54:9 132:1,1</p> <p><b>between</b> [10] 6:1 60:15 66:7 67:21 109:19 111:2 113:10 116:21 118:22 135:11</p> <p><b>beyond</b> [2] 94:10 124:12</p> <p><b>Biden</b> [2] 54:5 98:3</p> <p><b>big</b> [1] 147:21</p> <p><b>bigger</b> [1] 7:22</p> <p><b>bill</b> [19] 6:12,17,18 7:2,5,7, 21 8:8,9 10:18 11:2 40:21 79:10,25 106:7 107:18 115:3,12 116:21</p> <p><b>bills</b> [7] 8:14 116:4 133:13, 18 134:5,19 135:17</p> <p><b>bind</b> [5] 8:10,13 35:11 36:</p>	<p>24 80:4</p> <p><b>binding</b> [9] 6:21 8:10,18 9:15 19:24 31:8 94:8 129:21 134:20</p> <p><b>binds</b> [2] 45:2,3</p> <p><b>bipartisan</b> [3] 5:1 151:18, 21</p> <p><b>birth</b> [4] 102:22 103:14 112:19,19</p> <p><b>birthright</b> [4] 56:25 78:16 112:21 143:9</p> <p><b>bit</b> [5] 117:2 120:16 124:16 139:9 140:20</p> <p><b>blatantly</b> [1] 125:12</p> <p><b>blocking</b> [1] 4:21</p> <p><b>blowing</b> [1] 53:11</p> <p><b>board</b> [2] 17:5 106:15</p> <p><b>boiled</b> [1] 69:4</p> <p><b>border</b> [1] 11:20</p> <p><b>borders</b> [1] 94:11</p> <p><b>born</b> [17] 7:16 11:17,20 41:4,8 77:13,20 101:21 102:4, 21 103:10 104:15 105:3 110:14,15 112:4,22</p> <p><b>both</b> [20] 9:3,6,8 12:5 17:24 52:13 58:5 59:2 64:14,19 97:4 100:9 114:6 125:25 127:21 130:5 157:7 158:13,21,22</p> <p><b>bottom</b> [1] 68:24</p> <p><b>bound</b> [12] 19:12 41:1 68:1, 3,7,8,18 75:3 115:25 130:7, 11 133:8</p> <p><b>bounds</b> [1] 5:8</p> <p><b>Boyle</b> [1] 102:5</p> <p><b>Brackeen</b> [1] 90:21</p> <p><b>Branch</b> [4] 24:21 125:10 144:15 161:20</p> <p><b>branches</b> [3] 6:2 57:25 126:5</p> <p><b>Bray</b> [3] 59:10 128:10 145:17</p> <p><b>brief</b> [2] 54:23 155:15</p> <p><b>briefed</b> [5] 13:24 22:12 31:25 51:18 53:9</p> <p><b>briefing</b> [11] 44:4 49:12 50:15 83:2 93:9,15 95:3 100:16,23 143:10,12</p> <p><b>briefly</b> [1] 142:3</p> <p><b>briefs</b> [1] 30:15</p> <p><b>bright</b> [2] 99:21 150:23</p> <p><b>bright-line</b> [4] 78:10 81:8 85:13 124:13</p> <p><b>bring</b> [11] 20:14,18,25 21:17 22:1 28:19 48:10,12 49:18 95:16 124:19</p> <p><b>brings</b> [2] 18:13 35:6</p> <p><b>broad</b> [5] 16:18 39:11 79:14 117:7 140:5</p> <p><b>broader</b> [7] 14:8 22:18 24:10 109:20 117:5,17 145:19</p> <p><b>broadly</b> [2] 7:23 108:25</p> <p><b>brought</b> [5] 34:8 35:11 48:9 72:24 137:3</p>	<p><b>brunt</b> [1] 49:16</p> <p><b>bucket</b> [27] 82:13 84:8,9,13 85:2 86:8,8,16,17,19 87:6, 22 88:3,3,6 89:23 90:4,11, 11,15,18 91:6 127:14 152:11,18,19 153:7</p> <p><b>buckets</b> [2] 84:3 147:24</p> <p><b>bug</b> [2] 26:11 35:1</p> <p><b>building</b> [2] 92:20 105:15</p> <p><b>built</b> [1] 123:4</p> <p><b>bunch</b> [3] 15:10 38:17 46:10</p> <p><b>burden</b> [2] 102:9 104:2</p> <p><b>burdens</b> [7] 5:16 83:24,25 91:10 92:7,13 119:10</p> <p><b>business</b> [1] 147:8</p> <p><b>buying</b> [1] 10:24</p> <p style="text-align: center;"><b>C</b></p> <p><b>calculus</b> [1] 111:24</p> <p><b>call</b> [7] 14:20 20:1 21:4 42:6 68:25 73:7 158:7</p> <p><b>called</b> [1] 116:23</p> <p><b>calls</b> [3] 55:16 108:17 135:24</p> <p><b>Camden</b> [2] 110:10,15</p> <p><b>came</b> [2] 2:2 11:19</p> <p><b>candidate</b> [2] 52:20 54:9</p> <p><b>cannot</b> [4] 73:2 78:16,25 158:9</p> <p><b>capacity</b> [1] 41:1</p> <p><b>care</b> [7] 66:13 89:22 92:9 113:24,25 117:16 130:25</p> <p><b>careful</b> [1] 6:3</p> <p><b>Carolina</b> [1] 110:23</p> <p><b>CASA</b> [3] 1:7 4:5 142:14</p> <p><b>cascade</b> [2] 4:21 161:5</p> <p><b>Case</b> [113] 4:4 11:11,16,18, 22 12:11 13:25 14:7,10,15 15:16 16:1 18:19 23:16 24:3,4,8 26:1 27:15 28:16 29:4,20 30:22 31:2 32:2,3 33:12,19 36:14 38:2 39:14 42:6,21 45:10,23 46:14,17,24 47:3,5,16,20,24 48:10,21 49:17,18 50:9,12 52:19 59:16 61:17,22 65:3,9,16 70:12 73:7,18 79:22 80:3,14 81:15 82:6,6,14 86:22 87:3,19 88:7 91:7,11,25 93:12 94:2,5,22,24 95:7 98:11 99:14,19 106:14,15 113:17, 22 114:11 116:15 117:25 118:8 119:25 122:14,16 123:8 124:18 126:22 136:15,24 139:7 147:4 148:3,4, 13,14 150:3 151:8 153:15 154:1 155:13 158:3 161:13,25 162:1</p> <p><b>cases</b> [61] 4:6 7:1 13:2,18, 20 15:2,6 25:23 26:2 31:3 37:19,21 38:1,17 46:10 48:7 49:21 50:16 52:13 53:14 54:4 65:7,8,19 66:18 72:</p>
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## Official - Subject to Final Review

<p>14 73:19 78:13 81:2,6,12 82:3 89:14 90:20 92:11 99: 4,16 106:12 108:18,18 114: 23 119:5 124:11 132:4 133:15 135:5,10,18 137:3, 3 138:10,11 140:3,11 147: 6 148:3 155:18 158:23 160:8 161:6,10 Casey [3] 16:12 18:7 72:14 catalog [1] 138:9 catastrophic [1] 126:7 catch [3] 74:6 75:8 148:10 categorical [4] 60:24 63:5 135:21 138:19 categorically [4] 98:24 107:1 125:17 134:16 categories [2] 79:13 140:8 category [2] 139:6,7 cause [1] 24:18 cease [3] 70:12,15,18 century [13] 26:8 78:21 80: 7 105:13 106:8,9 114:4,25 115:1 123:4 125:10 126:6 160:2 cert [12] 38:14 41:16 42:2, 15 50:21 94:13,20 137:11 143:14,16,22 160:19 Certain [5] 15:6 25:23 51: 17 61:17 115:25 certainly [10] 21:23 26:2 39:6 59:24 129:15,16 135: 23 146:15 150:20 159:4 certificate [1] 102:22 certification [38] 5:16 8:24 25:2,6 32:2,4,7 34:24 38: 25 39:10 52:21,23 53:4,7, 12 66:15,17 88:9,11,17 89: 3 128:24 129:22 130:12 131:23 132:5,8,12,15,19 133:21 136:14 137:5,16 140:2,4 146:20,22 certified [8] 13:19 29:3 51: 5 66:7 67:9,10 134:13 136: 20 certify [2] 13:2 29:13 certiorari [1] 94:7 cetera [2] 74:18 155:3 challenge [4] 48:5 125:14 140:19 149:3 challenged [5] 34:17 45: 13 55:1 61:24 149:25 challenges [3] 59:12 126: 11 138:23 Chamber [1] 137:4 chance [2] 111:9 122:5 Chancery [5] 27:18 54:15 74:22,24 114:22 changed [2] 110:12 119:23 channel [1] 127:18 channeled [1] 53:1 channeling [5] 127:23 128: 16 131:14 137:21 148:18 chaos [3] 91:17 110:5,19 characterization [2] 13:</p>	<p>23 14:1 characterized [1] 69:17 characterizing [1] 69:24 check [1] 100:11 checking [1] 102:24 Cherokee [2] 159:1,7 CHIEF [48] 4:3,10 7:6,11,13 11:5 12:15 13:6 14:6 18: 20 23:25 24:12,19 36:10 37:4,5 38:19 39:25 45:19 50:3,24 60:5 68:21 76:24 77:4 80:17 82:20 83:8 96: 18 100:3 111:7 114:14 120:10 124:21 125:3 129: 4 142:3,25 143:3 144:20 147:2 149:16 152:7 153: 20 159:13,19 160:16 161: 24 child [2] 11:15 104:18 children [13] 4:17 8:4 15: 22 29:8 41:4,7,8,15 43:12, 12 106:23 125:6 159:22 choices [1] 118:23 Chrysafis [1] 139:6 Circuit [38] 7:7 13:25 19:15 23:4 24:1,16 33:6,8,10,13, 13,25 34:4 35:21 37:18 38: 16 44:4,24 47:14,15,16,17 48:16 60:14,20 61:6,7,8,16, 19,22 62:2,19 75:18,18 87: 15 94:16 100:19 Circuit's [2] 24:4 35:4 circuit-wide [2] 35:20 51: 12 circuits [5] 33:25 34:5 47: 19 50:17 63:4 circumstance [4] 29:21 67:15 78:11 121:18 circumstances [17] 17:19 33:22 60:24 79:5 80:10,16, 19 81:10 84:11 99:2 119: 24 120:21 123:15 125:25 127:1 132:11 133:20 circumvent [1] 5:15 cite [3] 37:20,21 160:1 cited [1] 44:4 cites [1] 59:15 citizen [7] 11:18,21,24 42:1 44:16 52:14 104:18 citizens [9] 15:22 36:1 46: 12 78:6 83:17,18 103:24 104:13 160:5 Citizenship [36] 4:14,17 7: 16 8:3 11:15,23 28:22 41: 5,21 42:9 43:11,23 44:11 56:8,25 77:19 78:1,3,16 101:24 102:9 103:2 105:4, 8 110:6,12 111:15 112:18, 21,25 113:3,5 125:6 143:9 159:21,21 citizenship-stripping [1] 126:10 City [3] 2:11 3:8 77:3 Civil [1] 105:7</p>	<p>claim [8] 7:18 22:15 41:11 44:12 72:25 85:2 108:9 141:24 claim's [1] 84:6 claimant [2] 14:9,9 claimed [2] 78:9 100:9 claiming [2] 12:4,9 claims [4] 6:20 10:25 38: 18 52:25 clarified [1] 80:2 clarify [1] 153:25 class [106] 5:16 6:22,23,24 7:4 8:5,10,12,13,16,18,24 10:10,11 12:11,13,14,17 13:2,19 25:2,5 29:2,7,10, 13 31:23 32:1,4,7,7 33:5 34:12,15,23 39:1,10 40:5, 12,14,15 43:14 45:3 51:4, 15,23 52:23 53:4,6,11 54:7 66:4,7,18 67:8,9,22 68:1,1, 5 82:8 88:9,11,17 89:2,8, 16,22,25 90:2 115:5 116:4, 21 128:23,25 129:6,11,21 130:11 131:22 132:4,7,12, 14,19,22,23 133:21,23 134: 12 135:13,25 136:9,14,19 137:5,16 140:2 146:1,12, 20,21 154:25 155:3,4 156: 23 class-wide [7] 25:16,18 29: 17 36:5 51:2,11 140:17 classes [6] 51:11,12,12 88: 18 89:10 131:6 classic [1] 155:13 classwide [1] 66:9 Clause [3] 8:3 78:1 159:21 clean [1] 46:20 cleanest [1] 94:21 clear [10] 21:11 30:23 59: 20 75:12 89:6 90:7,21 98: 16 100:15 134:21 clear-cut [2] 65:10,14 clearly [4] 44:15 108:8 123: 13 161:10 clients [1] 158:14 close [1] 114:10 codified [2] 114:6 123:5 collateral [3] 15:4 16:19 19:9 collaterally [1] 19:24 colleagues [3] 97:22 108: 10 157:1 collect [1] 27:14 collection [3] 80:6 107:19 116:7 colloquies [5] 90:8 91:8 92:5 94:23 113:15 combined [1] 114:9 come [25] 22:5 36:3 57:18 65:3 70:14 79:2 84:13 87: 4,11 88:24 89:13 90:24 92: 14 94:24 102:4,7 104:16 122:18 131:19 135:11 147: 12 154:20 156:19 158:10</p>	<p>161:8 comes [10] 13:11,16 23:14 24:5 64:13 70:9 71:12,20 98:11 102:25 coming [2] 59:5,6 comment [1] 148:16 Commerce [1] 137:4 commission [1] 161:17 commit [3] 33:7 34:7 35:4 Committee [4] 128:9,11, 13 131:15 Committee's [1] 127:20 common [6] 37:20 71:1 74: 22 78:23 125:8 140:16 commonality [5] 8:21 52: 8 67:13 132:12 140:15 compelling [2] 49:13 160: 1 complained [1] 105:19 complaining [5] 5:7 16:16 18:5 38:7 72:19 complaint [1] 78:24 complete [26] 15:20 23:2, 22 31:9 66:5 90:4 92:11 93:12,14 95:9 101:12,17, 22 111:20 117:6,17 121:4 123:17,24 125:23 126:21 127:14 141:4,9,22 146:3 completed [1] 100:7 completely [14] 63:19 70:4 76:8,15 108:21 111:14 116:16,19 121:20 122:8 151:1,20,21 161:3 compliance [1] 25:10 complicated [1] 147:12 complies [2] 130:1,23 concede [7] 21:25 25:25 32:1,8,11 55:14 65:12 conceding [1] 12:10 concept [1] 71:1 conceptually [1] 155:24 concern [2] 74:3 135:25 concerned [3] 141:1 150:8, 9 concerns [15] 17:17 50:1 80:22 81:4 84:21 93:22,25 94:23 130:19,20 131:20 138:25 149:20 150:12 156: 25 conclusion [2] 24:5 42:10 concrete [2] 148:25 149:5 concurrence [3] 92:21 145:18 149:7 condition [1] 73:12 conduct [7] 70:22 71:18 72:7 75:6 121:9,22 122:11 confidence [1] 29:25 confines [2] 117:1 136:3 confirmed [1] 135:6 conflicting [2] 5:22 36:19 confront [1] 111:11 confrontations [1] 5:25 confronted [1] 88:7 confused [1] 154:19</p>	<p>confuses [1] 156:9 confusing [1] 153:24 confusion [2] 90:7 100:16 Congress [10] 26:24 40:12 41:20 43:19 57:22 59:22 73:11 84:10 91:3 123:5 Congress's [1] 113:6 congressional [2] 81:17 114:5 connects [1] 145:19 consequences [5] 15:4 16:19 19:9 126:7 141:20 consider [4] 82:7 86:20 112:11 161:19 consideration [1] 145:22 considerations [2] 127:10, 11 considered [4] 38:1,4 125: 11 128:9 considering [1] 31:5 considers [2] 17:17 127:9 consistent [6] 26:3 74:20 84:4 127:20 155:11 160:7 consistently [1] 38:5 consolidated [1] 4:5 constantly [1] 46:25 constitute [1] 54:25 Constitution [4] 42:8 43:6 74:14 78:6 Constitution's [1] 6:3 constitutional [9] 17:21 42:24 44:13 76:20 78:19 138:24 140:19 141:24 149: 4 constitutionality [1] 145: 13 constrain [1] 70:2 constraint [2] 84:20 134:1 contemplate [1] 128:20 contemplates [2] 128:4 156:15 contemplating [2] 153:12 156:17 contempt [5] 19:20 20:14, 25 21:17 154:21 contend [1] 21:24 contention [2] 8:2 30:11 contest [1] 22:19 contesting [2] 145:11,12 context [11] 16:10,14,20 18:2 68:2 70:9,20 98:12 129:9 135:14 160:6 contexts [2] 68:14 82:11 continue [3] 33:9,23 56:13 continued [1] 94:17 continues [1] 154:22 continuing [2] 80:5,7 contrary [6] 78:20 105:15 116:7,8 122:17 125:6 contribute [1] 113:13 controlling [1] 54:25 convinced [1] 98:6 Cooper [1] 62:17 CORKRAN [73] 2:13 3:10</p>
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## Official - Subject to Final Review

<p>124:23 125:1,3 126:17  127:13 129:8,12,15 130:2,  10,14,22 131:9,13 132:18  133:9,17 134:7,18 136:13,  21 137:1,10,14 138:1,5,8  140:1,6,13 141:10,12 142:  6 143:2,11,21,25 144:4,7  145:8 146:6,10,14,18 147:  4,19 148:8,17 150:11,20  151:1,16,19,24 152:2,9,12,  15,21 153:5,8 154:11 155:  10 156:14 157:7,19,22,25  158:12,17,21  <b>correct</b> [15] 9:5 18:24 19:2  27:3 38:12 51:5,6 53:19  63:12 106:19 107:3,10,14  145:7 161:17  <b>correctable</b> [1] 149:14  <b>correctly</b> [3] 40:3 60:17  160:16  <b>correlated</b> [1] 152:3  <b>cosmically</b> [1] 133:6  <b>costs</b> [2] 104:25 111:9  <b>coterminous</b> [1] 132:6  <b>couched</b> [1] 121:3  <b>couldn't</b> [6] 9:17 44:16 74:  25 82:9,10 143:15  <b>counsel</b> [12] 13:7 14:6 19:  10 36:11 76:25 84:2 89:2  96:19 124:22 143:4 159:  14 161:25  <b>count</b> [4] 11:9 109:4,6 111:  19  <b>counted</b> [3] 109:9,16,17  <b>countless</b> [1] 41:23  <b>countries</b> [1] 41:9  <b>country</b> [9] 13:10 39:9 54:  14 56:22 75:21 78:2 80:12  110:17 126:8  <b>country's</b> [1] 105:7  <b>county</b> [1] 104:3  <b>couple</b> [5] 25:12 83:10 87:  8 92:4 122:18  <b>course</b> [9] 20:2 25:7 28:6  37:15 46:20 54:24 118:21  154:14 156:7  <b>COURT</b> [200] 1:1 2:3 4:11  7:1 9:12,14,16,22 10:1,5,  22 11:9 12:1,5,5,6,8,19,24  13:17 14:21,22 15:3,17,25  16:13,20 17:2,8,13,17,19  18:2,22 19:6 20:2 25:17  26:5,23,25 27:3,4,11,15,18  28:6 30:7 31:7,25 32:18  34:4,24 35:25 36:20,23 38:  1,4,7 42:3,16,22 45:1,4,8,  17 46:18,21 47:4 49:2,9,19  50:11,13,18 54:14 55:1 62:  18,23,25 63:7,11 65:16,18  66:24 68:17 69:21,22 70:2,  14 71:2,5,22,24 72:2,6,12,  15,22 73:6 74:23 75:4,5,21  76:3,10,14,18 77:5,6,18 78:  16,18 79:2 82:17,22 83:2</p>	<p>84:18 88:7 92:2,21 93:8  94:2,5,8,16,19,25 95:13 97:  14,22 98:9,10,16 100:10,  23 105:11 106:17 109:23  113:16 114:4,21 117:9,11,  12,19,25 118:17,18 119:3,  20,22 120:7,17,23 121:10  122:10 123:3,21 124:9,19  125:4,11 126:2,24 128:17  129:16,18 131:16 132:23  135:1,4,20 136:1 138:10,  13,16,17,21 139:9,13,24  141:3 142:18 144:10,12,17,  23 148:23,25 149:20 150:9  154:3,13,20 156:19 158:10  160:17,21 161:21,23  <b>Court's</b> [28] 5:23 6:5 17:7  25:11 37:16 47:14 54:24  69:18 78:13 79:6,19 80:8  89:5 90:20 103:24 105:15  106:3 122:17 123:18 125:  9 126:12 131:21 134:14  137:21 140:23 144:13 150:  16 155:18  <b>courtroom</b> [1] 97:24  <b>courts</b> [58] 4:19,23 9:4 12:  24 13:2,14,19 25:15 26:12,  16 27:8 31:4,6,11 33:24  34:4 42:23 43:2,2,8 45:11,  25 46:2 47:7 48:13 49:12  50:13 51:3,18 53:17 74:24  75:1 82:7,11 86:20 90:14  100:13 108:11 110:24 119:  4,5 121:10,11 122:25 138:  4 139:15 147:7,12 148:5,6  149:9,11,12,14 156:4 160:  1,13 161:15  <b>courts'</b> [1] 34:10  <b>cover</b> [2] 39:8 102:7  <b>covered</b> [1] 23:7  <b>Covington</b> [1] 110:24  <b>Cox</b> [1] 64:16  <b>crafting</b> [1] 117:14  <b>create</b> [5] 5:9,21,24 85:12  117:15  <b>created</b> [3] 38:22 96:24  147:21  <b>creates</b> [1] 94:6  <b>cries</b> [1] 50:12  <b>criminal</b> [1] 106:22  <b>criteria</b> [7] 11:1 22:5 29:15,  16 34:23 44:2 52:18  <b>critical</b> [1] 8:9  <b>cross</b> [5] 105:5,8 110:2,7,  18  <b>crosses</b> [1] 77:21  <b>crucial</b> [1] 68:19  <b>cure-all</b> [1] 51:22  <b>curious</b> [1] 58:12  <b>current</b> [2] 39:22 136:12  <b>currently</b> [4] 20:24 21:15  22:23 50:15  <b>cut</b> [1] 149:1</p>	<p><b>D</b>  <b>D.C</b> [6] 1:24 2:8,13 37:17  75:18,18  <b>DACA</b> [4] 87:13,14,15 99:5  <b>damages</b> [2] 132:15 140:  18  <b>dangerous</b> [1] 141:23  <b>dating</b> [1] 151:12  <b>day</b> [8] 36:22,23 51:9 55:24  62:4 66:24 123:10 155:4  <b>days</b> [4] 36:8 55:12 57:7,9  <b>DDC</b> [1] 75:17  <b>dead</b> [1] 28:17  <b>deal</b> [3] 45:24 59:9 124:3  <b>dealing</b> [1] 83:15  <b>debate</b> [2] 73:9 135:17  <b>debtor's</b> [1] 27:13  <b>decades</b> [4] 6:8 84:22 86:6  150:19  <b>decide</b> [15] 26:24 47:2 76:3  78:16 83:22 93:18 95:2,18  96:1,3,6,7 123:16 143:7  147:13  <b>decides</b> [2] 31:7 41:20  <b>deciding</b> [3] 99:24 123:22  148:5  <b>decision</b> [16] 9:21 14:13  24:5,17 26:6 33:21 36:23  39:11 42:17 65:4 82:22 87:  17 95:21 105:15 131:17  133:7  <b>decisions</b> [9] 5:14 12:19  14:2 25:18 26:7 36:19 44:  7 54:24 65:1  <b>decisis</b> [2] 55:5 149:8  <b>declaration</b> [4] 102:6 155:  14 159:6,8  <b>dedicated</b> [1] 97:14  <b>deep</b> [1] 20:3  <b>deeper</b> [1] 145:19  <b>defeat</b> [2] 11:13,14  <b>defendant</b> [12] 17:12 18:  24 69:18,22 70:3,12,15 71:  2 72:23 79:3 154:3 156:5  <b>defending</b> [1] 145:12  <b>definitely</b> [1] 121:5  <b>degree</b> [1] 39:5  <b>delaying</b> [1] 104:3  <b>delays</b> [2] 76:17 146:24  <b>delegation</b> [1] 73:12  <b>deliberately</b> [1] 46:17  <b>deliberation</b> [1] 143:10  <b>delve</b> [1] 135:20  <b>demonstration</b> [1] 113:12  <b>deny</b> [2] 42:22 77:6  <b>Department</b> [2] 2:7 61:14  <b>depend</b> [1] 33:21  <b>depending</b> [2] 103:4 124:6  <b>depends</b> [1] 45:22  <b>deportation</b> [2] 141:21  153:16  <b>describe</b> [1] 13:25  <b>described</b> [4] 5:24 7:1 20:  15 148:20  <b>describes</b> [2] 91:7 99:19  <b>desegregation</b> [1] 15:2  <b>deserves</b> [1] 43:17  <b>designation</b> [1] 56:8  <b>designed</b> [1] 77:8  <b>detention</b> [1] 141:20  <b>determination</b> [3] 120:17  125:13 133:22  <b>determine</b> [4] 17:9 120:24  122:10,10  <b>determined</b> [1] 121:8  <b>developed</b> [1] 7:3  <b>developing</b> [1] 132:20  <b>device</b> [6] 82:8 89:16,22,25  90:2 133:23  <b>diagram</b> [1] 132:3  <b>difference</b> [3] 66:6 67:19,  20  <b>differences</b> [1] 8:9  <b>different</b> [42] 7:20 11:3 14:  7 15:12 22:15 28:2 50:16  52:9 56:5 65:9 67:12,16  68:15,15 73:19 74:23 83:  11 86:5 92:2 95:6 111:15,  22 112:2 118:9,12,15 121:  16 132:11 133:3,24 134:11,  16,19 135:9,19 137:22 138:  6 147:5,12 148:7 155:24  158:1  <b>differentiates</b> [1] 154:24  <b>differently</b> [4] 36:16 87:4  115:13 147:13  <b>difficult</b> [6] 5:11 22:17 28:  11 128:23 144:9 145:10  <b>difficulty</b> [2] 59:21 137:16  <b>direction</b> [1] 75:10  <b>directly</b> [9] 7:3 24:13,20 63:  16 73:15 83:3 123:5 151:5  152:3  <b>disagree</b> [9] 13:23 17:23  40:7 44:18 45:12 47:10 60:  21 124:16 132:9  <b>disagreed</b> [2] 50:19 100:  19  <b>disagreement</b> [2] 45:25  59:20  <b>disapprove</b> [1] 139:9  <b>disclose</b> [1] 141:18  <b>disclosures</b> [1] 141:23  <b>discovery-intensive</b> [1]  146:23  <b>discrete</b> [6] 6:19,20 7:15,  24 8:5 43:14  <b>discretionary</b> [1] 139:10  <b>discrimination</b> [1] 14:11  <b>discuss</b> [2] 6:9 79:11  <b>discussing</b> [1] 128:23  <b>discussion</b> [1] 88:24  <b>disease</b> [2] 97:18,19  <b>dispute</b> [8] 21:7 22:4 29:3,  6 32:14 37:14 55:18 101:  20  <b>disregarding</b> [1] 54:19</p>	<p><b>disrupt</b> [1] 6:2  <b>disruptive</b> [1] 113:20  <b>dissent</b> [1] 158:25  <b>dissolve</b> [1] 119:21  <b>dissolved</b> [1] 142:19  <b>distinct</b> [2] 6:17 136:11  <b>distinction</b> [6] 19:12 66:12  68:9 70:11 116:20 118:10  <b>distinguishes</b> [1] 157:3  <b>distinguishing</b> [1] 60:15  <b>district</b> [51] 4:19,23 14:12,  22,25 15:15 22:11 23:3 25:  17 31:10 33:24 45:11 48:  13 51:3 53:8 58:15,19,22  68:17 75:20 77:17 78:15  82:7,17 84:18 86:20 97:13  100:22 105:11 108:11 117:  19,25 118:17,18 119:3,4,  19,22 120:7,16 121:10,10  122:25 138:4 142:17,18  144:23 147:7 149:10,12  161:15  <b>districting</b> [1] 14:10  <b>districts</b> [2] 5:1 20:18  <b>divisible</b> [3] 15:14 16:1,25  <b>docket</b> [5] 5:23 24:4 94:7  130:22 131:21 150:16  <b>documentation</b> [1] 56:21  <b>documents</b> [1] 56:7  <b>doing</b> [30] 14:21 38:17 55:  21 58:23 69:22 71:2,7,18  72:23 73:2 74:16 75:7 76:  8,16 84:19 92:3 120:22  121:13 122:9 128:25 130:  16 133:21 138:22 139:21,  22 147:8 154:15 155:24  156:4,7  <b>dollars</b> [2] 82:17 96:12  <b>domesticated</b> [1] 7:8  <b>domicile</b> [2] 44:2 160:3  <b>DONALD</b> [4] 1:3,10,17 37:  25  <b>done</b> [12] 13:21 16:20 22:  10 29:10 47:23 57:24 65:7  88:13 135:8 147:16,18  151:23  <b>double-counting</b> [1] 151:  7  <b>down</b> [3] 19:18 146:8 150:  4  <b>dragon</b> [1] 7:9  <b>dramatically</b> [1] 151:6  <b>draw</b> [1] 59:8  <b>drawn</b> [2] 14:12,25  <b>drop</b> [1] 21:13  <b>duly</b> [1] 144:14  <b>during</b> [2] 59:13 151:13</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**E**

**each** [2] 91:19 157:9  
**eager** [1] 143:12  
**earlier** [16] 25:16 65:10 90:  
19 91:8 92:5 93:22 94:23  
106:16 108:3 113:16 128:

## Official - Subject to Final Review

<p>2 130:15 135:11 151:3 153:9 155:19 early [2] 26:8 114:25 Earth [1] 38:15 easier [1] 47:15 easily [3] 39:23 69:17 70:1 eat [2] 92:12 118:19 Education [1] 106:15 effect [4] 55:9,25 75:20 150:6 effectively [2] 23:24 66:3 efforts [1] 126:3 Eighth [1] 19:15 either [4] 37:20 103:7 104:3 108:19 elephant [1] 122:20 eligibility [1] 113:3 eligible [3] 23:8 103:13 104:14 eliminate [2] 124:5 137:2 eliminated [1] 145:5 Elk [1] 160:8 embedded [1] 144:19 emergency [17] 5:23 13:20 25:19 26:9 29:17 38:25 39:10 77:6 83:5 98:12 101:2 103:6 105:12 118:25 130:22 131:21 150:16 emerges [1] 147:10 emphasized [2] 25:4 44:1 employees [1] 16:22 Employment [1] 37:22 empty [1] 88:3 enacted [2] 144:14 157:10 enacts [1] 149:23 encourage [1] 5:12 end [8] 27:14 36:22 109:18 123:10 128:14 134:21 142:15 155:3 endow [1] 26:25 enforce [12] 9:18 49:21 55:3 71:23 73:2 128:3,5 155:5 156:12 158:9,11 159:7 enforceable [1] 156:3 enforced [1] 66:10 enforcement [1] 125:18 enforcing [3] 107:2 145:14 157:13 engaging [1] 30:7 England [1] 135:7 English [5] 54:14 74:22,24 107:18 115:11 enjoin [5] 23:5 71:2 74:25 76:15 98:6 enjoined [6] 27:22 55:21 57:15 66:4 75:17 76:8 enough [3] 82:9,11 85:8 enroll [1] 104:24 enrolled [2] 104:21 105:1 enrollment [2] 110:4 113:4 ensure [2] 77:8 108:10 enter [5] 34:24 103:3 117:12 129:20 149:9</p>	<p>entered [2] 22:23 29:8 enters [1] 84:18 entertain [1] 95:14 entertained [1] 95:17 entire [3] 27:24 33:8 70:16 entirely [2] 99:9 135:9 entitled [7] 22:21 76:4 104:18 123:17 128:5 145:3 146:3 entitlement [2] 11:13,15 enumeration [1] 103:13 enumeration-at-birth [1] 103:25 environmental [3] 15:6 18:11 38:18 EO [13] 28:7,19,25 30:3,23 33:6,8 34:6 35:10 49:21 66:3 77:12 78:20 EPA [3] 92:19 135:25 150:24 equitable [20] 5:8 18:1 26:3,4 29:15 30:8 34:10 39:20 44:20 45:8 54:13 80:2 107:17 115:23 125:16 128:19 129:19 134:25 145:22 159:4 equitably [2] 72:17,17 equities [6] 42:6 111:2 121:25 127:4 145:6,7 equity [22] 9:3 17:14 27:8 30:12 54:13 78:14 80:1 84:5,12 92:9,10 107:13,18,20 115:11,24 116:6,13 124:14 133:19 145:18 157:9 equivalently [1] 48:9 especially [1] 17:14 ESQ [4] 3:3,6,10,13 ESQUIRE [1] 2:13 essence [1] 69:4 essentially [3] 5:25 56:14 161:4 establish [1] 127:23 established [2] 11:8,9 establishes [1] 78:10 ET [8] 1:4,7,11,14,18,21 74:18 155:3 evaluate [1] 17:13 even [51] 6:21 8:5 9:12 10:21 11:16,19,22 26:22 33:4 34:2,5 38:13 40:5,25 41:18 42:14 43:13 44:25 55:13,21,21 57:15 77:20 78:11 79:18 80:4 81:22 82:6 83:2,17 89:16 98:22 99:21 101:17 103:23 105:3 106:18 110:4 112:2 115:25 116:10,20 117:6 123:16,25 127:9 128:20 132:22 141:17,21 153:17 everybody [5] 23:18 33:10 74:7 111:17 133:4 everyone [9] 13:12 51:21 70:16 72:1 74:16 106:2 113:20 156:2 159:9</p>	<p>everyone's [1] 13:13 everything [2] 34:3 36:24 everywhere [3] 5:18 66:4 133:5 Eviction [3] 53:19 139:6 150:4 evolved [1] 7:2 Ex [2] 107:20 133:21 exact [3] 78:19 123:2 129:1 exactly [8] 27:3 38:11 64:17 85:3 87:18 102:18 107:15 160:14 example [28] 14:21 15:1,7 18:3 20:12 23:3 24:15 26:4,25 47:13 51:25 52:8,9 54:5 56:23 59:15 64:16 65:9 73:8 75:14 99:6 102:15 104:9 108:23 109:2 115:6,12 160:2 examples [4] 61:17 87:8,11 91:18 exceed [3] 5:4 39:18,19 exceeded [1] 59:3 exceeding [1] 58:25 exceeds [1] 30:11 exception [1] 45:7 exceptions [1] 33:14 exclude [1] 56:25 excluding [1] 128:18 exclusive [1] 131:14 execute [1] 126:9 Executive [38] 4:13 12:6 23:7 24:21 36:8 41:19,21,24,25 52:10 55:8,15 56:5,9 57:12,25 62:2 66:9 67:11 70:19 72:25 74:7 75:3 77:11 78:21 94:10 105:14 109:3 114:5 123:4 125:5,10 144:15 150:18 151:10 152:4 158:9 161:20 exercise [1] 161:19 existing [3] 58:3,25 59:3 exists [4] 5:6 18:4 111:18 158:13 expansion [1] 132:14 expect [1] 45:23 expedition [4] 45:21 82:23,25 83:1 expeditiously [7] 31:17 36:13 37:2 42:4 50:9 84:17 160:18 experience [1] 139:3 experienced [1] 86:5 experiencing [1] 111:25 explain [2] 137:9 141:15 explained [2] 141:3 146:1 explaining [1] 86:21 explains [1] 139:4 explanation [1] 58:16 explicitly [1] 128:3 exploded [1] 38:14 explore [1] 51:22 expressed [1] 147:7 expressly [1] 135:5</p>	<p>extended [2] 39:7 159:21 extends [1] 7:22 extent [2] 18:17 70:2 externalities [2] 109:23 111:4 extract [1] 152:22 extracted [1] 145:23 extraordinary [4] 58:17 79:1 125:25 127:1 extremely [2] 160:24,25</p> <p style="text-align: center;"><b>F</b></p> <p>face [1] 120:4 facial [3] 138:23 140:19 149:2 facilitate [1] 76:6 facing [1] 122:8 fact [9] 6:25 38:12 74:24 112:12,17 117:16 135:15 140:5 144:11 Factor [3] 111:1,3,23 factors [11] 30:8 111:1 124:1,8,10,12 136:3,4 144:19,24 145:5 facts [3] 42:10 119:18 120:2 fair [3] 32:23 85:8 115:15 fairly [1] 36:19 fairness [1] 87:1 fall [3] 84:7 139:5,7 falls [3] 85:1 90:17 108:8 familiar [1] 87:10 families [1] 104:12 far [3] 11:25 68:23 106:9 fast [4] 65:1 82:9,11 93:7 father [1] 52:14 favorable [1] 111:18 favored [1] 98:24 fealty [2] 11:12,13 feature [3] 26:11 34:25 76:22 features [1] 7:5 federal [29] 4:24 9:4 15:21 23:5 24:13,15 27:8 41:11 48:13 56:6,13,17 61:4 62:12 65:21 72:15 77:23 80:25 83:14,20,21 93:11 102:1 103:17 104:14,19 119:9 125:9 153:14 feel [1] 84:24 FEIGENBAUM [62] 2:10 3:6 77:1,2,4 79:12 80:20 82:24 84:24 85:4,8,19,22,25 86:7,13,18 87:7,24 88:4,23 89:19 90:6,14 91:22 92:1 93:4,8,21 94:3 95:5 96:2 97:3 98:19 100:14,18,22 101:5,11,19 102:14,17,25 106:20 107:4,11,15 108:12 111:21 112:13 115:10,15 117:24 118:5,11 119:16 122:12 123:21 127:15 133:19 142:16 147:23 felt [1] 152:13</p>	<p>few [6] 78:24 84:22 86:6 88:8 107:21 152:5 Fifth [2] 24:4 87:15 figure [6] 56:14 58:9 95:10 124:2,4 158:20 figures [1] 74:17 figuring [1] 96:4 file [5] 10:5 74:8,17 119:5 146:21 filed [2] 51:10 53:7 files [1] 109:7 filibuster [1] 57:23 fill [1] 29:24 final [8] 44:23,25 75:24 121:6 129:22 133:2 134:22 150:1 finally [3] 10:19 35:16 78:22 financial [1] 22:15 find [2] 120:13 144:22 finding [2] 58:24 59:2 finds [1] 78:13 fine [2] 105:25 122:22 finish [1] 108:2 fire [1] 74:17 firm [1] 42:16 first [33] 6:15 8:2 17:24 23:1,4 24:15,21 25:14 37:9,13 50:16 65:17 69:16 79:14 81:12 82:13 84:3 85:11 86:8,16 87:22 88:2 91:6 92:4 100:19 103:8 119:6 120:8 141:13 147:15 148:17 151:5,10 fit [2] 82:13 137:18 fits [2] 117:1 136:8 five [6] 4:25 5:2 35:7 57:19 58:11 59:25 flag [1] 107:6 flood [1] 161:4 focus [4] 17:3 69:12 122:3 136:2 focused [7] 16:21 120:15 127:3 128:21 135:2,3 141:2 focusing [1] 69:17 folks [1] 156:23 follow [5] 60:19 62:5 66:11 71:25 72:2 follow-up [1] 63:21 followed [1] 4:22 following [2] 72:4 108:11 follows [1] 155:9 force [1] 64:25 forcing [1] 5:17 forecast [1] 47:10 foreign [2] 11:12,14 forerunner [1] 115:4 form [2] 31:23 107:10 former [4] 4:17 8:4 31:19 159:22 forms [1] 82:4 formulate [1] 57:6 formulating [1] 55:22</p>
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## Official - Subject to Final Review

<p><b>forth</b> <sup>[2]</sup> 59:22 61:19</p> <p><b>Forty</b> <sup>[1]</sup> 60:2</p> <p><b>forum</b> <sup>[3]</sup> 5:12 130:19 147:14</p> <p><b>forward</b> <sup>[3]</sup> 36:3 120:2 157:1</p> <p><b>found</b> <sup>[9]</sup> 13:20 25:17 69:23 82:18 120:23 128:12 134:12 135:4 154:4</p> <p><b>founding</b> <sup>[2]</sup> 107:10 116:11</p> <p><b>four</b> <sup>[14]</sup> 11:9 12:1 13:20 25:17 35:7,9,17,23 36:12 57:19 58:10 60:3 124:1,9</p> <p><b>Fourteenth</b> <sup>[7]</sup> 4:16 43:5,10,25 78:2 106:10 125:7</p> <p><b>fourth</b> <sup>[3]</sup> 31:19 50:16 61:6</p> <p><b>frame</b> <sup>[3]</sup> 28:2 30:25 121:16</p> <p><b>framework</b> <sup>[2]</sup> 89:11 137:19</p> <p><b>Francisco</b> <sup>[1]</sup> 147:17</p> <p><b>frankly</b> <sup>[1]</sup> 24:9</p> <p><b>friend</b> <sup>[8]</sup> 81:18 83:12 87:12 88:10,12 99:6 105:18 116:3</p> <p><b>friends</b> <sup>[3]</sup> 25:3 124:11 161:2</p> <p><b>front</b> <sup>[2]</sup> 26:13 89:15</p> <p><b>Frothingham</b> <sup>[1]</sup> 37:23</p> <p><b>froze</b> <sup>[1]</sup> 27:13</p> <p><b>frustrating</b> <sup>[1]</sup> 90:1</p> <p><b>frustration</b> <sup>[2]</sup> 147:7,10</p> <p><b>full</b> <sup>[3]</sup> 87:19 94:12 95:14</p> <p><b>fully</b> <sup>[4]</sup> 13:24 23:11 49:12 83:10</p> <p><b>fundamental</b> <sup>[4]</sup> 12:18 43:10 138:24 149:3</p> <p><b>fundamentally</b> <sup>[11]</sup> 6:21 8:7,20 13:22 25:20 26:10 49:14 64:23 83:7 134:10 161:14</p> <p><b>furious</b> <sup>[1]</sup> 65:1</p> <p><b>further</b> <sup>[1]</sup> 100:2</p> <p><b>future</b> <sup>[2]</sup> 89:14 119:14</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gather</b> <sup>[2]</sup> 36:15,21</p> <p><b>gave</b> <sup>[2]</sup> 60:10 65:9</p> <p><b>GEN</b> <sup>[5]</sup> 2:7 3:3,13 4:8 159:16</p> <p><b>General</b> <sup>[169]</sup> 2:7,10 4:7,10 6:6,14 7:25 8:15 9:6,10,14,20,25 10:7,11,15,20,25 12:2,9,17,23 13:18 14:19 16:6,9 17:23 18:25 19:3,8,23 20:16 21:2,6,14,19,23 22:3,10,24 24:7,11,25 25:12,24 26:18 27:2,23,24 28:11,14 29:1,14 30:4 31:2,12,18,24 32:10,13 33:11,20 34:9,18,22 35:13,19 36:2 37:3,8,10 38:11 39:6,17 40:7,13,20,25 42:2,20 43:7,16,24 44:7,</p>	<p>18 45:5,16,20 46:16 47:9 48:1,12 49:4,10,24 50:10,22 51:6,16,25 52:7 53:5,24 54:3 55:6,14 56:4,12,16,20 57:4,11 58:14 59:7 60:7,22,22 61:10,13 62:5,9,14,20 63:1,12,15,18 64:3,15,22 65:8,15 66:16,23 67:3,6,23,25 68:12,17 69:6,9 70:10 72:8,10 73:6,21,24 75:8 76:19 96:22 100:7 102:18 111:8 118:6 126:19 127:17 132:2,9 136:13 143:13 147:23 148:14 150:13 151:2 156:16 159:15,18 161:19</p> <p><b>Generally</b> <sup>[8]</sup> 33:12,15 61:14,15 62:5,8,11 136:24</p> <p><b>generals</b> <sup>[1]</sup> 102:20</p> <p><b>genuinely</b> <sup>[1]</sup> 105:16</p> <p><b>Georgia</b> <sup>[2]</sup> 159:1,6</p> <p><b>gets</b> <sup>[11]</sup> 13:15 33:5 34:17,17,20 35:6,17 59:1 91:4,4 105:23</p> <p><b>getting</b> <sup>[13]</sup> 59:21 82:4 104:21 123:23 131:4 134:22 138:15 146:25 149:13 154:6,17,19 155:4</p> <p><b>Gill</b> <sup>[4]</sup> 14:23 16:11 18:6 72:13</p> <p><b>give</b> <sup>[17]</sup> 15:18 18:9 40:12 42:14 43:22 65:4 68:25 71:19 99:8,13 100:6 101:16 104:9 105:20 108:23 144:8 156:1</p> <p><b>given</b> <sup>[9]</sup> 15:20 25:18 26:14 57:5 60:1 94:5 114:8 118:21 124:9</p> <p><b>gives</b> <sup>[1]</sup> 98:10</p> <p><b>giving</b> <sup>[8]</sup> 43:11 69:14 71:14 90:3 93:13 95:14 138:12 157:5</p> <p><b>global</b> <sup>[1]</sup> 54:21</p> <p><b>GORSUCH</b> <sup>[40]</sup> 24:6,23 25:1,22 26:17,20 32:17,20 40:3 50:4,5,8,20 83:21 84:1 85:3,6,17,20,23 86:1,2,11,15,23 87:21 88:1 90:9 91:20,23 93:3,6,16,24 114:15 132:18 133:12 134:2,8 149:17</p> <p><b>Gorsuch's</b> <sup>[3]</sup> 107:8 119:9 145:17</p> <p><b>gosh</b> <sup>[1]</sup> 86:24</p> <p><b>got</b> <sup>[13]</sup> 23:16,17 29:24 32:22,22 44:5,6,9 54:1 84:6 93:17 96:3 112:10</p> <p><b>government</b> <sup>[78]</sup> 4:25 5:18 6:2 24:9,11,15 33:7 35:14 46:25 47:13,17 48:14,15 49:17 52:22 55:3 60:13,18 61:4 62:12 64:13 65:14 66:13 67:16 68:7 70:12,15 74:9,13 75:10 76:4,8,14,16 77:23 83:14,20,22 93:11 119:</p>	<p>10 120:22 121:12,18,19 122:7,15 123:8 125:15,21 126:5,9,14 127:7 135:22 136:22 137:15,17 138:20 140:13,25 141:19 144:12,17 145:10,14 151:6 153:14,18 154:8,13,15,22 155:6,8 156:3 158:6,8,11</p> <p><b>government's</b> <sup>[12]</sup> 24:14 45:22 65:6,22 84:21 120:25 121:8 126:3 127:24 142:6 146:19 148:18</p> <p><b>grant</b> <sup>[14]</sup> 16:14,15 26:4,12 39:11 41:16 42:15,18 58:16 94:16 101:14 118:7 143:22 161:23</p> <p><b>granted</b> <sup>[8]</sup> 5:5 52:24 53:4 55:17 73:15 80:12</p> <p><b>granting</b> <sup>[4]</sup> 77:16 82:18 85:23,24</p> <p><b>grants</b> <sup>[1]</sup> 94:20</p> <p><b>grave</b> <sup>[1]</sup> 68:4</p> <p><b>great</b> <sup>[7]</sup> 19:23 29:24 45:24 75:14 85:19,22 141:20</p> <p><b>greater</b> <sup>[1]</sup> 93:4</p> <p><b>gridlock</b> <sup>[1]</sup> 59:21</p> <p><b>ground</b> <sup>[5]</sup> 91:17 105:17 109:1 110:5,19</p> <p><b>group</b> <sup>[3]</sup> 6:20 7:15,23</p> <p><b>groups</b> <sup>[1]</sup> 52:10</p> <p><b>Grup</b> <sup>[1]</sup> 135:3</p> <p><b>Grupo</b> <sup>[10]</sup> 26:6 27:11 114:20 115:7,16 116:12,18 117:8 134:23 135:19</p> <p><b>guaranteed</b> <sup>[1]</sup> 4:16</p> <p><b>guess</b> <sup>[16]</sup> 15:23 16:4,24 21:3 53:13 57:20 69:13 71:10,10 120:12,20 147:3 149:21 150:7 153:1 155:22</p> <p><b>guidance</b> <sup>[8]</sup> 55:21 57:6 105:20,21,23 106:1 108:14 139:15</p> <p><b>gun</b> <sup>[3]</sup> 13:10,16 44:16</p> <p><b>guns</b> <sup>[3]</sup> 13:12,14 41:25</p> <p><b>guy</b> <sup>[3]</sup> 34:8 35:11 46:11</p> <p><b>gypsies</b> <sup>[1]</sup> 43:23</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>Haaland</b> <sup>[1]</sup> 161:11</p> <p><b>haggling</b> <sup>[1]</sup> 134:3</p> <p><b>hand</b> <sup>[1]</sup> 98:11</p> <p><b>handle</b> <sup>[1]</sup> 101:25</p> <p><b>happen</b> <sup>[8]</sup> 47:7 55:11,11 66:3 104:19 108:20 119:14,15</p> <p><b>happened</b> <sup>[4]</sup> 7:21 58:8 108:20 119:23</p> <p><b>happening</b> <sup>[5]</sup> 49:8 54:15 111:19 129:2 130:17</p> <p><b>happens</b> <sup>[1]</sup> 15:10</p> <p><b>happy</b> <sup>[6]</sup> 83:4 85:4 123:11 126:23 127:5 142:23</p> <p><b>hard</b> <sup>[10]</sup> 28:3 54:5 58:1 59:7 91:7 94:4 116:9 122:15</p>	<p>144:22 147:11</p> <p><b>harder</b> <sup>[1]</sup> 57:22</p> <p><b>harm</b> <sup>[24]</sup> 18:18 22:15 79:17 81:13 84:6 99:5,7 110:3,4 111:3,19,25 113:13,18,19 114:10 121:20,24 122:8 124:2,6 125:19 139:3 145:9</p> <p><b>harmful</b> <sup>[1]</sup> 154:8</p> <p><b>harms</b> <sup>[14]</sup> 77:11 78:13 82:16 87:18,20 92:12 94:9 96:15 101:10 109:21 110:21 118:20 119:2 123:24</p> <p><b>hat</b> <sup>[2]</sup> 127:16 141:2</p> <p><b>Hawaii</b> <sup>[3]</sup> 6:16 27:6 37:12</p> <p><b>head-on</b> <sup>[1]</sup> 5:25</p> <p><b>hear</b> <sup>[3]</sup> 4:3 12:15,16</p> <p><b>heard</b> <sup>[5]</sup> 83:12 87:12 88:10 92:4 132:9</p> <p><b>hearing</b> <sup>[1]</sup> 83:3</p> <p><b>heart</b> <sup>[1]</sup> 21:8</p> <p><b>hedging</b> <sup>[1]</sup> 63:10</p> <p><b>held</b> <sup>[1]</sup> 59:16</p> <p><b>help</b> <sup>[1]</sup> 19:9</p> <p><b>helpful</b> <sup>[3]</sup> 86:13 95:24 155:15</p> <p><b>hesitant</b> <sup>[2]</sup> 158:12 159:10</p> <p><b>hierarchy</b> <sup>[1]</sup> 5:20</p> <p><b>High</b> <sup>[3]</sup> 114:21,21 134:25</p> <p><b>high-stakes</b> <sup>[1]</sup> 5:14</p> <p><b>highlights</b> <sup>[1]</sup> 20:3</p> <p><b>hinder</b> <sup>[2]</sup> 91:13,15</p> <p><b>hire</b> <sup>[1]</sup> 74:18</p> <p><b>historical</b> <sup>[3]</sup> 6:11,12 59:8</p> <p><b>historically</b> <sup>[4]</sup> 28:24 94:22 112:18 133:25</p> <p><b>history</b> <sup>[26]</sup> 43:25 44:10 59:19 78:1,14 79:25 85:11,16 105:7 106:6 107:17,23 108:13,15,17 114:19 116:8,25 124:14,17 125:8 127:9 131:2 134:4 136:7 155:12</p> <p><b>Hobbs</b> <sup>[3]</sup> 81:22,23 91:5</p> <p><b>hold</b> <sup>[4]</sup> 19:20 38:23 55:170:21</p> <p><b>holders</b> <sup>[1]</sup> 153:19</p> <p><b>holding</b> <sup>[5]</sup> 12:7 14:1 15:15 72:11 117:15</p> <p><b>holdings</b> <sup>[1]</sup> 12:8</p> <p><b>holds</b> <sup>[1]</sup> 62:2</p> <p><b>home</b> <sup>[1]</sup> 139:17</p> <p><b>homes</b> <sup>[1]</sup> 41:7</p> <p><b>honest</b> <sup>[1]</sup> 137:24</p> <p><b>honestly</b> <sup>[1]</sup> 26:7</p> <p><b>Honor</b> <sup>[6]</sup> 7:25 79:13 85:9 87:25 95:7 112:14</p> <p><b>hope</b> <sup>[1]</sup> 153:25</p> <p><b>hopefully</b> <sup>[1]</sup> 57:13</p> <p><b>Hornbook</b> <sup>[1]</sup> 92:10</p> <p><b>hornet's</b> <sup>[1]</sup> 135:23</p> <p><b>hospital</b> <sup>[1]</sup> 112:22</p> <p><b>hospitals</b> <sup>[1]</sup> 56:2</p>	<p><b>host</b> <sup>[3]</sup> 5:9 44:7 160:2</p> <p><b>hour</b> <sup>[1]</sup> 75:20</p> <p><b>hours</b> <sup>[2]</sup> 88:8,13</p> <p><b>Houston</b> <sup>[1]</sup> 36:18</p> <p><b>However</b> <sup>[1]</sup> 25:20</p> <p><b>hundred</b> <sup>[3]</sup> 95:19 113:23 144:14</p> <p><b>hundreds</b> <sup>[2]</sup> 10:3,23</p> <p><b>hung</b> <sup>[1]</sup> 120:13</p> <p><b>hurdles</b> <sup>[1]</sup> 25:5</p> <p><b>hurt</b> <sup>[1]</sup> 72:3</p> <p><b>hypothesis</b> <sup>[1]</sup> 40:15</p> <p><b>hypothetical</b> <sup>[9]</sup> 18:9 28:12 47:14,18 48:3 49:8 52:1 57:14 73:16</p> <p><b>hypotheticals</b> <sup>[1]</sup> 49:5</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>ICE</b> <sup>[3]</sup> 110:8,10,17</p> <p><b>idea</b> <sup>[5]</sup> 70:8 118:19 140:3 156:17 157:11</p> <p><b>identifiable</b> <sup>[1]</sup> 7:23</p> <p><b>identified</b> <sup>[5]</sup> 7:15 81:9 126:18 130:5 153:9</p> <p><b>identify</b> <sup>[3]</sup> 69:2 141:18 153:13</p> <p><b>identifying</b> <sup>[2]</sup> 139:14 148:24</p> <p><b>ignore</b> <sup>[4]</sup> 43:9 45:16 144:13,13</p> <p><b>ignoring</b> <sup>[1]</sup> 46:23</p> <p><b>Ill</b> <sup>[39]</sup> 5:5 9:3 16:3,9,14,20 17:2,6,21,25 18:2,4 19:2,4 26:11,21 27:4 34:9 39:19 40:4,10,16 42:12,13 45:7,17 72:16 77:9 78:9 79:21 81:20 82:1 84:10 94:14 95:15 97:17 124:13 125:16 135:24</p> <p><b>illegal</b> <sup>[12]</sup> 4:18 8:4 30:3,24 33:6 34:6,7 35:10 40:5 43:13 58:24 59:16</p> <p><b>illegality</b> <sup>[1]</sup> 125:19</p> <p><b>illegally</b> <sup>[4]</sup> 11:17,23 29:9 52:13</p> <p><b>illustrates</b> <sup>[2]</sup> 64:23 150:3</p> <p><b>illustration</b> <sup>[1]</sup> 88:6</p> <p><b>imagine</b> <sup>[3]</sup> 51:16 56:16 152:24</p> <p><b>immediate</b> <sup>[1]</sup> 25:8</p> <p><b>immediately</b> <sup>[4]</sup> 55:18 98:11 149:11 153:16</p> <p><b>immigrants</b> <sup>[1]</sup> 43:13</p> <p><b>impact</b> <sup>[3]</sup> 14:8 139:20 159:9</p> <p><b>imperative</b> <sup>[1]</sup> 65:21</p> <p><b>implement</b> <sup>[1]</sup> 75:12</p> <p><b>implementation</b> <sup>[2]</sup> 77:11 110:20</p> <p><b>implicate</b> <sup>[1]</sup> 14:14</p> <p><b>import</b> <sup>[1]</sup> 46:23</p> <p><b>important</b> <sup>[14]</sup> 28:16 36:15 42:24 64:2,4 66:25 68:9 69:10 84:16 88:23 112:25</p>
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## Official - Subject to Final Review

<p>113:15 149:9 150:5  <b>impose</b> <sup>[1]</sup> 23:18  <b>imposing</b> <sup>[3]</sup> 73:7 106:22 111:5  <b>impossible</b> <sup>[3]</sup> 94:19 99:16 144:10  <b>impugning</b> <sup>[1]</sup> 97:15  <b>inadequate</b> <sup>[1]</sup> 101:10  <b>inappropriate</b> <sup>[2]</sup> 65:2 138:17  <b>inapt</b> <sup>[1]</sup> 29:20  <b>INC</b> <sup>[1]</sup> 1:7  <b>incentive</b> <sup>[2]</sup> 49:18 94:6  <b>incentives</b> <sup>[2]</sup> 111:23 112:7  <b>incentivize</b> <sup>[1]</sup> 99:12  <b>incidental</b> <sup>[3]</sup> 18:22 71:23 154:7  <b>include</b> <sup>[2]</sup> 82:10 132:15  <b>included</b> <sup>[1]</sup> 122:13  <b>including</b> <sup>[5]</sup> 4:25 34:11 44:19 77:12 123:24  <b>inconsistent</b> <sup>[1]</sup> 117:8  <b>Incorporated</b> <sup>[1]</sup> 4:5  <b>incorrect</b> <sup>[1]</sup> 14:3  <b>increase</b> <sup>[1]</sup> 5:22  <b>incur</b> <sup>[1]</sup> 104:25  <b>independent</b> <sup>[1]</sup> 9:7  <b>independently</b> <sup>[1]</sup> 154:21  <b>indicate</b> <sup>[1]</sup> 90:22  <b>indicates</b> <sup>[1]</sup> 64:9  <b>indicative</b> <sup>[1]</sup> 75:1  <b>indisputably</b> <sup>[2]</sup> 44:15 98:16  <b>individual</b> <sup>[31]</sup> 10:6 15:16, 19 22:2 29:22 31:22 33:4, 12 42:9 48:7,8,9,24,24,25 49:20 54:11 58:15 59:18 66:8,22 117:18 118:8 136:16 137:12 142:8 146:14 152:20,25 153:4,11  <b>individually</b> <sup>[1]</sup> 156:19  <b>individuals</b> <sup>[8]</sup> 15:19 48:25 83:16 89:8 90:2 99:12 103:10 113:1  <b>indivisibility</b> <sup>[1]</sup> 108:18  <b>indivisible</b> <sup>[5]</sup> 14:20 17:1 73:8,17 109:11  <b>ineffective</b> <sup>[1]</sup> 161:3  <b>ineligible</b> <sup>[2]</sup> 104:17 105:3  <b>inflicts</b> <sup>[1]</sup> 125:20  <b>initial</b> <sup>[1]</sup> 120:17  <b>initiated</b> <sup>[1]</sup> 110:8  <b>injunction</b> <sup>[74]</sup> 6:18 15:18, 21 20:11,13,21,24 21:12 23:5,13 24:3,17 27:12 31:1 34:13 36:7 37:13,17 39:7 42:12,14,19 46:7 48:6,14 55:17 67:21 69:25 75:19 77:7 79:15,16,19 85:1 89:15 90:12 91:12 98:8,9 99:10 100:20 106:8,18 107:1, 7 110:1,25 113:11 117:7, 13 119:21 123:18 126:4</p>	<p>128:8 129:7 134:11,17 135:6 139:19 141:4,14 142:10,13,18 144:24 145:3 147:6 155:7 156:13 157:2 158:5,7,8,15  <b>injunctions</b> <sup>[66]</sup> 4:20,22, 24 5:4,10 6:7,10 9:5 12:25 15:13 20:22 30:21 31:10, 20 37:9 38:10,22 39:2,16, 18 40:4,10 45:12 53:11,16 54:16 55:23 58:23 59:15, 17 64:24 68:25 69:14 70:9 76:6 78:11,25 79:10,14 80:6 96:24 97:5,10 98:23 107:9,19 108:4 116:6,7 125:22 126:15 130:4,17 138:16,22 139:10,17 149:2,10 150:15 151:4 157:4,23 160:15 161:5,16  <b>injunctive</b> <sup>[12]</sup> 34:25 36:4 38:3 88:21 126:20 127:1 128:21 131:10,11 132:5 138:11 161:12  <b>injuries</b> <sup>[24]</sup> 12:25 23:9,12 72:18 73:24 77:9 83:10 90:22 92:16,17 94:14,18 95:9, 15,20 96:5,8,9,11 99:17 100:8 113:24,25 114:12  <b>injury</b> <sup>[15]</sup> 5:6 14:24 15:3 16:16 18:5 19:4 25:8 40:17 72:23 73:16 79:21 91:1 121:5 140:16 153:9  <b>insight</b> <sup>[1]</sup> 109:21  <b>insolvent</b> <sup>[1]</sup> 27:13  <b>instance</b> <sup>[2]</sup> 24:22 120:8  <b>instances</b> <sup>[1]</sup> 63:2  <b>instead</b> <sup>[4]</sup> 53:22 125:15 136:1 147:13  <b>instinct</b> <sup>[1]</sup> 155:18  <b>Institute</b> <sup>[1]</sup> 38:15  <b>instruction</b> <sup>[1]</sup> 83:14  <b>instructs</b> <sup>[1]</sup> 57:12  <b>intend</b> <sup>[1]</sup> 50:21  <b>intended</b> <sup>[1]</sup> 140:22  <b>intentioned</b> <sup>[1]</sup> 151:22  <b>intentions</b> <sup>[3]</sup> 57:25 58:4,6  <b>interest</b> <sup>[5]</sup> 111:4 127:4 139:18,22 145:14  <b>interested</b> <sup>[2]</sup> 6:11 142:22  <b>interim</b> <sup>[6]</sup> 121:1,12 123:17 132:25 150:2 154:5  <b>internal</b> <sup>[1]</sup> 105:22  <b>interpreted</b> <sup>[1]</sup> 26:5  <b>interrupt</b> <sup>[1]</sup> 32:21  <b>interstate</b> <sup>[1]</sup> 23:23  <b>inversion</b> <sup>[1]</sup> 31:9  <b>invert</b> <sup>[2]</sup> 5:19,20  <b>invite</b> <sup>[1]</sup> 10:23  <b>involve</b> <sup>[2]</sup> 113:25 149:3  <b>involved</b> <sup>[2]</sup> 6:19 149:20  <b>involving</b> <sup>[4]</sup> 38:17 81:2 138:24 139:10  <b>IRAP</b> <sup>[1]</sup> 139:5  <b>irreparable</b> <sup>[5]</sup> 124:2,5</p>	<p>125:19 139:3 145:9  <b>Island</b> <sup>[1]</sup> 38:15  <b>Isn't</b> <sup>[10]</sup> 10:13 20:5 40:6 65:13 79:18 109:11 117:9, 10 121:17 129:21  <b>issuance</b> <sup>[1]</sup> 161:16  <b>issue</b> <sup>[40]</sup> 7:15 8:8 9:15 12:24,24 17:10,13,14 19:16 27:12 36:23 38:3 41:17 43:3 46:3 50:14 52:17 53:23, 25 65:17,20 76:3,18 96:25, 25 97:1 106:1 121:13 123:2,11 125:12 131:7,8 133:1 137:25 139:16,19 160:14, 15 161:7  <b>issued</b> <sup>[7]</sup> 4:13,20,23 36:7, 8 37:17 151:12  <b>issues</b> <sup>[4]</sup> 22:5 52:15 76:20 120:14  <b>issuing</b> <sup>[5]</sup> 9:4 39:22 45:11 59:14 132:25  <b>it'll</b> <sup>[1]</sup> 150:1  <b>itself</b> <sup>[5]</sup> 55:16,22 78:1 123:23 128:15</p>	<p>13  <b>junction</b> <sup>[2]</sup> 7:9 22:22  <b>jurisdiction</b> <sup>[12]</sup> 17:8,10, 11 69:18,19,20 70:4 75:11, 11 133:1 134:14 156:6  <b>jurisdictions</b> <sup>[1]</sup> 101:18  <b>Justice</b> <sup>[389]</sup> 2:8 4:3,10 5:24 6:6,14 7:10,11,12,13,14 8:12 9:1,8,11,17,24 10:2,9, 13,17,21 11:4,5,6 12:3,13, 15,21 13:4,6,8 14:4,6 15:23 16:8,24 18:8,21 19:1,7, 10 20:5,7,8,9,20 21:3,10, 15,21,25 22:7,13 24:6,23 25:1,9,22 26:17,20 27:5,23 28:1,13,15 29:5,18 30:17 31:12,14,15,16,21,22 32:6, 11,16,17,19,20,24 33:1,15, 18 34:1,15,20 35:2,9,16,22 36:10 37:4,5,7,8 38:9,19, 19,20 39:12,24,25,25 40:2, 3,9,18,23 41:2 42:5 43:1, 15,18 44:5,9,21 45:19,19, 20 46:22 47:20 48:4,18,23 49:7,15 50:2,3,3,5,5,8,20, 24,24 51:1,7,20 52:4 53:2, 13 54:1,22 55:7,24 56:10, 15,19 57:2,8,17 58:20 60:4, 5,5,7,11,11,12,18 61:2,12, 14,20 62:7,10,16,21 63:9, 14,17,20 64:11,18 65:6,13, 24 66:1,20 67:1,4,8,17,24 68:10,16,20,21,21,23 69:8, 11 70:18 72:9,21 73:20,23 74:1,5,11 75:23,25 76:13, 23,24 77:4 79:7 80:17 82:20 83:8,20 84:1 85:3,6,17, 20,23 86:1,2,11,15,23 87:21 88:1,16 89:18,21 90:8, 13 91:20,23 92:20 93:3,6, 16,22,24 95:1,21 96:18,20, 21,22 97:6 99:24 100:3,3,5, 17,21 101:3,7,12 102:11, 16,19 103:1 106:5,6,21 107:5,8,12,13 108:1 111:7, 7,8 112:10 114:13,14,14, 16,17,18,24 115:14 116:16 118:4,10 119:9,13 120:9, 10,10,12,15 123:14 124:20, 21 125:3 126:13 127:8  128:1 129:3,4,5,10,13,23 130:3,13,15,21,23 131:12, 19 132:18 133:12 134:2,8, 23 135:10 136:5,18,23 137:8,13,23 138:2,7 139:25 140:1,7 141:8 142:3,25 143:3,5,6,7,18,23 144:2,5, 20,20,22 145:17,25 146:7, 11,16 147:1,2,2,3,20 148:9, 11 149:7,16,16,18,19 150:17,22 151:14,17,20,25 152:7,7,9,13,16,23 153:6,20,20, 22 154:12 155:18,22 156:20 157:18,20,24 158:2,16</p>	<p>19,25 159:12,13,19 160:16 161:24  <b>justified</b> <sup>[1]</sup> 127:2  <b>justifies</b> <sup>[1]</sup> 24:2  <b>justify</b> <sup>[1]</sup> 24:10</p>
<b>K</b>				
<p><b>KAGAN</b> <sup>[50]</sup> 27:23 28:1,13, 15 29:5,18 30:17 31:14,16, 22 32:16,19,24 33:1,15,18 34:1,15,20 35:2,16,22 45:19,20 46:22 47:20 48:4,18, 23 49:7,15 50:2,5 60:11,12, 18 74:11 75:25 76:13 111:7,8 112:10 114:13 140:1,7 141:8 147:2,3,20 148:9  <b>Kagan's</b> <sup>[1]</sup> 93:22  <b>Katzenbach</b> <sup>[1]</sup> 161:11  <b>Kavanaugh</b> <sup>[49]</sup> 50:25 51:1,7,20 52:4 53:2,13 54:1, 22 55:7,24 56:10,15,19 57:2,8,17 58:20 60:4,11 88:16 114:16 129:3,5,10,13,23 130:3,13,21,23 131:12 136:5,18,23 137:8,13,23 138:2, 7 139:25 149:18,19 150:17, 22 151:14,17,20,25  <b>Kavanaugh's</b> <sup>[2]</sup> 92:20 149:7  <b>keep</b> <sup>[6]</sup> 47:6 66:17 74:15 113:18 143:15 148:5  <b>keeps</b> <sup>[2]</sup> 76:16 120:22  <b>KELSI</b> <sup>[3]</sup> 2:13 3:10 125:1  <b>key</b> <sup>[2]</sup> 44:2 69:11  <b>keystone</b> <sup>[2]</sup> 145:1,2  <b>kids</b> <sup>[1]</sup> 102:7  <b>Kim</b> <sup>[5]</sup> 14:2 105:16,23 123:2 160:7  <b>kind</b> <sup>[30]</sup> 16:1 22:5,15 25:19 29:17 42:5 54:20 56:25 57:1 61:25 62:18 74:6 82:18 83:16 84:4 117:20 120:12 121:3,15 123:10 131:17 133:18 135:20 139:14 145:22 148:23 149:13 152:16 156:17 160:12  <b>kinds</b> <sup>[3]</sup> 30:20 67:12 69:14  <b>king</b> <sup>[2]</sup> 74:25 75:2  <b>knows</b> <sup>[2]</sup> 29:23 94:19  <b>Korean</b> <sup>[1]</sup> 151:13  <b>Kowalski</b> <sup>[1]</sup> 161:11</p>				
<b>L</b>				
<p><b>label</b> <sup>[1]</sup> 131:22  <b>Labrador</b> <sup>[3]</sup> 30:6 64:8 92:20  <b>lack</b> <sup>[1]</sup> 161:9  <b>laid</b> <sup>[1]</sup> 135:11  <b>language</b> <sup>[2]</sup> 27:10 117:15  <b>large</b> <sup>[1]</sup> 129:25  <b>last</b> <sup>[21]</sup> 5:2 6:8 22:9,13 26:17,17,20 54:17 57:17,19 58:10 59:25 60:3 65:24 78:</p>				

## Official - Subject to Final Review

<p>24 84:22 86:6 87:4 105:6 150:19 152:5 late <sup>[1]</sup> 114:25 later <sup>[2]</sup> 75:20 114:23 latter <sup>[1]</sup> 154:10 laughed <sup>[1]</sup> 22:12 Laughter <sup>[7]</sup> 32:25 33:17 48:22 50:7 54:2 141:11 143:17 law <sup>[20]</sup> 15:24 27:16 35:25 71:25 72:2,4 74:20,22 75: 3,4 76:5 102:1 103:17 107: 2 114:6 120:25 123:6 125: 8 130:24 159:8 lawful <sup>[2]</sup> 52:14 122:11 lawfully <sup>[2]</sup> 141:21 153:17 lawfulness <sup>[1]</sup> 121:22 laws <sup>[3]</sup> 113:6 155:16 159: 7 lawsuit <sup>[7]</sup> 18:13 20:19 48: 13 74:8,18 109:8,8 lawsuits <sup>[2]</sup> 10:23 89:7 lawyer <sup>[2]</sup> 74:8,18 leads <sup>[1]</sup> 147:22 least <sup>[8]</sup> 13:20 54:17 74:5 79:9 81:10 83:15 123:15 145:12 leave <sup>[1]</sup> 99:12 ledger <sup>[1]</sup> 139:8 legal <sup>[11]</sup> 5:11 10:19 17:13 42:7 56:22 95:12 126:11 139:1 147:11 161:18,19 legally <sup>[11]</sup> 79:17 81:14 82: 4 91:2 99:18 109:1,15 119: 7 120:3,5 149:24 legislation <sup>[2]</sup> 57:22 58:9 legitimate <sup>[1]</sup> 156:25 less <sup>[6]</sup> 58:8 91:12 93:12, 14 95:14 140:18 letter <sup>[1]</sup> 44:3 Lewis <sup>[3]</sup> 16:12 18:7 72:13 life-tenured <sup>[1]</sup> 6:1 light <sup>[1]</sup> 55:4 likelihood <sup>[1]</sup> 144:25 likely <sup>[7]</sup> 27:13 30:14 34:18 51:9 134:12,13 154:4 limit <sup>[5]</sup> 17:20 38:6 72:6 101:20 108:6 limitation <sup>[3]</sup> 71:6,12,20 limited <sup>[5]</sup> 38:13 108:5,24 142:10 146:2 limiting <sup>[6]</sup> 17:7 136:2 138: 14 139:14 148:21 161:1 line <sup>[6]</sup> 26:7 68:24 98:21 99: 21 140:8,11 lines <sup>[11]</sup> 14:22 23:15 77: 21 78:8 105:5,9 110:2,7,18 112:6 148:24 liquidated <sup>[1]</sup> 115:21 list <sup>[1]</sup> 150:5 litigate <sup>[5]</sup> 33:24 36:16 68: 14 73:1 121:13 litigated <sup>[1]</sup> 123:20 litigating <sup>[3]</sup> 39:8 61:18</p>	<p>121:21 litigation <sup>[8]</sup> 37:1 75:15 87: 10,13 89:1,12 120:23 121: 7 little <sup>[4]</sup> 117:2 120:15 141:1 153:24 live <sup>[2]</sup> 18:12 110:9 lives <sup>[1]</sup> 18:12 loans <sup>[1]</sup> 53:20 local <sup>[2]</sup> 15:8 142:12 logic <sup>[1]</sup> 24:2 long <sup>[5]</sup> 28:20 36:22 126: 25 142:22 155:12 longstanding <sup>[4]</sup> 61:3,9, 11 62:11 look <sup>[19]</sup> 30:20 37:19 46:21 47:17 59:19 73:1 86:4 95: 18 97:9 114:20 115:6 116: 4,5 117:23 120:5 127:21 132:11 151:9 158:23 looked <sup>[2]</sup> 109:21 115:20 looking <sup>[11]</sup> 15:16 90:15 93:14 103:5 108:25 112:7 113:22 116:22 120:14 124: 7 144:23 looks <sup>[7]</sup> 7:8 111:1,3 115:8, 19 122:25 133:24 Loper <sup>[1]</sup> 150:23 lose <sup>[12]</sup> 46:1 48:20,20 49: 3 50:20,22 67:7 68:3,7,8 94:4 110:13 lose-lose-lose <sup>[1]</sup> 140:24 losing <sup>[6]</sup> 46:3,10,25 47:6 49:19,20 loss <sup>[1]</sup> 67:21 lot <sup>[9]</sup> 30:18 49:20 53:14,18 57:21 69:7 140:16 141:2 147:5 lots <sup>[1]</sup> 29:12 lottery <sup>[1]</sup> 81:24 low-information <sup>[1]</sup> 5:14 lower <sup>[20]</sup> 12:6,24 13:1 31: 4,6 33:21 42:23 43:8 45: 25 46:2 47:7 50:13 51:18 53:17 62:25 76:14 139:15 148:6 160:1,13 loyal <sup>[2]</sup> 7:18,19 Lukens <sup>[3]</sup> 16:23 37:14,23</p>	<p>23:4 36:17 37:24 102:6 117:25 matter <sup>[11]</sup> 2:2 17:9,21 69: 20 78:11 95:22 100:11 110:25 121:6,12 122:8 mean <sup>[37]</sup> 7:16,17 15:14,25 17:1 20:8 22:4 26:22 29:6, 6 30:17 32:14 42:8 45:21 46:1,5,8 48:19 53:17 66: 23 69:3 70:20 71:16 72:1 82:20 88:1 101:4 111:13 116:19 122:12 129:8 130: 24 139:25 140:13 151:15 155:12 156:16 Meaning <sup>[4]</sup> 4:14,15 43:5 159:20 meaningful <sup>[2]</sup> 144:10 157: 6 means <sup>[9]</sup> 9:12,24 34:1 68: 2 73:10,10 76:15 88:3 99: 21 meant <sup>[3]</sup> 87:19 135:18,18 meantime <sup>[1]</sup> 36:2 mechanism <sup>[10]</sup> 127:24 128:16 129:21,23 131:3,15 132:22,23 137:22 147:22 Medicaid <sup>[3]</sup> 101:23 103: 21 104:21 medicine <sup>[1]</sup> 83:23 meet <sup>[3]</sup> 34:23 78:12 88:20 meeting <sup>[2]</sup> 79:16,21 Mellon <sup>[1]</sup> 37:24 member <sup>[2]</sup> 40:14,15 members <sup>[8]</sup> 6:22 8:11,18 68:1 141:18 142:14 152: 25 155:4 mention <sup>[1]</sup> 87:12 mentioned <sup>[1]</sup> 57:18 merit <sup>[1]</sup> 76:20 merits <sup>[65]</sup> 13:24 17:13 28: 5,7 30:10,14 31:7 34:19 43:9 46:18 47:10 49:11,12 50:9,14 54:11 63:23 64:5, 20 65:1,5,11,14,17,19 74: 13 76:2 79:7 83:3,3,5 91: 24 92:14,18 93:2,7,9,15 95: 4,17,18,25 96:14 97:8 113: 22 114:1,3,8 118:22 122: 21 123:19,19,22 124:4,7 134:13 144:18 145:1,4,7, 23 159:25 160:10,13,18 messing <sup>[1]</sup> 109:18 met <sup>[1]</sup> 25:5 method <sup>[1]</sup> 40:19 Mexicana <sup>[1]</sup> 116:13 Mexicano <sup>[6]</sup> 26:6 27:11 115:17 134:23 135:3,20 might <sup>[35]</sup> 14:20 15:6 25:9 29:3,5 39:11 52:15,16 54: 6,7,8 57:21 58:12,17 60:21 61:17 80:5 81:24 82:5,11 85:25 89:13,14 91:18 92: 21 99:4,11,14 111:25,25 113:18 123:1 132:20 138:</p>	<p>13 152:17 migration <sup>[1]</sup> 112:3 military <sup>[3]</sup> 13:13 75:15,16 million <sup>[1]</sup> 112:5 millions <sup>[2]</sup> 82:16 96:12 mind <sup>[4]</sup> 27:9 28:3 66:17 100:1 mindful <sup>[2]</sup> 80:22 98:19 minds <sup>[2]</sup> 97:8 143:8 minors <sup>[1]</sup> 109:5 mischarac <sup>[1]</sup> 70:7 mismatch <sup>[1]</sup> 140:21 missing <sup>[1]</sup> 91:9 mistaken <sup>[1]</sup> 160:11 Mm-hmm <sup>[2]</sup> 137:13 138:7 modern <sup>[4]</sup> 6:24 7:4 11:2 133:23 moment <sup>[3]</sup> 69:12 86:9 133:13 monarch <sup>[1]</sup> 97:24 month <sup>[1]</sup> 36:14 months <sup>[2]</sup> 60:3 78:24 moratorium <sup>[2]</sup> 53:19 150: 4 morning <sup>[2]</sup> 4:4 88:25 most <sup>[7]</sup> 80:21 87:9,10 88: 23 124:10 139:5 161:14 mostly <sup>[1]</sup> 132:14 mother <sup>[1]</sup> 52:12 mothers <sup>[1]</sup> 52:11 motion <sup>[3]</sup> 53:7 119:21 146:21 motions <sup>[1]</sup> 8:24 motivations <sup>[1]</sup> 58:15 motives <sup>[1]</sup> 97:16 move <sup>[12]</sup> 23:15 36:13 76:2 82:9,11 92:8 102:23 103: 10 110:9,14 113:10 142:4 moved <sup>[2]</sup> 110:15,16 movement <sup>[2]</sup> 112:16,17 moves <sup>[2]</sup> 76:9 111:17 Ms <sup>[70]</sup> 124:23 125:3 126: 17 127:13 129:8,12,15 130: 2,10,14,22 131:9,13 132: 18 133:9,17 134:7,18 136: 13,21 137:1,10,14 138:1,5, 8 140:1,6,13 141:10,12 142:6 143:2,11,21,25 144: 4,7 145:8 146:6,10,14,18 147:4,19 148:8,17 150:11, 20 151:1,16,19,24 152:2,9, 12,15,21 153:5,8 154:11 155:10 156:14 157:7,19,22, 25 158:12,17,21 much <sup>[7]</sup> 6:23 13:9 36:13 54:9 108:24 113:1 116:4 multi <sup>[1]</sup> 81:24 multi-circuit <sup>[1]</sup> 81:24 multi-member <sup>[1]</sup> 97:21 Multiple <sup>[8]</sup> 4:19 31:4,20 42:23 43:2 47:18 50:14 129:9 Murthy <sup>[1]</sup> 161:10 muscular <sup>[1]</sup> 139:21</p>	<p>must <sup>[1]</sup> 10:22</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p>named <sup>[7]</sup> 13:15 20:13 21: 16 142:10 152:23,25 158:4 names <sup>[1]</sup> 153:11 narrow <sup>[8]</sup> 16:1 18:16 79:4 80:10,15,18 95:23 99:1 narrowed <sup>[1]</sup> 142:14 narrower <sup>[1]</sup> 24:16 nation <sup>[5]</sup> 55:1 78:5,18 159: 1,7 national <sup>[5]</sup> 16:21 37:21 88:21 114:11 148:1 nationals <sup>[1]</sup> 41:8 nationwide <sup>[32]</sup> 4:20 9:16 30:21 31:1,8,10 34:12,13, 15 35:14 46:7 48:5 51:12 53:10 59:12 64:24 78:23 79:4,15,16 81:23 91:12 97: 4 98:23 99:10 100:20 113: 11 133:5 139:10 147:5 160:15 161:16 natural <sup>[3]</sup> 29:2 52:20 139: 17 nature <sup>[6]</sup> 87:18 96:15 99:5, 7 112:15 114:10 near <sup>[1]</sup> 18:12 Nebraska <sup>[2]</sup> 54:6 96:11 necessarily <sup>[8]</sup> 10:7 15:4 18:19 52:24 59:23 61:16 62:24 137:18 necessary <sup>[10]</sup> 23:1 66:5 69:1 73:22 101:16 118:12 125:23 126:21 141:4,9 necessity <sup>[1]</sup> 88:14 need <sup>[26]</sup> 26:21 48:19 55: 11 78:12,17 80:14 82:12 85:6 89:24 94:11 95:9 102: 5,8 103:22 113:10,11 114: 11 116:17 117:5,17 118:6, 21 119:2 121:4 139:21 155:23 needed <sup>[4]</sup> 79:5 130:7 131: 4 158:15 needs <sup>[5]</sup> 19:14 64:20 108: 21 122:16 123:9 negative <sup>[2]</sup> 109:22 111:4 neighbor <sup>[1]</sup> 19:19 neither <sup>[1]</sup> 52:14 nervous <sup>[1]</sup> 146:19 nest <sup>[1]</sup> 135:24 net <sup>[1]</sup> 36:21 never <sup>[20]</sup> 8:25 22:11 26:25 29:12 31:24 46:3 53:9 55: 16 57:5 77:17 78:2 80:10 81:8 85:13 98:22 100:1 105:6 124:15 132:16 135: 8 NEW <sup>[28]</sup> 1:21 2:10 13:4,8 58:2 59:9,23,24 60:20,25 75:13 77:13 101:21 102:3, 12 103:3 109:7,16 110:15 111:10 112:3 118:2,2 119:</p>
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-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## Official - Subject to Final Review

<p>1,20,24 139:6 149:23  <b>newborn</b> [2] 56:2,3  <b>newborns</b> [1] 57:3  <b>next</b> [6] 29:19 62:4,4 63:20  142:4 147:17  <b>night</b> [1] 88:14  <b>Ninth</b> [4] 13:24 38:16 44:4  50:16  <b>Nken</b> [3] 136:3 144:10,19  <b>nobody</b> [4] 42:18 46:13,25  148:6  <b>nobody's</b> [1] 48:20  <b>non</b> [2] 156:12 158:4  <b>non-named</b> [1] 20:23  <b>non-party</b> [3] 21:5 130:16  135:12  <b>non-plaintiffs</b> [1] 40:11  <b>noncitizens</b> [2] 103:11  160:4  <b>none</b> [3] 5:16 133:20 143:  13  <b>nonideological</b> [1] 96:25  <b>nonmembers</b> [1] 40:11  <b>nonparties</b> [13] 69:1,15 71:  14 80:4,5 115:25 125:23  128:2,11 154:5 156:12  157:5,13  <b>nonpartisan</b> [1] 97:1  <b>nonparty</b> [3] 82:4 125:17  128:4  <b>nonplaintiff</b> [1] 158:10  <b>nor</b> [2] 52:14 89:8  <b>norm</b> [1] 80:11  <b>normal</b> [2] 34:2 112:3  <b>North</b> [1] 110:23  <b>note</b> [3] 83:8 141:16 145:  16  <b>noted</b> [1] 143:13  <b>nothing</b> [5] 7:8 27:9 85:1  128:15 148:19  <b>notice</b> [2] 8:19 46:5  <b>notion</b> [2] 23:21 26:13  <b>novel</b> [5] 5:11 42:23 43:2  65:12 76:19  <b>NRA</b> [1] 137:4  <b>nuclear</b> [2] 27:15,19  <b>nuisance</b> [4] 15:1 18:13  19:17,22  <b>nuisance-maker</b> [1] 19:20  <b>Number</b> [9] 13:25 29:21 35:  24 50:10 56:17 149:1 150:  14 151:9 152:4  <b>numbers</b> [4] 103:12,18,22  104:2  <b>numerous</b> [1] 135:5</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>Obama</b> [1] 98:4  <b>obey</b> [1] 60:13  <b>object</b> [1] 105:20  <b>objected</b> [2] 97:4 100:20  <b>objection</b> [2] 78:22 83:1  <b>objections</b> [2] 81:20 82:25  <b>objects</b> [1] 47:25</p>	<p><b>obligated</b> [1] 113:2  <b>obligation</b> [1] 155:6  <b>obtain</b> [1] 29:16  <b>obvious</b> [1] 111:14  <b>obviously</b> [10] 15:17 23:11  32:14 49:11 50:19 53:9 85:  15 122:18,24 124:16  <b>occupational</b> [1] 97:18  <b>offend</b> [1] 77:25  <b>offer</b> [6] 16:6 17:24 25:12  30:6 80:21 91:18  <b>offered</b> [5] 23:3,19 24:16  65:17 142:11  <b>offering</b> [3] 5:15 140:25  161:2  <b>officials</b> [5] 15:21 23:6 56:  6,13,17  <b>offspring</b> [1] 160:5  <b>often</b> [3] 59:5,6 122:20  <b>oftentimes</b> [1] 59:1  <b>Ohio</b> [1] 92:19  <b>Oil</b> [2] 37:14,23  <b>Okay</b> [27] 22:7,8,13 37:5 51:  7 55:7 61:20 62:16 63:17,  20 65:24 67:3,24 68:20 70:  24 72:5 84:10 86:3,16 92:  7 93:16 101:4 103:2 106:  11 134:3 136:18 147:1  <b>Oklahoma</b> [1] 109:17  <b>on-or-off</b> [1] 113:6  <b>on/off</b> [1] 108:19  <b>once</b> [2] 17:12 35:16  <b>one</b> [92] 7:15 8:17 11:8 14:  13 19:11 20:3 22:22 23:14,  19,20 29:1 30:19,22,24 32:  22,23 34:8,13 35:11 36:9,  17,17,18 40:16 42:21 45:9,  23,23 47:23,23,23,25,25,  25 50:12,20 51:24 54:22  58:16 59:15 61:9 64:2,4  65:11,13,15 67:14 69:9,10  70:1,14 72:10 73:13 74:3  75:5,20,24 78:7 79:1 82:6  84:3,18 89:23 90:4,11 91:  21 93:19 95:8 106:13 107:  24 108:8 111:16 112:16  117:3 121:7 126:18 127:9,  19 129:24 132:20 135:10  141:16 146:21 147:15 152:  10,11,18,19 153:7,23 160:  19,25  <b>one's</b> [1] 97:22  <b>onerous</b> [1] 156:15  <b>ones</b> [4] 49:1,2 138:17 139:  11  <b>ongoing</b> [2] 5:21 25:8  <b>only</b> [32] 5:6 12:13,14 14:  23 15:21 17:3 18:4 19:14  34:7 35:11 40:10,19 43:4  45:1,3 46:6 49:10 57:8 64:  6 67:14 69:17 70:24 71:6,  19,21 80:18 101:9 109:6  113:18 125:7 138:23 145:  4</p>	<p><b>opening</b> [1] 58:10  <b>operate</b> [1] 5:17  <b>operated</b> [1] 126:6  <b>operates</b> [1] 75:9  <b>opinion</b> [6] 6:16 23:25 27:  6 37:16 60:21 62:25  <b>opinions</b> [4] 7:2 60:15 62:  22 63:3  <b>opportunity</b> [2] 57:6 66:24  <b>oppose</b> [12] 32:1 34:16,19  51:14,23 52:2,5,6 66:18,21  67:7 146:20  <b>opposite</b> [1] 75:9  <b>opt-out</b> [1] 8:19  <b>option</b> [1] 136:10  <b>opts</b> [1] 8:13  <b>oral</b> [7] 2:2 3:2,5,9 4:8 77:2  125:1  <b>Order</b> [44] 4:13,15,21 11:25  23:6,8 36:8 52:10 55:8,16  56:5,9 57:12 62:2 63:23  66:9 67:11,14 70:11,11,19  71:6,22 72:25 73:3 74:8  75:12 77:12 80:8 93:9 94:  10 98:5 109:3 117:6 123:  16 124:5 125:12 134:14  141:24 145:13,15 154:7  155:9 158:9  <b>order's</b> [3] 125:5,18,19  <b>ordering</b> [2] 71:24 154:2  <b>orders</b> [5] 13:9 109:23 128:  3 157:13,17  <b>ordinary</b> [1] 5:20  <b>organization</b> [1] 146:4  <b>organizations</b> [1] 146:12  <b>origin</b> [1] 79:8  <b>original</b> [3] 4:15 55:8 159:  20  <b>originalism</b> [1] 134:25  <b>originated</b> [1] 157:9  <b>origins</b> [1] 6:9  <b>Ortiz</b> [1] 7:2  <b>OSHA</b> [1] 53:20  <b>other</b> [51] 6:25 10:8 14:2  15:11,19 20:18 23:13,21  24:14 25:3 26:2 33:24,25  36:18 39:2 54:4 62:21 65:  7 68:14 71:23 73:18 74:3  75:21 78:24,25 81:2 83:12  87:12 88:10,12 89:13 90:  12,20 93:19 99:6 101:18  105:18 106:12 108:9 111:  16 115:19 116:3 120:1  124:11 137:4 139:8,20  145:4 151:11 157:9 161:2  <b>others</b> [11] 15:5 26:14 41:  23 45:10 63:22 67:25 73:  17 111:6 150:3 154:2 160:  20  <b>otherwise</b> [2] 23:7 112:1  <b>ought</b> [2] 35:25 45:17  <b>ourselves</b> [2] 92:7 120:14  <b>out</b> [35] 6:15 8:13 13:13 22:  16 25:3 38:16 49:8 50:12</p>	<p>56:14 58:10 67:11 70:23  74:17 76:13 77:14 86:16  87:4 95:10 96:4 97:7,8  102:4 105:22 106:13 112:  4 116:19 120:18 124:2,4  135:11 136:24 145:2 158:  20 160:3,17  <b>outlining</b> [2] 38:20 96:23  <b>outside</b> [4] 73:5 130:17  135:13 153:2  <b>over</b> [25] 6:8 17:10,11 46:  11,11 51:10 53:14 69:19  70:3 78:20 86:5 87:3 105:  13 113:5,5 114:4 123:3  125:9 126:6 134:3 149:13  150:18 152:5 156:5 161:  20  <b>overarching</b> [1] 54:12  <b>overcorrection</b> [1] 135:23  <b>overlooks</b> [1] 78:18  <b>override</b> [1] 127:11  <b>overruled</b> [2] 61:19 105:24  <b>oversight</b> [1] 161:19  <b>overstates</b> [1] 151:7  <b>overwhelmingly</b> [1] 30:13  <b>own</b> [22] 20:18 28:20 45:22  77:9 78:12 79:21 81:1 83:  22 92:16 95:20 96:5,6,8  99:17 104:20 106:3 113:4,  6,7 115:17 119:10 131:17</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> [1] 162:1  <b>PAGE</b> [1] 3:2  <b>papers</b> [2] 41:5 71:11  <b>parents</b> [10] 7:19 11:17,19,  23 42:16 77:13 89:6 101:  18 106:19,23  <b>parents'</b> [2] 11:13 41:7  <b>parse</b> [1] 70:23  <b>part</b> [11] 10:4 19:16 36:15  71:8 73:13 93:1 110:16  118:14 122:1 129:25 150:  25  <b>Parte</b> [1] 107:20  <b>partially</b> [2] 70:5 92:19  <b>participation</b> [2] 91:15  104:10  <b>particular</b> [17] 6:10 14:8,  10 17:20 23:19 24:8 29:4  32:2 36:25 46:17 71:3 81:  6 82:14,15 122:16 136:15  161:13  <b>particularly</b> [5] 6:12 57:23  79:10 123:7 127:3  <b>parties</b> [33] 18:5 19:25 20:  1,1 37:20 40:22 45:2,3 58:  5 59:3 70:13 78:25 81:14  83:25 90:20,22 97:4 101:  15 109:15,22 111:2 118:12  119:8,12,20 130:5 132:24  133:2 134:15 139:2 143:  14 154:23 156:24  <b>party</b> [6] 5:7 42:20 55:4 72:</p>	<p>19 123:23 147:14  <b>party's</b> [1] 92:16  <b>party-centric</b> [1] 116:25  <b>passing</b> [1] 43:21  <b>passionate</b> [1] 59:11  <b>passionately</b> [1] 45:12  <b>past</b> [3] 53:11,15 130:11  <b>patchwork</b> [2] 23:23 24:8  <b>patent</b> [1] 155:16  <b>patently</b> [1] 106:3  <b>path</b> [1] 29:2  <b>pathological</b> [1] 150:14  <b>pathologies</b> [1] 39:21  <b>pathology</b> [1] 53:10  <b>pause</b> [2] 55:10 58:21  <b>peace</b> [27] 6:13,17,18 7:2,5,  7,21,21 8:8,9,14 10:18 11:  2 40:21 79:10,25 106:7  107:18 115:3,12 116:4,21  133:14,18 134:5,20 135:17  <b>pedigree</b> [2] 6:12 79:9  <b>peek</b> [7] 92:18 93:1 95:4,17,  25 123:19,22  <b>peel</b> [1] 19:16  <b>penalties</b> [1] 106:23  <b>penalty</b> [1] 106:25  <b>people</b> [33] 8:22 10:4 13:  12 15:11 23:6,15 26:12 29:  8,21 35:24 36:16 43:19,21  49:22 56:8 67:12 71:23 92:  8 97:12 109:5,6 113:9 130:  7 131:5 154:25 155:1,7  156:2,8,18,22 158:5 159:  22  <b>people's</b> [2] 74:9 110:6  <b>peoples</b> [1] 139:20  <b>percent</b> [7] 95:19,19 102:7  112:5 113:19,23,24  <b>percolated</b> [1] 43:3  <b>percolation</b> [12] 5:11 31:5  42:23 43:17 50:12 64:1,4,  21 76:19 78:17 81:5 82:21  <b>perfectly</b> [1] 99:19  <b>perhap</b> [1] 133:5  <b>perhaps</b> [2] 133:6 138:5  <b>period</b> [7] 55:9,12,15,19  107:20 115:7,19  <b>Perkins</b> [3] 16:23 37:14,22  <b>permanent</b> [3] 52:15 128:  21 131:10  <b>permeates</b> [1] 112:25  <b>permit</b> [3] 41:23 42:13,13  <b>person</b> [5] 28:18 33:4 35:6  69:19 71:21  <b>personal</b> [4] 17:11 69:19  70:3 156:6  <b>persons</b> [1] 89:1  <b>perspective</b> [2] 65:22 123:  16  <b>petition</b> [1] 38:14  <b>Pfander's</b> [1] 155:15  <b>phenomenon</b> [1] 151:18  <b>Philly</b> [3] 110:9,14,15  <b>phrased</b> [1] 61:15</p>
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## Official - Subject to Final Review

<p><b>PI</b> [3] 81:23 122:1 129:13  <b>piece</b> [1] 153:24  <b>Pierce</b> [4] 106:13,17 155:20 158:23  <b>pin</b> [1] 146:8  <b>Pls</b> [4] 78:23 82:10 131:5 151:8  <b>pivot</b> [2] 141:5,25  <b>place</b> [5] 20:25 51:10 147:15 156:23 157:11  <b>places</b> [1] 41:6  <b>plain</b> [2] 43:4 125:7  <b>plaintiff</b> [37] 13:15,16 14:14 15:3,10 16:2,17 17:3,20 18:12,16,18 19:5,14 20:12,23,25 21:4 27:14 38:25 54:7 70:6,25 71:8,18,19,21 72:24 73:25 79:3 83:15 106:24 117:18 145:20 152:24 153:15 155:1  <b>plaintiffs</b> [2] 73:16 145:20  <b>plaintiff-specific</b> [1] 141:13  <b>plaintiffs</b> [36] 5:19 9:22 13:1 15:16,20 19:5 22:1,2 23:2 24:10 31:23 36:3 38:6 41:12,13 59:18 66:8,22 118:8 119:8 125:24 126:8,22 137:14 141:23 142:8,8,11 146:15,24 152:20,25 153:4,11 158:4,14  <b>plan</b> [4] 94:1 104:24 108:21 109:12  <b>planning</b> [1] 106:2  <b>plans</b> [1] 104:21  <b>plant</b> [5] 15:8 18:10,12 108:22 109:13  <b>plausibly</b> [1] 52:5  <b>playing</b> [2] 150:9 152:16  <b>please</b> [5] 4:11 32:21 65:4 77:5 125:4  <b>plenty</b> [1] 64:12  <b>pocketbook</b> [4] 23:9 77:10 82:16 96:11  <b>podium</b> [2] 108:16 118:15  <b>Poe</b> [2] 30:7 149:7  <b>point</b> [56] 12:18 15:14 19:11,23 22:14 25:3 27:10 32:19 33:3 37:15 39:15,17 51:8 54:12 58:22 59:10 66:2 68:19 69:11 84:7,12 87:25,25 88:5 105:6 107:9,25 108:2,9,13,14 109:2 110:11 111:22 112:2 115:15 119:9 122:23 124:15 128:7 129:18 130:15 131:25 132:19 134:10,24 136:9 142:16 149:6 150:13 152:19 153:15 155:22 156:22 159:2 160:3  <b>pointed</b> [4] 6:15 22:16 38:16 160:16  <b>pointing</b> [2] 67:11 128:14  <b>points</b> [4] 76:13 106:13</p>	<p>107:12 136:7  <b>policies</b> [5] 59:13 80:25 81:1 88:21 98:23  <b>policy</b> [19] 55:2,22 59:16,17 61:1,13 62:11,12 75:13,16,19 92:22,24 93:1 99:2,3 127:11 131:17 140:23  <b>pollution</b> [1] 15:9  <b>porous</b> [1] 110:16  <b>portion</b> [2] 39:9 67:14  <b>position</b> [7] 52:3,22,23,24 54:11 98:25 160:10  <b>positive</b> [1] 123:13  <b>possibility</b> [2] 31:1 53:21  <b>possible</b> [8] 18:17 38:24 53:3,5 76:2 88:9 99:22 160:19  <b>possibly</b> [3] 84:9 93:13 105:17  <b>post-Civil</b> [1] 78:5  <b>posture</b> [5] 120:13 121:1,17 129:7,14  <b>potential</b> [2] 60:8,9  <b>potentially</b> [4] 34:12 74:16 110:11 111:23  <b>pouring</b> [1] 15:8  <b>Powell</b> [2] 5:24 64:8  <b>power</b> [10] 5:5 9:13 17:4,7 18:4 58:17,18 75:4 108:22 109:12  <b>powers</b> [1] 6:4  <b>practical</b> [17] 5:9 38:21 39:4,13 56:1 66:12 67:18,20 97:7,12,13 98:17,20 136:6,11,25 139:1  <b>practically</b> [11] 79:18 81:14 82:5 91:2 99:18 109:1,14 117:22 119:7 120:2,5  <b>practice</b> [18] 33:12,16,19 39:22 60:22,25 61:3,4,9 63:3,6 78:21 105:14 114:5 123:4 125:10 144:15 155:12  <b>practices</b> [3] 27:17 34:10 128:19  <b>pragmatic</b> [1] 127:10  <b>precedence</b> [1] 63:6  <b>precedent</b> [29] 9:16,21 31:8 32:12 33:13 35:5,14,20 43:4,4 47:14,18 48:17 54:25 60:14,20 61:16,19 63:10 94:6,8,16 106:4 114:4,9 122:17 125:9 144:13 155:12  <b>precedents</b> [7] 11:10 12:1 25:11 35:9 60:23 89:5 103:24  <b>precludes</b> [1] 40:4  <b>predecessors</b> [1] 134:9  <b>predicting</b> [1] 52:2  <b>preeminent</b> [1] 159:3  <b>preferred</b> [1] 108:5  <b>prefers</b> [1] 77:15  <b>preliminary</b> [15] 27:12 36:</p>	<p>4 125:22 126:3,15 128:8,20,24 129:6 131:7,11 132:24 134:11 136:10 144:24  <b>premise</b> [1] 134:6  <b>prepared</b> [1] 51:13  <b>presence</b> [1] 56:22  <b>present</b> [8] 8:5 40:25 49:25 52:12,13 142:19 148:10 159:23  <b>presented</b> [8] 8:25 46:18 100:9,13 105:11 118:17 160:13,23  <b>presenting</b> [1] 159:25  <b>presents</b> [1] 30:22  <b>preserve</b> [1] 134:14  <b>preserves</b> [1] 133:1  <b>PRESIDENT</b> [14] 1:3,10,17 4:12 11:7 13:5,9 44:14 98:1,2,3,3 149:22 151:12  <b>presidential</b> [2] 5:3 59:25  <b>Presidents</b> [6] 57:24 58:1,5 59:2 97:3 151:22  <b>press</b> [2] 101:6 119:17  <b>pressed</b> [1] 101:1  <b>pressures</b> [1] 5:23  <b>presumably</b> [1] 53:19  <b>Presuming</b> [1] 36:15  <b>presumption</b> [1] 134:19  <b>pretty</b> [3] 46:2 96:10 151:6  <b>prevail</b> [3] 26:23 55:8,10  <b>prevent</b> [3] 5:10 47:8 126:7  <b>preventing</b> [3] 18:17,17 111:19  <b>primarily</b> [1] 57:20  <b>primary</b> [2] 8:2 141:6  <b>principal</b> [1] 116:2  <b>Principi</b> [1] 128:16  <b>principle</b> [8] 16:10 19:2,4 43:10 45:14,17 71:13 72:10  <b>principles</b> [8] 9:3 39:19 45:16 136:2 138:15 139:14 148:21 161:1  <b>prior</b> [1] 132:17  <b>Private</b> [5] 2:14 3:11 106:24 125:2 142:8  <b>probably</b> [3] 87:11 88:19 142:15  <b>problem</b> [33] 5:2 21:9 24:1,14,21,23 39:5,13 51:2 55:23 64:24 65:18 75:9 90:5 97:7,12,13 98:18 111:12 112:8 116:24 122:7 129:25 130:9 132:2 136:6,11 137:21 147:21 148:2,11,12 160:14  <b>problematic</b> [1] 148:4  <b>problems</b> [18] 5:9 20:3 24:8,19 26:19 38:21 52:7 81:25 96:23 98:20 103:7 111:5,10 130:3 136:15,25 137:22 140:23  <b>procedural</b> [1] 51:8</p>	<p><b>procedures</b> [3] 8:19 53:12 54:20  <b>proceed</b> [1] 138:18  <b>proceeding</b> [7] 21:1,18 47:25 68:5 110:9 120:24 132:22  <b>process</b> [5] 57:16 66:15,17 89:4 147:14  <b>produce</b> [1] 91:17  <b>Professor</b> [4] 59:9 128:9 145:17 155:14  <b>proffered</b> [1] 6:13  <b>profoundly</b> [6] 13:22 14:2 30:5 37:18 40:8 160:10  <b>program</b> [2] 103:14 104:1  <b>programs</b> [8] 91:14,16 103:9 104:14 105:1 112:1,8 113:4  <b>prohibit</b> [3] 9:4 125:17 128:10  <b>prohibits</b> [1] 40:10  <b>projecting</b> [1] 131:17  <b>proliferated</b> [1] 6:8  <b>proliferation</b> [1] 151:3  <b>promise</b> [1] 86:14  <b>prompting</b> [1] 51:21  <b>promptly</b> [3] 4:19 91:25 94:2  <b>prong</b> [1] 139:18  <b>prongs</b> [1] 127:4  <b>properly</b> [2] 77:7 140:11  <b>property</b> [2] 155:14 159:7  <b>proposal</b> [6] 127:17 128:9,12 140:25 142:20 148:18  <b>proposed</b> [2] 34:21 93:11  <b>proposing</b> [1] 148:22  <b>protect</b> [1] 15:18  <b>Protecting</b> [3] 4:13 48:15 59:18  <b>protection</b> [1] 20:12  <b>prototypical</b> [1] 133:15  <b>prove</b> [1] 145:11  <b>proven</b> [1] 161:3  <b>provide</b> [11] 23:2 34:10 41:14 66:5 71:17 100:25 125:23 126:21 131:11 139:15 157:19  <b>provided</b> [5] 23:22 49:5 73:11 135:13 157:13  <b>provides</b> [7] 29:14 31:19 40:17 49:25 131:3,3,9  <b>providing</b> [3] 111:20 125:17 136:2  <b>provision</b> [1] 38:3  <b>provisional</b> [1] 104:6  <b>prudential</b> [1] 17:17  <b>pseudo</b> [1] 153:11  <b>public</b> [5] 15:1 111:4 127:3 139:18,21  <b>pure</b> [1] 42:7  <b>purport</b> [2] 8:22 131:14  <b>purportedly</b> [1] 76:16  <b>purpose</b> [2] 10:18 74:12  <b>purposes</b> [4] 85:20 103:4,</p>	<p>4 158:17  <b>pursuant</b> [1] 69:18  <b>pursue</b> [2] 132:7 146:1  <b>push</b> [1] 58:1  <b>pushing</b> [4] 58:3,6 140:2,9  <b>put</b> [19] 28:2 29:23 34:20 44:13 53:23 93:16 97:7,8 105:22 119:19,20 120:1 122:21 127:14,15 136:6 153:6 157:1,10  <b>putative</b> [7] 128:25 129:6,11 131:6 132:23 134:12 136:9  <b>puts</b> [4] 110:5 121:15 141:19 156:22  <b>Putting</b> [4] 79:7 104:20,23 134:1</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>quarrel</b> [1] 105:21  <b>question</b> [75] 7:24 9:2 10:19 15:24 22:9,14 26:20,21,24 28:16 29:7 30:22 32:8,12 42:8,25 44:11 45:21 46:4,6,7,9,19,23 47:11 48:2,11 49:14,17 56:1 57:18 63:21 64:7,10,12,20 65:23,25 67:17 72:11,20 78:17,19 83:8 84:2,25 85:21 91:4,5 93:18,19 95:2,23 97:9 99:25 101:8 106:6 114:18 117:4,10 120:20 121:17 127:16 128:2 143:9,20,24 145:4 146:17 149:24 151:2 152:10 160:22,24 161:1  <b>questioned</b> [1] 25:10  <b>questioning</b> [1] 142:5  <b>questions</b> [25] 5:12 6:5 29:22 50:6 58:18 63:22 77:22 79:6 81:21 85:5 90:25 100:2 105:10 110:20 122:19,22 126:12 137:6 140:16 142:1,23 147:11,11,22 149:5  <b>quick</b> [3] 32:22,23 107:24  <b>quickly</b> [8] 32:9,12 36:19 41:2 76:2,9 115:16 141:5  <b>quintessentially</b> [1] 148:1  <b>quite</b> [9] 30:23 108:24 122:14,24 123:9 124:10 133:24 139:9 157:12  <b>quo</b> [1] 126:4  <b>quotation</b> [1] 63:15  <b>quote</b> [1] 145:17  <b>quote/unquote</b> [2] 69:25 75:2</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>racial</b> [1] 14:11  <b>racing</b> [2] 75:10 160:14  <b>Rahimi</b> [1] 115:19  <b>railroad</b> [2] 135:18 155:20  <b>raise</b> [3] 81:21 94:22 119:1  <b>raised</b> [5] 77:17 101:9 119:3,4 120:6</p>
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## Official - Subject to Final Review

<b>raises</b> [2] 80:23 156:25 <b>raising</b> [2] 77:21 108:10 <b>ramp-up</b> [2] 55:15,19 <b>rampant</b> [1] 5:12 <b>ran</b> [1] 128:12 <b>range</b> [1] 34:11 <b>rare</b> [1] 38:13 <b>rate</b> [1] 106:12 <b>rates</b> [1] 155:20 <b>rather</b> [3] 26:24 28:24 69:24 <b>ratified</b> [1] 126:5 <b>re-begin</b> [1] 19:21 <b>reach</b> [4] 26:21 50:9 76:2,18 <b>reaction</b> [1] 132:21 <b>read</b> [3] 71:11 107:22 133:13 <b>readiness</b> [1] 75:16 <b>reading</b> [5] 37:11 85:11 107:16 116:10 124:17 <b>reads</b> [1] 85:15 <b>reaffirmed</b> [2] 72:13 123:3 <b>real</b> [4] 49:16 74:3 94:23 138:25 <b>realize</b> [2] 104:17 122:19 <b>really</b> [35] 16:5 17:6 23:10 31:15 35:8 37:13 38:14 43:13 45:6,6,15 49:19 61:12 64:1,4 70:23 83:18 84:16 89:6,24 91:9 92:22 95:2 112:24 113:14 139:21 144:18 145:21 146:2,24 148:6 149:21 150:5 154:16 155:15 <b>realm</b> [1] 97:25 <b>Realtors</b> [1] 54:8 <b>reason</b> [12] 36:20,25 42:21 55:20 64:5,18 109:20 116:3 130:14 137:15 148:10 155:2 <b>reasonable</b> [2] 82:22,25 <b>reasoning</b> [4] 115:18 116:12,17 117:1 <b>reasons</b> [12] 9:7 22:25 30:15 44:19 58:18 120:6 126:18 127:7 141:13 160:25 161:8,22 <b>REBUTTAL</b> [4] 3:12 122:6 159:15,16 <b>receives</b> [1] 128:5 <b>receiving</b> [1] 41:10 <b>recent</b> [4] 13:21 24:4 25:17 139:11 <b>recently</b> [5] 64:16 80:7 88:7 129:17 139:5 <b>recognize</b> [3] 41:7 45:9 90:14 <b>recognized</b> [1] 126:25 <b>reconcile</b> [1] 92:24 <b>rectified</b> [1] 39:5 <b>redistricting</b> [3] 14:14 108:21 109:12 <b>redone</b> [1] 108:21	<b>redrawing</b> [1] 14:21 <b>redress</b> [2] 18:5 95:15 <b>redressed</b> [1] 95:20 <b>refer</b> [1] 31:18 <b>referred</b> [3] 12:20 25:16 72:11 <b>referring</b> [1] 107:21 <b>reflect</b> [1] 148:23 <b>reflected</b> [3] 30:12 58:19 161:15 <b>reflects</b> [1] 4:15 <b>reflexive</b> [1] 80:11 <b>regardless</b> [1] 125:18 <b>regime</b> [2] 74:6 136:12 <b>regularly</b> [2] 79:2 119:23 <b>regulation</b> [1] 73:14 <b>reject</b> [1] 126:2 <b>rejected</b> [5] 44:6,9 128:11 138:12 161:21 <b>rejecting</b> [1] 135:5 <b>relate</b> [1] 86:9 <b>related</b> [1] 8:3 <b>relates</b> [1] 75:24 <b>relative</b> [1] 69:19 <b>release</b> [1] 18:14 <b>releases</b> [1] 18:10 <b>relevant</b> [4] 8:17 43:24 70:10 115:7 <b>relied</b> [2] 106:7,8 <b>relief</b> [121] 15:20 17:15,20 22:18 23:2,17,22 24:10 25:16,18 26:12,13 29:17 30:9 34:25 36:5 38:3 39:11 51:2 54:21 64:7,9 66:5 68:25 69:14,21 71:14,16 77:9,16 79:4,24 80:4,11 81:3 82:4,19 87:9,20 88:21 90:4,10,17,19 92:11,23,25 93:5,12,14 94:11 95:9 96:4,8,9 99:23 101:13,14,16,17,21,22 111:20 114:11 115:9,25 117:4,6,17 118:6,7,11,20,21 121:4 123:10,11,24,25 125:17,24 126:20,21 127:1,14 128:5,10,20,21,25,25 129:6,10,20 131:5,7,10,11 132:5,25 133:2 134:15 135:12 136:10 138:11 139:2 140:5 141:4,9,22 145:19 146:3,25 154:1,6,17,20 157:5,14,19 161:12 <b>relying</b> [1] 129:19 <b>rem</b> [1] 155:13 <b>remedial</b> [7] 30:9 65:16,20,22 93:17,19 160:22 <b>remediate</b> [5] 12:25 14:23 23:12 72:18 73:22 <b>remediated</b> [1] 73:15 <b>remediating</b> [2] 15:2 72:22 <b>remedied</b> [4] 82:17 96:14 99:9 100:9 <b>remedies</b> [8] 16:15,25 17:1 46:19 81:21,22 96:13	<b>remedy</b> [24] 14:20 15:14 16:1,14 22:17 38:6,8 40:12 73:8,11,14,17 83:10 84:6 92:17 94:12 99:16 101:10 108:5 113:19 114:11 119:2 120:18 160:22 <b>remedying</b> [5] 19:4 81:13 82:15 91:1 92:15 <b>remotely</b> [1] 74:20 <b>removal</b> [3] 110:8,10,17 <b>remove</b> [1] 16:16 <b>removing</b> [1] 153:18 <b>render</b> [1] 41:5 <b>repeated</b> [1] 5:25 <b>repeatedly</b> [2] 27:20 44:10 <b>represent</b> [2] 89:7,9 <b>representation</b> [1] 52:16 <b>representational</b> [1] 115:4 <b>representative</b> [3] 6:1 133:25 157:12 <b>represented</b> [4] 6:22 40:14 41:1 68:1 <b>require</b> [11] 5:13 15:25 23:12 56:21 71:5 77:18 85:11 96:9 105:25 141:17,22 <b>required</b> [2] 17:19 84:5 <b>requirements</b> [2] 17:5,22 <b>requirements</b> [3] 29:12 132:12,17 <b>requires</b> [7] 16:4 86:19 101:23 102:1 103:17 106:1 108:25 <b>requiring</b> [1] 154:8 <b>reserve</b> [2] 26:23 60:19 <b>reserved</b> [1] 79:4 <b>resident</b> [1] 52:15 <b>residents</b> [2] 90:23 99:8 <b>resides</b> [1] 78:4 <b>resisted</b> [2] 31:21 60:12 <b>resolution</b> [1] 6:19 <b>resolve</b> [2] 32:8,12 <b>respect</b> [24] 17:7 25:2 33:13 35:15,18,20 42:9 44:24,25 60:23 61:6,15 62:22,24 63:3,6,10 68:11 70:5,6 71:7 133:2 142:7 157:1 <b>Respectfully</b> [3] 10:15 43:7 47:9 <b>respecting</b> [2] 47:13 48:16 <b>respects</b> [1] 83:11 <b>respond</b> [1] 134:9 <b>responded</b> [1] 23:24 <b>Respondents</b> [11] 1:8,15,22 2:12,14 3:8,11 6:13 21:20 77:3 125:2 <b>responding</b> [1] 150:12 <b>response</b> [11] 8:1 17:24 18:21 23:10,20,21 25:13 47:11 49:14 97:11 132:20 <b>responses</b> [2] 16:7 72:8 <b>responsibilities</b> [1] 102:2 <b>responsibility</b> [2] 104:10,	<b>20</b> <b>responsible</b> [1] 104:23 <b>responsive</b> [1] 128:1 <b>rest</b> [2] 12:16 27:4 <b>restrained</b> [3] 97:22 98:23 107:1 <b>result</b> [8] 23:8 28:9,18,21 30:2,5,24 126:8 <b>resulted</b> [1] 14:11 <b>results</b> [1] 26:19 <b>return</b> [1] 81:15 <b>reversed</b> [1] 37:16 <b>revert</b> [1] 88:2 <b>review</b> [2] 5:21 94:16 <b>riggers</b> [1] 88:17 <b>rights</b> [2] 74:10 138:24 <b>rigorous</b> [7] 11:1 29:15,16 34:23 52:18 88:20 135:17 <b>rigors</b> [3] 66:14,16 88:11 <b>rise</b> [1] 84:22 <b>rises</b> [1] 85:1 <b>risk</b> [3] 5:21 68:4 141:20 <b>road</b> [1] 142:15 <b>ROBERTS</b> [36] 4:3 7:11,13 11:5 12:15 13:6 14:6 36:10 37:5 38:19 39:25 45:19 50:3,24 60:5 68:21 76:24 80:17 82:20 96:18 100:3 111:7 114:14 120:10 124:21 129:4 142:3,25 143:3 144:20 147:2 149:16 152:7 153:20 159:13 161:24 <b>role</b> [2] 150:9 152:17 <b>room</b> [1] 122:20 <b>Roosevelt</b> [1] 59:13 <b>roughly</b> [1] 138:21 <b>roving</b> [1] 161:17 <b>Rule</b> [85] 5:15 6:24 8:16 11:1,1 12:11,17 16:3 22:1,4 28:22,23,24 29:1,10,11,14,20,23 31:19 33:10 40:14,17 42:14 49:24 51:21 52:20,25 53:13 57:23 69:2 74:20 78:10 80:1 81:8 82:9 84:15 85:13 87:5 107:18,20 111:18 115:24 116:6 124:13 127:18,22,22,22,23,25 128:3,7,8,10,14,19 129:20 130:6,18,18 131:2,13,18 132:13 133:11,16,19 134:9 135:21 136:8 138:3,19 140:22 148:19 149:23 150:2 155:23 156:11,14 157:9,10,16 158:13 159:11 <b>ruled</b> [1] 49:9 <b>rules</b> [12] 28:10 30:25 111:15 116:19 127:20,21 128:8,18 130:1,24 131:15 155:2 <b>Rules-Enabling</b> [1] 128:13 <b>ruling</b> [2] 33:5 154:21 <b>run</b> [2] 20:17 161:12 <b>running</b> [1] 81:5 <b>rush</b> [1] 88:8	<b>rushed</b> [3] 5:13 64:25 65:4 <b>S</b> <b>safety</b> [1] 36:21 <b>saluting</b> [1] 107:6 <b>same</b> [17] 4:25 7:5 8:19 24:5 29:10 33:25 66:2 78:7 116:23 129:1 137:15 148:5 151:8 155:17 156:23 157:11,11 <b>San</b> [1] 147:17 <b>satisfies</b> [1] 11:1 <b>satisfying</b> [1] 87:23 <b>SAUER</b> [158] 2:7 3:3,13 4:7,8,10 6:6,14 7:25 8:15 9:6,10,14,20,25 10:7,11,15,20,25 12:2,9,17,23 13:18 14:19 16:6,9 17:23 18:25 19:3,8,23 20:16 21:2,6,14,19,23 22:3,10,24 24:11,25 25:12,24 26:18 27:2,24 28:11,14 29:1,14 30:4 31:2,13,18,24 32:10,13 33:11,20 34:9,18,22 35:13,19 36:2 37:3,10 38:11 39:6,17 40:7,13,20,25 42:2,20 43:7,16,24 44:7,18 45:5 46:16 47:9 48:1,12 49:4,10,24 50:10,22 51:6,16,25 52:7 53:5,24 54:3 55:6,14 56:4,12,16,20 57:4,11 58:14 59:7 60:7,22 61:10,13 62:5,9,14,20 63:1,12,15,18 64:3,15,22 65:8,15 66:16,23 67:3,6,23,25 68:12,17 69:6,9 70:10 72:8,10 73:6,21,24 75:8 76:19 96:22 122:5 126:19 132:2,9 136:13 143:13 151:2 156:16 159:15,16,18 <b>Sauer's</b> [2] 127:17 150:13 <b>saying</b> [32] 29:20 31:16 34:6,7 42:18 62:8,23 65:3 66:10 69:5,13 76:14 84:7 85:16 86:3 89:25 90:18 95:5 99:8 108:4 112:11 118:2 121:12 122:25 123:1,8,14 124:12 133:4 136:21 138:22 153:2 <b>says</b> [29] 11:19,22 13:11 18:13 23:14 24:1,20 27:6 47:21,22 56:6 70:14,21 71:6,18 72:2 74:11,15 81:8 98:4 101:13 105:23 109:4 116:13 120:16 124:14 128:4,15 158:6 <b>Scarborough</b> [1] 128:17 <b>scenario</b> [2] 57:14 153:12 <b>scheme</b> [1] 126:10 <b>scholar</b> [1] 159:3 <b>scholarly</b> [1] 97:15 <b>scholars</b> [1] 135:16 <b>school</b> [2] 15:1 106:24 <b>schools</b> [1] 106:24 <b>scope</b> [13] 17:25 22:22 24:
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## Official - Subject to Final Review

<p>16 30:9,12 45:8 46:19 64:7,9 72:17 73:5 96:4 160:22</p> <p><b>Scott</b> [1] 37:25</p> <p><b>Second</b> [24] 23:4,25 30:16 33:6,8,10 35:4,21 47:15,15 60:14,19 61:6,7,22 62:2,19 81:16,17 84:9 131:25 141:15,16 153:9</p> <p><b>Section</b> [1] 56:6</p> <p><b>secured</b> [1] 11:23</p> <p><b>Security</b> [4] 103:12,18,22 104:1</p> <p><b>see</b> [30] 11:25 16:25 21:11,14 37:20 38:21 45:9 48:7 53:20 54:5 56:23 60:10 66:13 70:1 73:19 87:24 89:14,19 90:3,13 95:16 100:10 113:5 114:2 115:13,21 136:11,25 155:17 161:5</p> <p><b>seek</b> [9] 22:8 50:21 54:20 94:13 103:15 137:11 146:12,25 154:21</p> <p><b>seekers</b> [1] 153:19</p> <p><b>seeking</b> [6] 51:10 90:10,11,17,19 137:16</p> <p><b>seeks</b> [1] 145:20</p> <p><b>seem</b> [3] 16:2 17:4 84:15</p> <p><b>seems</b> [15] 17:18 18:18 51:2,8 57:21 68:24 71:16 74:4,14 76:7 84:4 88:18 131:1,6 139:9</p> <p><b>seen</b> [3] 151:3 152:5 153:18</p> <p><b>sees</b> [1] 96:23</p> <p><b>seize</b> [1] 13:13</p> <p><b>Seldin</b> [4] 16:11 18:3 72:12 73:5</p> <p><b>selection</b> [2] 130:19 147:14</p> <p><b>Senator</b> [1] 44:1</p> <p><b>sends</b> [1] 13:13</p> <p><b>sense</b> [6] 10:14 80:22 81:11 132:16 140:17 157:6</p> <p><b>sensitive</b> [2] 42:24 76:20</p> <p><b>sent</b> [1] 106:23</p> <p><b>sentence</b> [1] 103:5</p> <p><b>sentences</b> [4] 101:2 105:12 118:25 120:5</p> <p><b>separate</b> [9] 6:16 9:23 27:6 64:9,12 79:20 137:25 144:18 145:2</p> <p><b>separation</b> [1] 6:4</p> <p><b>series</b> [1] 158:3</p> <p><b>serious</b> [5] 77:21 81:21 91:10 101:20 110:21</p> <p><b>seriously</b> [2] 25:9 119:17</p> <p><b>service</b> [1] 104:4</p> <p><b>services</b> [2] 23:8 41:15</p> <p><b>set</b> [12] 6:20 10:25 19:5 30:25 53:24 70:22 73:9 81:19,23 93:8 133:15 148:3</p> <p><b>sets</b> [1] 52:9</p> <p><b>setting</b> [1] 83:2</p>	<p><b>settle</b> [1] 10:18</p> <p><b>settled</b> [7] 78:19 106:3 114:9 122:17 123:2 125:22 126:18</p> <p><b>several</b> [1] 121:10</p> <p><b>share</b> [3] 84:21 93:21,25</p> <p><b>Shilling</b> [1] 75:15</p> <p><b>shoes</b> [1] 47:3</p> <p><b>shopping</b> [1] 5:13</p> <p><b>shouldn't</b> [6] 21:4 26:22 40:24 41:16 92:9 112:11</p> <p><b>shoving</b> [1] 130:18</p> <p><b>show</b> [1] 122:15</p> <p><b>showing</b> [9] 56:21,22 114:1,3 118:22 120:7 122:2 124:5,7</p> <p><b>shown</b> [1] 121:19</p> <p><b>shows</b> [3] 108:24 109:20 135:19</p> <p><b>shut</b> [1] 19:17</p> <p><b>side</b> [16] 25:3 75:21 81:2,19 83:12 87:12 88:10,12 99:6 105:19 116:3 122:21 123:13 124:11 139:8 161:2</p> <p><b>signed</b> [1] 158:25</p> <p><b>significant</b> [4] 77:10 82:15 96:11 150:18</p> <p><b>similar</b> [7] 14:25 15:7 30:6 31:3 40:21 72:14 76:12</p> <p><b>similarly</b> [2] 107:5 139:2</p> <p><b>simply</b> [5] 78:23 101:25 126:11 133:4 156:4</p> <p><b>Since</b> [5] 4:22 78:1 105:7 107:10 123:3</p> <p><b>single</b> [7] 24:3 28:18,22 35:5 40:16 78:15 85:13</p> <p><b>singular</b> [1] 7:24</p> <p><b>Sisters</b> [3] 106:14,17 155:21</p> <p><b>sit</b> [1] 13:14</p> <p><b>sitting</b> [1] 97:23</p> <p><b>situated</b> [1] 139:2</p> <p><b>situation</b> [6] 14:18 61:18,21 62:1,18 154:6</p> <p><b>situations</b> [5] 26:9 97:25 98:15 99:22 101:13</p> <p><b>six</b> [1] 151:10</p> <p><b>Sixth</b> [1] 7:7</p> <p><b>skew</b> [1] 109:13</p> <p><b>skis</b> [1] 149:13</p> <p><b>slapping</b> [1] 131:22</p> <p><b>slaughter</b> [1] 161:4</p> <p><b>slaughterhouse</b> [1] 160:8</p> <p><b>slaves</b> [4] 4:17 8:4 43:12 159:22</p> <p><b>slowing</b> [1] 161:4</p> <p><b>small</b> [2] 6:19,20</p> <p><b>snap</b> [4] 43:8 49:10 103:20 160:12</p> <p><b>Social</b> [5] 103:12,18,22 104:1,4</p> <p><b>Society</b> [3] 106:14,17 155:20</p>	<p><b>Solicitor</b> [2] 2:7,10</p> <p><b>solve</b> [8] 129:25 130:9 131:6,7 138:6 140:23 148:2,19</p> <p><b>solved</b> [2] 39:13 137:24</p> <p><b>solves</b> [1] 90:4</p> <p><b>solving</b> [1] 137:20</p> <p><b>somebody</b> [3] 47:21,24 48:20</p> <p><b>somehow</b> [2] 71:14 156:12</p> <p><b>someone</b> [9] 7:18,19 21:16 47:15 77:20 78:4 85:15 143:1 158:9</p> <p><b>Sometimes</b> [6] 16:18 81:1 97:16 99:1,15 134:21</p> <p><b>somewhat</b> [1] 111:22</p> <p><b>somewhere</b> [1] 102:21</p> <p><b>sorry</b> [10] 7:10 23:17 32:20,20,21 90:7 91:21 129:8 142:2 158:6</p> <p><b>sort</b> [30] 6:11 8:20,23 20:14 22:17 25:15 38:2 39:10,21 43:16 45:21 59:12 69:4 75:12 92:6 110:19 113:8 115:17 117:15 121:1,16,20 129:20 133:11 135:25 142:19 146:7,23 148:15 156:2</p> <p><b>sorts</b> [4] 52:25 119:2 149:9,10</p> <p><b>SOTOMAYOR</b> [64] 7:10,12,14 8:12 9:1,8,11,17,24 10:2,9,13,17,21 11:4,6 12:3,13,21 13:4,8 14:4 25:9 35:9 40:1,2,9,18,23 41:2 42:5 43:1,15,18 44:5,9,21 100:4,5,17,21 101:3,7,12 102:11,16,19 103:1 106:5,21 107:5,12,13 108:1 114:24 135:10 144:21,22 145:25 146:7,11,16 147:1 155:19</p> <p><b>sought</b> [5] 36:4 78:25 87:13 106:19,25</p> <p><b>sounds</b> [1] 62:17</p> <p><b>sovereign</b> [3] 11:12,14 77:10</p> <p><b>space</b> [1] 79:24</p> <p><b>spanned</b> [1] 5:2</p> <p><b>specific</b> [1] 87:15</p> <p><b>specifically</b> [5] 80:1 83:13 93:10 115:24 118:2</p> <p><b>speculating</b> [1] 58:14</p> <p><b>speculative</b> [1] 57:14</p> <p><b>spent</b> [1] 138:9</p> <p><b>spotting</b> [2] 85:17 86:2</p> <p><b>squiggle</b> [1] 86:16</p> <p><b>SSNs</b> [1] 104:5</p> <p><b>stage</b> [2] 142:4 154:5</p> <p><b>stand</b> [3] 20:22 21:16 63:18</p> <p><b>stand-in</b> [1] 118:3</p> <p><b>standing</b> [9] 21:7 22:19,21 29:19 38:24 40:15 96:1 137:2 161:10</p> <p><b>standpoint</b> [1] 74:7</p>	<p><b>stands</b> [2] 20:22 133:6</p> <p><b>stare</b> [2] 55:4 149:8</p> <p><b>start</b> [3] 100:5 106:2 127:25</p> <p><b>started</b> [6] 19:21 35:9 38:16 55:16 106:6 108:3</p> <p><b>starting</b> [3] 57:15 116:11 134:18</p> <p><b>State</b> [43] 2:11 3:7 14:16 23:14,15,20 41:13 54:6 77:3,14,19,21 78:4,8 87:10 89:1,12 94:5 99:9 102:4,5,8,23 104:20 105:5,9 106:15 107:2 109:7 110:2,7,18 111:17 112:4,6,20 113:17 121:4 129:9 137:17 142:12 145:25 161:9</p> <p><b>state's</b> [2] 99:17 113:13</p> <p><b>state-only</b> [1] 99:10</p> <p><b>stated</b> [1] 30:15</p> <p><b>stateless</b> [1] 41:6</p> <p><b>statements</b> [1] 44:1</p> <p><b>STATES</b> [73] 1:1,4,11,18 2:3 7:17,22 22:14 23:9,14,16,22 38:23 39:8 56:3,12 66:6 77:8,24 78:6,7,12 79:2 80:23,24,25 81:4 83:16,24 89:5,7,10,16 90:1,10,11,24 91:10 92:6,11,22,23 93:11,13 94:1,4 95:8 98:20 99:22 101:24 102:13,20 103:14 104:16 105:20,21 106:22 108:16 109:19,25 111:14 113:2,10,16 117:5 118:6 119:5,17 123:25 124:18 159:24 161:7,12</p> <p><b>States'</b> [2] 96:6 103:1</p> <p><b>statewide</b> [4] 38:2 51:11,15,23</p> <p><b>status</b> [3] 110:12 126:4 150:2</p> <p><b>statute</b> [5] 55:2 70:21 101:23 125:9 144:14</p> <p><b>statutes</b> [2] 81:1 114:6</p> <p><b>stay</b> [7] 64:6 65:3 98:7,9 122:1 125:13 126:3</p> <p><b>stayed</b> [2] 75:18 139:12</p> <p><b>step</b> [2] 82:12 88:15</p> <p><b>steps</b> [4] 51:4 69:2 105:22 106:1</p> <p><b>still</b> [1] 7:23 11:21,24 14:4 44:11 49:21 62:7,10 91:10 94:14 138:18</p> <p><b>stop</b> [19] 12:6 15:7 44:13,14,17 69:22 70:6,19 71:7,18 72:21,23 73:2 74:9 75:7 121:13,20 122:9 156:7</p> <p><b>stopped</b> [1] 11:20</p> <p><b>story</b> [2] 145:21 150:25</p> <p><b>Story's</b> [1] 158:25</p> <p><b>Strauss</b> [1] 19:15</p> <p><b>strength</b> [5] 92:16 114:1,8 118:22 124:6</p> <p><b>stretch</b> [1] 58:2</p>	<p><b>strictures</b> [1] 45:7</p> <p><b>strikes</b> [1] 111:13</p> <p><b>striking</b> [1] 122:24</p> <p><b>stripping</b> [1] 125:5</p> <p><b>strong</b> [1] 58:18</p> <p><b>stronger</b> [2] 114:3 145:20</p> <p><b>struggling</b> [1] 84:14</p> <p><b>student</b> [1] 53:20</p> <p><b>studied</b> [1] 135:16</p> <p><b>subject</b> [5] 17:9 29:15 41:23 56:9 69:20</p> <p><b>submission</b> [2] 79:22 109:24</p> <p><b>submitted</b> [3] 64:6 161:25 162:2</p> <p><b>substantial</b> [2] 39:5,9</p> <p><b>substantially</b> [1] 104:25</p> <p><b>substantive</b> [3] 46:6,8 48:11</p> <p><b>succeed</b> [2] 30:14 134:13</p> <p><b>success</b> [1] 144:25</p> <p><b>successfully</b> [4] 55:3 66:18,21 132:7</p> <p><b>sue</b> [3] 19:19 26:12,15</p> <p><b>sued</b> [2] 70:14 106:25</p> <p><b>suffer</b> [7] 77:10 92:12 94:9 109:22 121:19,24 133:7</p> <p><b>suffering</b> [2] 90:23 94:15</p> <p><b>sufficient</b> [1] 124:4</p> <p><b>sufficiently</b> [1] 148:25</p> <p><b>suggest</b> [7] 18:20 50:8 84:15 92:5 135:12 136:1 138:8</p> <p><b>suggested</b> [5] 25:9 100:7 108:6 140:14 156:11</p> <p><b>suggesting</b> [9] 16:3 17:2 33:22 46:24 49:15 127:24 135:22 136:22 138:20</p> <p><b>suggestion</b> [4] 24:7 138:13 146:19 160:9</p> <p><b>suggestions</b> [1] 101:9</p> <p><b>suggests</b> [3] 18:15 29:18 102:6</p> <p><b>suing</b> [1] 90:21</p> <p><b>suit</b> [8] 20:14 21:17 28:20 34:8 35:6,12 115:4 119:5</p> <p><b>suitable</b> [1] 137:5</p> <p><b>suits</b> [6] 27:7 51:10 132:15 133:25 136:17 157:12</p> <p><b>Summers</b> [1] 38:15</p> <p><b>super-important</b> [1] 147:25</p> <p><b>supplemental</b> [3] 83:2 93:9 143:12</p> <p><b>support</b> [3] 78:13 115:8 127:10</p> <p><b>supports</b> [1] 81:7</p> <p><b>suppose</b> [6] 18:9 35:3,5 39:1 94:12 110:10</p> <p><b>supposed</b> [3] 47:7 75:3 110:10</p> <p><b>SUPREME</b> [21] 1:1 2:3 9:12,14 10:22 11:9 12:1,4,5,19 34:4 42:16 45:1 47:4</p>
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## Official - Subject to Final Review

<p>49:19 62:18,23 63:7 76:10 94:5 114:4 survived [1] 38:9 Sutton [3] 7:6 24:12,19 Sutton's [1] 23:25 switch [2] 108:19 113:6 symmetry [1] 68:6 sympathetic [1] 81:3 system [9] 47:12 74:5,21, 23 75:2 76:1,21,22 122:10 systematic [1] 60:2</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p>table [3] 75:12 81:5 98:25 tailored [2] 16:15,15 talked [3] 53:15 115:18 116:20 talks [4] 89:1,2,3 155:16 TANF [1] 103:21 target [1] 67:14 targets [1] 67:11 tax [4] 80:6 106:8 107:19 116:7 technical [1] 51:1 technicalities [1] 130:25 technicality [2] 131:1,2 tee [1] 94:21 teeth [1] 84:23 tells [3] 15:21 114:20 115:7 temporarily [4] 12:22,23 52:12 159:23 temporary [2] 4:18 56:23 tens [1] 156:18 tension [4] 60:8,9,10 157:8 term [2] 79:15,20 terminated [1] 87:15 termination [1] 87:14 terms [1] 131:4 terrific [1] 159:1 territory [2] 7:16 11:21 test [3] 127:5 135:1 139:18 tethered [1] 142:9 Texas [9] 87:13,15,19 99:7, 11,12,13 145:18 147:18 text [2] 77:25 125:8 theme [1] 37:21 themselves [2] 102:1 153: 13 theory [4] 9:2 14:17 112:20 157:6 there's [36] 7:14 8:21 13:9 17:9,11 23:10 31:16 35:5 37:13 45:2 46:25 50:10 52: 9 54:12 58:8 66:9 67:20 69:6 73:9 79:13,23 87:7 92:1 94:7 95:6 100:16 101: 20 102:12 107:16 108:18 109:3 119:23 124:13 145: 16,16 146:16 therefore [2] 23:16 45:15 they'll [1] 46:12 they've [6] 22:16 58:3 80:9, 10 101:1,9 thinking [2] 97:19 140:15</p>	<p>thinks [6] 30:19,23 84:19 116:3 138:16 148:6 third [16] 82:2 83:25 86:8, 17,19 87:6 88:3,6 90:22 101:14 109:15,22 112:24 119:8,11 147:24 third-party [2] 110:21 161: 9 Thirteenth [1] 43:20 THOMAS [11] 6:6,14 37:7, 8 38:9 79:7 96:20 106:6 126:13 127:8 143:5 Thomas's [1] 27:5 though [9] 6:9 20:6 24:7 83:17 101:17 103:23 105: 4 116:10 143:4 thoughtful [1] 84:3 thoughts [2] 25:11 133:8 thousands [5] 10:3,23 41: 3 136:16 156:18 three [20] 6:8 8:1 35:7 36:7, 12,12 50:15 80:21 81:10 84:2,13 88:13 90:15,18 103:7 108:6,7 112:15 126: 4 150:19 throughout [3] 14:15,16 54:25 Thursday [1] 1:25 TikTok [1] 36:14 timing [1] 131:8 today [9] 83:13 91:8 92:5 94:23 108:16 117:21 118: 16 122:19 126:19 together [3] 57:10 112:15 127:22 tomorrow [1] 93:10 took [4] 46:6 55:9 81:18 124:11 tool [3] 26:3 42:3 160:19 tools [13] 25:14,15 26:9 29: 15 31:20 34:11,14 36:6,9 44:20 49:4 50:11 160:18 totally [3] 73:19 88:5 109: 14 touchstone [1] 160:3 toxins [2] 18:11,23 trace [1] 79:24 trade [1] 137:2 tradition [6] 54:13 115:17, 20,22,23 125:16 traditional [8] 5:8 30:12 34:10 39:18,20 72:17 80:3 84:4 training [1] 104:3 transcript [1] 100:24 transgress [1] 5:7 transpire [1] 138:3 TransUnion [1] 161:21 travel [1] 23:23 traveling [1] 112:5 treasuries [3] 16:22 37:22, 22 treat [5] 15:22 23:6 83:16 128:18 131:18</p>	<p>treated [6] 36:1 46:12 48:8 103:11 160:4,5 treatment [1] 51:11 Trenton [1] 2:10 trial [5] 97:23,23,24 98:1,4 tries [1] 108:16 TRO [2] 129:7,13 TROs [3] 55:17 82:10 151: 7 trouble [1] 117:2 true [9] 9:11 52:21 90:3 92: 10 101:25 121:5 126:1 157:8 158:22 Trumbull [1] 44:1 TRUMP [10] 1:3,10,17 4:4, 12 6:16 27:6 37:11 98:2 147:15 try [6] 61:18 68:13,14 81:19 89:8 138:5 trying [9] 58:9 89:6 100:6 116:11 124:3 138:9 148: 22 156:1 158:19 tunes [2] 82:16 96:12 turn [9] 74:2,4 77:20 92:17 93:1 96:14,15 105:8 110: 11 turned [1] 105:4 turns [6] 96:8 103:3 110:1, 6,17 120:18 Twenty-three [1] 102:19 two [29] 16:7 22:24 39:3 52: 9 67:12 72:8 79:13 85:10 90:12 92:1,24 95:6 100:8 101:1,8 105:12 106:24 107:12 108:9 111:14 112: 17 118:25 120:4 126:17 127:6 140:7 141:12 149: 25 150:6 type [1] 14:7 typical [1] 147:10 typicality [3] 52:8,16 132: 13</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p>U.S. [2] 77:15 78:9 U.S.'s [1] 78:22 U.S.-born [1] 125:6 U.S.C. [4] 101:22 103:20,20 104:22 ultimate [1] 134:15 ultimately [10] 31:7 81:25 87:14 94:13,24 96:16 111: 24 116:5 149:24,25 unable [1] 37:1 unanswered [1] 77:22 unconstitutional [8] 44: 14,15 45:6,15 55:2 62:3 126:10 145:15 unconstitutionally [1] 14: 24 under [20] 6:24 20:21,21, 22 29:10 57:11 72:16,16 73:8 74:14 76:5 81:25 87: 4 103:24 109:5 120:21</p>	<p>126:6 144:24 157:16 161: 10 underlying [4] 30:10 58:22 76:18 143:9 undermine [2] 79:1 103:8 undermines [1] 156:21 understand [29] 16:5 48:2 60:17 61:10 63:25 64:11 67:1 69:13 70:8 71:9 72:5 73:4,20 74:1,19 84:14 108: 15 115:13 121:23 122:2 127:17 130:13 133:14 144: 23 149:21 152:17 153:23 156:13 158:16 understandably [1] 58:4 understanding [4] 58:7 62:15 63:5 127:21 understood [6] 48:2 89:12 95:22,23 126:19 134:6 undertake [1] 102:2 undocumented [2] 104: 13 105:2 undone [1] 139:12 unfair [1] 109:14 uniform [1] 88:22 uniformly [2] 46:2 105:14 unilateral [1] 152:4 union [2] 16:22 37:22 unions [1] 16:22 unique [4] 59:24 113:8 122: 14 161:7 unitary [1] 108:19 UNITED [18] 1:1,4,11,18 2: 3 7:17,22 78:6 80:23 81:4 96:6 103:1 108:16 109:25 113:16 119:17 123:25 159: 24 universal [81] 4:20,22,24 5: 4 6:7,10,18 7:9 9:4 15:13, 18 20:4,10,13,24 21:12 24: 2 25:16 34:13 36:7 37:9, 13,17 38:2,10,22 39:2,15, 18 40:4 42:11,14,18 53:16 54:16 55:17 58:23 59:14 67:21 68:25 69:25 70:8 76: 5 79:9,19,24 80:4 81:3 87: 9 96:24 97:10 106:18 107: 7,9 108:4 115:9 116:5 117: 7,13 118:7,20,21 126:20, 25 130:4 134:17 138:11,22 145:3 149:2 150:14 151:4 152:22 155:7 156:13 157: 2,4 158:7,8,15 161:5 universally [5] 9:18 12:7 75:17,22 133:5 unlawful [25] 18:14,23 28: 7 41:19,24,25 59:3 69:23 70:13,16,23,24 71:3 72:7, 25 73:14 75:6 76:17 98:4 120:23 121:9 123:1 125: 13 154:5 156:7 unlawfully [2] 18:10 159: 23 unlawfulness [1] 121:14</p>	<p>unless [4] 41:8 98:15,15 142:1 unprecedented [1] 91:17 unresolved [1] 116:14 until [7] 13:15 38:9 44:22 74:16 129:21,22 130:11 untold [1] 35:24 unusual [1] 123:8 unworkable [1] 142:24 up [25] 22:6 29:19 33:5 34: 3 35:7 44:8 47:2,16 57:18 59:5,6 66:12 75:17 88:24 89:13 94:21 109:18,18 120:13 122:18 140:8,11 143:8,8 161:8 upend [1] 144:14 urge [1] 139:23 urgent [2] 160:24 161:1 useful [1] 124:10 using [1] 116:13</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p>vacate [1] 73:10 vacatur [4] 73:8 81:19,22 91:4 vaccine [2] 53:20 150:4 Value [1] 4:14 variation [1] 78:8 vary [2] 77:19 78:3 vast [3] 46:21 49:22 63:2 vehicle [2] 46:20 65:18 Venn [1] 132:3 verification [2] 101:24 113: 3 verifications [1] 102:9 versus [8] 4:5 62:17 73:5 92:19 106:14,17 110:23 150:24 vertical [1] 149:8 via [1] 66:4 view [7] 28:9 66:7 74:5 81: 25 87:5 151:21 154:1 viewed [1] 72:16 violate [1] 71:22 violated [1] 9:21 violates [3] 12:1 120:25 158:11 violating [5] 11:8 12:7 43: 3 47:17 74:9 violation [1] 140:19 violence [1] 13:10 Virginia [3] 106:15 107:6 150:24 visa [2] 56:24 153:19 vision [2] 161:14,17 visitor [1] 56:23 visitors [1] 4:18 voting [2] 14:24 109:7 vulnerable [2] 97:18 153: 16</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p>wait [2] 13:15 44:22 wanted [3] 60:18 119:17</p>
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## Official - Subject to Final Review

<b>146:8</b>	<b>15,25 144:7 149:25 159:9</b>
<b>wants</b> <sup>[3]</sup> <b>76:9 109:25 119:10</b>	<b>willing</b> <sup>[1]</sup> <b>35:3</b>
<b>War</b> <sup>[3]</sup> <b>78:5 105:7 151:13</b>	<b>win</b> <sup>[7]</sup> <b>5:18,19 48:4,19 49:1 51:8 66:8</b>
<b>warranted</b> <sup>[1]</sup> <b>125:24</b>	<b>winning</b> <sup>[2]</sup> <b>47:1 143:15</b>
<b>Warth</b> <sup>[4]</sup> <b>16:11 18:3 72:12 73:5</b>	<b>wins</b> <sup>[1]</sup> <b>109:8</b>
<b>WASHINGTON</b> <sup>[6]</sup> <b>1:14, 24 2:8,13 22:11 53:8</b>	<b>Winter</b> <sup>[10]</sup> <b>110:25 111:3 124:1,9,12 127:5 136:3 139:18 144:24 145:5</b>
<b>water</b> <sup>[2]</sup> <b>15:8,9</b>	<b>Winters</b> <sup>[1]</sup> <b>124:7</b>
<b>watermark</b> <sup>[1]</sup> <b>134:25</b>	<b>Wirtz</b> <sup>[1]</sup> <b>37:12</b>
<b>way</b> <sup>[37]</sup> <b>14:23 26:7 31:3,17 35:6 44:13 47:4 50:18 63:6 82:12 85:12 86:7 93:19 94:21 95:10,25 97:16 103:8 109:11,14 112:25 118:15 129:24 130:1 131:18 132:1 135:1 138:6 140:12 147:7,10 148:1,5 150:15 156:24 158:24 159:5</b>	<b>wise</b> <sup>[1]</sup> <b>26:22</b>
<b>ways</b> <sup>[10]</sup> <b>56:17 81:13 82:15 83:4 91:1 92:2 95:6 100:8 108:6 119:1</b>	<b>wished</b> <sup>[1]</sup> <b>93:10</b>
<b>weak</b> <sup>[1]</sup> <b>160:10</b>	<b>wishes</b> <sup>[1]</sup> <b>160:17</b>
<b>weapon</b> <sup>[2]</sup> <b>27:16,19</b>	<b>withdraw</b> <sup>[1]</sup> <b>100:1</b>
<b>week</b> <sup>[2]</sup> <b>62:1,4</b>	<b>within</b> <sup>[6]</sup> <b>33:13 60:14 61:7 108:8 117:1 136:2</b>
<b>weeks</b> <sup>[2]</sup> <b>107:22 151:10</b>	<b>without</b> <sup>[23]</sup> <b>22:17 30:25 38:10 41:4 51:3 69:1 78:8 82:18 93:14 95:4,17 96:4 102:21 103:23 104:5,5 112:6,20 113:22 133:7 143:10 144:11 145:7</b>
<b>weird</b> <sup>[1]</sup> <b>94:6</b>	<b>Witnesses</b> <sup>[1]</sup> <b>107:7</b>
<b>welcome</b> <sup>[4]</sup> <b>6:5 79:6 119:25 126:12</b>	<b>woman</b> <sup>[1]</sup> <b>46:11</b>
<b>West</b> <sup>[3]</sup> <b>106:14 107:6 150:24</b>	<b>won</b> <sup>[2]</sup> <b>94:17 106:25</b>
<b>Western</b> <sup>[2]</sup> <b>22:11 53:8</b>	<b>wonder</b> <sup>[1]</sup> <b>71:15</b>
<b>whatever</b> <sup>[2]</sup> <b>97:20 148:1</b>	<b>wondering</b> <sup>[1]</sup> <b>19:13</b>
<b>whatsoever</b> <sup>[1]</sup> <b>10:14</b>	<b>Wong</b> <sup>[6]</sup> <b>11:11 14:1 105:16,23 123:1 160:7</b>
<b>whenever</b> <sup>[1]</sup> <b>36:22</b>	<b>words</b> <sup>[4]</sup> <b>7:6 24:14 30:18 62:21</b>
<b>whereas</b> <sup>[1]</sup> <b>155:7</b>	<b>work</b> <sup>[8]</sup> <b>56:1 57:3,25 83:19 89:16,22 105:17 119:19</b>
<b>Whereupon</b> <sup>[1]</sup> <b>162:1</b>	<b>workability</b> <sup>[7]</sup> <b>96:16 105:10 111:2,5,10 142:1,7</b>
<b>whether</b> <sup>[34]</sup> <b>17:9,10 19:13 33:19 47:2 51:4 56:24 60:13 67:20 72:15 76:4 96:1,3,7,12 99:2 101:8 110:14 113:2,3,23 120:21,24 121:8 122:11 123:16,23 128:2 129:24 138:25 145:3 146:2 150:5 159:6</b>	<b>workable</b> <sup>[14]</sup> <b>79:18 81:14 86:21 91:2 95:11 99:18 109:1 110:24 119:7 120:3,6 141:15,17 142:19</b>
<b>Whitford</b> <sup>[4]</sup> <b>14:23 16:12 18:6 72:13</b>	<b>workers</b> <sup>[1]</sup> <b>104:4</b>
<b>who's</b> <sup>[2]</sup> <b>14:9 47:1</b>	<b>world</b> <sup>[7]</sup> <b>26:14 27:25 70:17 72:2 135:9 155:8 156:2</b>
<b>who've</b> <sup>[1]</sup> <b>80:24</b>	<b>worried</b> <sup>[4]</sup> <b>41:3 140:3,10,11</b>
<b>whole</b> <sup>[9]</sup> <b>14:15,16 19:17 26:14 38:17 89:11,16 121:15 135:25</b>	<b>worry</b> <sup>[3]</sup> <b>55:13 76:12 147:3</b>
<b>wholly</b> <sup>[1]</sup> <b>142:9</b>	<b>worrying</b> <sup>[1]</sup> <b>112:6</b>
<b>whom</b> <sup>[3]</sup> <b>49:22 70:3 156:5</b>	<b>wrinkle</b> <sup>[1]</sup> <b>130:8</b>
<b>widespread</b> <sup>[1]</sup> <b>60:1</b>	<b>writings</b> <sup>[1]</sup> <b>79:20</b>
<b>Wilkins</b> <sup>[1]</sup> <b>160:9</b>	<b>wrote</b> <sup>[1]</sup> <b>78:5</b>
<b>Wilkinson</b> <sup>[1]</sup> <b>64:16</b>	
<b>will</b> <sup>[32]</sup> <b>4:3 28:14 36:17,18,24 46:13 52:2,2,23 56:13 57:13 87:11 90:1 93:1 98:20 101:14 103:8,10 104:19 109:22 113:25 115:16 120:4 126:7 134:7 140:4 143:1,</b>	

## Y

**year** <sup>[6]</sup> **77:14 102:4 112:5 149:25 150:6 151:12**  
**years** <sup>[13]</sup> **13:21 35:7,17,23 36:12,12 53:15 78:20 87:4 114:4 123:2 144:15 152:5**  
**yields** <sup>[1]</sup> **39:21**  
**York** <sup>[4]</sup> **60:20 109:7,16 139:6**  
**Young** <sup>[1]</sup> **107:20**  
**yourself** <sup>[1]</sup> **28:2**