

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FRANCHISE TAX BOARD OF CALIFORNIA, )  
  ) Petitioner, )  
  ) v. ) No. 17-1299  
GILBERT P. HYATT, )  
  ) Respondent. )  
- - - - -

Pages: 1 through 59  
Place: Washington, D.C.  
Date: January 9, 2019

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3   FRANCHISE TAX BOARD OF CALIFORNIA, )  
4                           Petitioner,                    )  
5                           v.                                ) No. 17-1299  
6   GILBERT P. HYATT,                                        )  
7                           Respondent.                    )  
8   - - - - -

9  
10   Washington, D.C.  
11   Wednesday, January 9, 2019

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13                           The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 10:03 a.m.

16  
17   APPEARANCES:

18   SETH P. WAXMAN, ESQ., Washington, D.C. ;  
19                           on behalf of the Petitioner.

20   ERWIN CHERMERINSKY, ESQ., Berkeley, California ;  
21                           on behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SETH P. WAXMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ERWIN CHEMERINSKY, ESQ.	
7	On behalf of the Respondent	27
8	REBUTTAL ARGUMENT OF:	
9	SETH P. WAXMAN, ESQ.	
10	On behalf of the Petitioner	56
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 17-1299,  
5 Franchise Tax Board of California versus Hyatt.  
6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN  
8 ON BEHALF OF THE PETITIONER

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

11 The participants in the ratification  
12 debates disagreed about whether the new  
13 constitution would, or should, subject states  
14 to suit in the new courts of the soon-to-be  
15 superior sovereign, but they were unanimous in  
16 their understanding that states could not be  
17 sued in the courts of other states.

18 Edmund Pendleton, chairing the  
19 Virginia Convention, proclaimed "the  
20 impossibility of calling a sovereign before the  
21 jurisdiction of another sovereign," echoing  
22 writings and speeches given by Hamilton,  
23 Marshall, and Madison, among others. In  
24 Chisholm itself, Edmund Randolph --

25 JUSTICE SOTOMAYOR: Counsel, it's nice

1 that they felt that way, but what we know is  
2 they didn't put it in the Constitution. And so  
3 we talk a lot now about not relying on  
4 legislative history but relying on the plain  
5 text of the Constitution.

6 Could you tell me what there is in our  
7 original case, the Nevada -- in our original  
8 case, that didn't address this argument and say  
9 it wasn't compelling?

10 MR. WAXMAN: So --

11 JUSTICE SOTOMAYOR: What is new  
12 from --

13 MR. WAXMAN: Are -- you say the  
14 original case. Do you mean Nevada versus Hall?

15 JUSTICE SOTOMAYOR: Yes. What's --  
16 what -- what is new --

17 MR. WAXMAN: Well --

18 JUSTICE SOTOMAYOR: -- in any of the  
19 arguments that were raised in Nevada versus  
20 Hall that weren't addressed by the Court?

21 MR. WAXMAN: Well, as we point out --  
22 first of all, what was new --

23 JUSTICE SOTOMAYOR: I know you say it  
24 was wrong. Putting aside the wrongness.

25 MR. WAXMAN: I -- I want to -- I want

1 to -- I -- I -- I'm not going to harp on the  
2 wrongness. I think that's relatively clear  
3 from our petition and our merits brief.

4 JUSTICE SOTOMAYOR: Well, I know  
5 that's your position, but let's --

6 MR. WAXMAN: Yeah. I think before I  
7 address what the Court missed in Nevada versus  
8 Hall, I just want to point out that when you  
9 say what changed, the only thing -- Nevada  
10 versus Hall represents the only case in state  
11 or federal court in the 200 years prior that  
12 had ever recognized the ability of one state to  
13 compel another state to answer. It cited zero  
14 cases.

15 And while it isn't new, from the time  
16 this Court -- at least the time this Court  
17 decided Hans versus Louisiana until whatever  
18 its most recent case was on sovereign immunity,  
19 it has always stated repeatedly, uniformly,  
20 that, as the Court explained in -- in Alden,  
21 state sovereign immunity is demarcated by  
22 fundamental postulates implicit in the  
23 constitutional design. It -- "sovereign  
24 immunity derives from the structure of the  
25 original constitution."

1                   Now I can --

2                   JUSTICE SOTOMAYOR: So what do you  
3 think is the structure, since most sovereign  
4 immunity -- there's a lot of customary law  
5 involving it, but, at the essence, and it was  
6 this way in the United States for a very long  
7 time, recognizing the sovereign immunity of a  
8 foreign state was at the discretion of the host  
9 state.

10                  MR. WAXMAN: So --

11                  JUSTICE SOTOMAYOR: Now the U.S.  
12 followed the pattern, but, in the Tate letter,  
13 it changed it around. What do you think in the  
14 constitutional design reflects the willingness  
15 of one state to give up its power to protect  
16 its own citizens from the actions of another  
17 state who might intrude directly?

18                  Now we know, because we recently had a  
19 case, that states can be sued. Were you on  
20 that case? I can't remember now.

21                  MR. WAXMAN: I don't know what you're  
22 talking about.

23                  (Laughter.)

24                  JUSTICE SOTOMAYOR: That there --  
25 yeah. We had a case recently where there's a

1 question about whether a state can be sued to  
2 quiet title in another state. So, if one state  
3 owns property in another state, it can be  
4 hauled into court to quiet title of that  
5 property.

6           So we know that the rule wasn't  
7 absolute possibly, and so the question I have  
8 is where in the constitutional design do we  
9 see, and in light of the -- of the  
10 constitutional reservation to states of all  
11 powers not designated by the Constitution,  
12 their willing -- their ability to protect their  
13 own citizens in their own states?

14           MR. WAXMAN: Okay. So I'm going to --  
15 I'm going to give you what I believe are the  
16 textual -- the textual basis in the  
17 Constitution itself for the implicit plan, the  
18 underlying postulate that this Court has  
19 recognized for well over 130 years.

20           But let me just address first your  
21 point about, you know, international --  
22 national comity -- international comity under  
23 the law of nations. It is true that nations  
24 with no superior sovereign and no superior --  
25 and no mechanism to enforce their rights under



1 the law of nations had the raw power to violate  
2 the law of nations obligation that friendly  
3 states respect each other's sovereign immunity,  
4 just as nations had the raw power to violate  
5 each other's borders or declare war or to  
6 refuse to recognize each other's judgments.

7 But the states of the union, in  
8 ratifying the Constitution to -- to form a more  
9 perfect union, surrendered their powers to  
10 treat each other as legal strangers. They gave  
11 up the so -- the perhaps --

12 JUSTICE KAGAN: But just so I  
13 understand you --

14 MR. WAXMAN: -- wild west of  
15 international law.

16 JUSTICE KAGAN: Mr. Waxman, just so I  
17 understand you, are you saying that the states,  
18 pre the Constitution, were in the same position  
19 as foreign nations? In other words, it was --  
20 their immunity then was a matter of comity,  
21 rather than as -- a matter of legal  
22 requirement? Is that correct?

23 MR. WAXMAN: So my view is -- my view  
24 is -- and I think this is -- this is well  
25 recognized in the Court's cases -- that prior

1 to -- certainly, prior to the Articles of  
2 Confederation, but, you know, in any event,  
3 prior to the Constitution, the states stood in  
4 respect to each other and had obligations under  
5 the law of nations.

6 And the law of nations, you know, it's  
7 true that the -- in essence, the law of nation  
8 obligation to not haul an unconsenting  
9 sovereign into your courts was unenforceable,  
10 and it's true that this Court has referred to  
11 it as, therefore, in effect, a matter of  
12 comity.

13 And states were in that situation.  
14 But this Court explained in First National City  
15 Bank versus the Bank of China and in the  
16 Sabbatino versus Cuba case that -- and it's  
17 reflected in The Schooner Exchange itself, that  
18 what comity meant was that there was no  
19 obligation to adhere to -- to apply that or any  
20 other law of nations except with respect to  
21 friendly nations that the sovereign recognized.

22 JUSTICE ALITO: What do you --

23 MR. WAXMAN: And those -- that  
24 certainly characterized the -- the states of  
25 the union. And that's why, you know, this

1 Court in Alden and many other cases said that  
2 "the contours of sovereign immunity are  
3 determined by the founders' understanding."  
4 And their understanding, expressed by the anti-  
5 federalists, the federalists who thought it  
6 would be terrific if states could be sued in  
7 federal court, and the federalists who -- like  
8 Madison and Marshall, who assured everyone that  
9 it wouldn't, they all understood that because  
10 the states were recognized by each other and  
11 were friendly, there was an absolute law of  
12 nations immunity.

13 JUSTICE BREYER: It's odd then that  
14 Marshall didn't say that in Schooner McFaddon,  
15 nor did Joseph Story in Santissima Trinidad or  
16 whatever it is, nor did Vattel. What they said  
17 was it's a question of consent, that, of  
18 course, the state -- I mean, I can read it to  
19 you: "All exceptions to the full and complete  
20 power of a nation within its own territory must  
21 be traced up to the consent of the nation  
22 itself." And --

23 MR. WAXMAN: Yes.

24 JUSTICE BREYER: -- that's what they  
25 said.

1 MR. WAXMAN: Yes. And --

2 JUSTICE BREYER: I didn't find  
3 language like raw power. But what I found was  
4 it's a matter of comity. It's a matter of  
5 consent. And, of course, most nations follow  
6 it.

7 But, if somebody didn't, you couldn't  
8 say it violated international law. And then  
9 the question that I'd like to hear the answer  
10 to is -- is what Justice Sotomayor asked. And,  
11 of course, the founders were all talking about  
12 a situation where they were worried about  
13 federal power and the federal suit and bringing  
14 who could sue people under the federal power.

15 So, when I looked at this before,  
16 which I did, I found international authority  
17 after international authority, many, that said  
18 just what Marshall said, that said just what  
19 Story said, and you say, well, are states  
20 different? Well, they're not different in two  
21 respects.

22 Almost all of them do give immunity to  
23 the other state. But, if you find an outlier  
24 that doesn't, you can't say it violates  
25 international law. Were they states? There we

1 have Justice Sotomayor's question.

2 MR. WAXMAN: With --

3 JUSTICE BREYER: And what in the  
4 Constitution, it would have to be something  
5 that in this respect makes them less sovereign,  
6 what is it that says you can't have an outlier?

7 MR. WAXMAN: So, when you say, you  
8 know, if some states refuse to recognize that  
9 principle, well, that was one thing. No state  
10 before ratification, until Nevada versus Hall,  
11 had ever done such a thing.

12 This Court before Nevada versus Hall  
13 in a half a dozen cases stretching over 100  
14 years --

15 JUSTICE BREYER: I know they didn't.  
16 That isn't quite my question.

17 MR. WAXMAN: Well, but --

18 JUSTICE BREYER: Of course, they  
19 didn't.

20 MR. WAXMAN: So --

21 JUSTICE BREYER: Almost all countries  
22 recognize sovereign immunity. But you might  
23 have one, I mean, I don't know, maybe Tasmania  
24 if it was a country then didn't recognize it  
25 and the question is, do you have to?

1 MR. WAXMAN: So --

2 JUSTICE BREYER: And the answer of  
3 Marshall, Story, Vattel, no, you don't have to.

4 MR. WAXMAN: So I think Vattel, who  
5 was quoted and referenced in -- I'm going to  
6 talk about Vattel, The Schooner Exchange, and  
7 then the point of what changed when the  
8 Constitution was adopted, and then where in the  
9 text of the Constitution I'm citing my  
10 authority, which I -- I forgot to address.

11 Vattel and other commentators at the  
12 time whose jurisprudence was also referenced in  
13 the ratification debate held -- stated that  
14 sovereign immunity was a mandatory limit on the  
15 power of one sovereign to adjudicate another's  
16 claim, another -- to adjudicate claims against  
17 another sovereign. And he held that the  
18 response to a violation of that law of nations  
19 was war.

20 Now, in The Schooner Exchange, Chief  
21 Justice Marshall says: Of course, you -- a  
22 sovereign has absolute territory -- absolute  
23 discretion over its own territory.

24 There is a law of nations principle  
25 that friendly nations whose -- in that case

1 whose ships appear in our ports, whose  
2 sovereign ships that appear in our ports, under  
3 the law, there are certain principles under the  
4 law of nations in which the host state is  
5 deemed as a matter of the law of nations to  
6 have waived its sovereign authority to have its  
7 courts exercise jurisdiction. And he explained  
8 why that was the case. That is, there was an  
9 implicit consent.

10 Now, in the plan of convention, the  
11 states -- you know, at international law, if  
12 there was a violation of it, the nations had  
13 all sorts of retaliatory measures. They could  
14 blockade each other, embargo each other, make  
15 war on each other, all sorts of things.

16 JUSTICE BREYER: Well, Marshall --  
17 Marshall, who is a pretty good authority -- I  
18 happen to know this because we had this case  
19 before. But if you --

20 MR. WAXMAN: You did?

21 JUSTICE BREYER: -- look at quotes 4,  
22 Vattel, 472, okay, and what he says Vattel says  
23 -- I never read all those pages, I read some of  
24 them -- he says Vattel says that the consent of  
25 a foreign sovereign may be implied through a

1 tacit convention, but it suggests that it  
2 rested upon consent.

3 MR. WAXMAN: So -- and --

4 JUSTICE BREYER: It says that consent  
5 may be applied.

6 MR. WAXMAN: Yes, and with respect,  
7 Justice Breyer, what The Schooner Exchange says  
8 several times in Justice Mar -- Chief Justice  
9 Marshall's opinion, is that the state --  
10 sovereign states are deemed to have consented  
11 to recognize the sovereign immunity of other  
12 sovereigns in those instances in which, and  
13 that are enumerated, and he explains why a  
14 visiting warship of a friendly nation is one of  
15 those things.

16 JUSTICE BREYER: Well, I don't want to  
17 waste time.

18 JUSTICE ALITO: Mister --

19 MR. WAXMAN: Now, even if -- even if  
20 I'm -- oh, I'm sorry. Can I?

21 JUSTICE ALITO: Yeah, sure.

22 MR. WAXMAN: Even if I'm wrong about  
23 that, the fact of the matter is that in the  
24 plan of convention and in the text itself, the  
25 states, in order to form a more perfect union,



1 surrendered all of the retaliatory means that  
2 nations would have had in order to deter or  
3 enforce --

4 JUSTICE KAGAN: Well, that's what I  
5 understood --

6 MR. WAXMAN: -- or punish violations,  
7 and --

8 JUSTICE KAGAN: Mr. Waxman, that's  
9 what I understood your basic argument to be,  
10 right, that there was this system of comity, it  
11 all worked very well, essentially at least in  
12 part because states knew that they had all  
13 these powers that they could use against each  
14 other, and then they gave up those powers at  
15 the convention. So what replaced it? What  
16 replaced it was a constitutional rule. That's  
17 your basic story. Is that correct?

18 MR. WAXMAN: Yes, a constitutional --

19 JUSTICE KAGAN: And I guess I just  
20 find myself thinking that, I mean, sort of, you  
21 know, going back to Justice Sotomayor's  
22 question, what's the evidence of that, because  
23 this is a gigantic constitute -- you know,  
24 constitutional debate. There are a thousand  
25 issues on the table. Everybody has things that

1 they want.

2 And this idea that there's this  
3 one-for-one exchange that you have, we give up  
4 our power to blockade, we get a rule of  
5 sovereign immunity, I mean, that's just not how  
6 big negotiations work.

7 MR. WAXMAN: What was --

8 JUSTICE KAGAN: And unless you can  
9 show me evidence that that was the trade, I  
10 mean, if I could just -- if you would bear with  
11 me for one more moment -- Professors Baude and  
12 Sachs tell about another trade. Their trade is  
13 that there wasn't a rule of sovereign immunity,  
14 but the states retained their ability not to  
15 enforce judgments against them if they violated  
16 their own immunity.

17 So I guess what I'm saying is all of  
18 these trades, you can hypothesize them, but  
19 they are just hypotheses. And what's the  
20 evidence for any of them?

21 MR. WAXMAN: So I would say the  
22 evidence -- I mean, there -- there is a lot of  
23 evidence -- I don't think there's any  
24 disagreement that the framers intended to  
25 constitutionalize fundamental aspects of

1 sovereignty.

2           The reference to the former colonies  
3 as states, the reference to in the privileges  
4 and immunities clause of citizens of states,  
5 the limitation, the express limitations in the  
6 Constitution, including Section 10 of Article  
7 I, and, of course, the Eleventh Amendment  
8 itself, make sense only if the states are  
9 sovereign.

10           JUSTICE ALITO: Well, maybe that's --

11           MR. WAXMAN: Now --

12           JUSTICE ALITO: -- your answer to this  
13 question, but I'm still, you know -- because we  
14 are all always very vigilant not to read things  
15 into the Constitution that can't be found in  
16 the text, I'm waiting for the answer to Justice  
17 Sotomayor's question about what provisions of  
18 the Constitution you would point to.

19           MR. WAXMAN: So I -- I've -- I would  
20 point to the provisions of the Constitution  
21 that are enumerated by Justice Scalia in his  
22 opinion for the Court in Printz, which were  
23 reiterated again by Justice Kennedy for the  
24 Court in Alden, some of which I have -- I have  
25 recognized, I -- I have -- I have already

1 recited.

2           The -- the -- preserving fundamental  
3 aspects of sovereignty yet withdrawing the  
4 ability to protect sovereignty vis-a-vis either  
5 nations or other states was in -- in exchange  
6 for a guarantee that the then law of nations --  
7 the then principle of sovereignty under the law  
8 of nations would be protected by the  
9 Constitution and enforced by this Court.

10           Justice Kagan has referred to it as a  
11 one-for-one bargain. But what there really  
12 was, was the plan -- the genius of the  
13 Constitution, the structural provisions of the  
14 Constitution was that the states, having had an  
15 unsatisfactory experience with confederation,  
16 by ratifying, they surrendered their powers to  
17 treat each other as legal strangers.

18           In other words, in Chief Justice  
19 Marshall's words, they were deemed to waive  
20 whatever sovereign prerogative they had to  
21 violate the law of nations principle and haul  
22 one another into each other's courts. And --

23           JUSTICE KAVANAUGH: Given how --

24           MR. WAXMAN: -- that I -- I -- I mean

25 --

1           JUSTICE KAVANAUGH: Given -- given how  
2 important this is, as you describe, why is it  
3 not in the text of the Constitution in your  
4 view, given that the Constitution is a  
5 document, in my view, of majestic specificity.  
6 It's got a lot of specific details on very  
7 minute things, and this issue which you say  
8 rightly is so important, but then somehow was  
9 not mentioned in the text of the Constitution.

10           MR. WAXMAN: Well, I mean, this --  
11 this Court has been explaining at least since  
12 Hans that the principle of sovereign  
13 immunity -- of state sovereign immunity was so  
14 fundamental that it is a postulate that  
15 underlies and gives meaning to other provisions  
16 of the Constitution, including, as -- as then  
17 Justice Rehnquist explained in his dissent in  
18 Nevada versus Hall, the Eleventh Amendment  
19 itself.

20           But, in this regard, Justice  
21 Kavanaugh, this principle of state sovereign  
22 immunity is no different than Chief Justice  
23 Marshall's recognition in McCulloch versus  
24 Maryland of the constitutional principle of  
25 intergovernmental immunity, of the principle

1 against commandeering that's recognized by the  
2 Court in Printz and New York versus United  
3 States, in the principle --

4 JUSTICE SOTOMAYOR: Mr. Waxman --

5 MR. WAXMAN: -- the equal footing  
6 doctrine and the Dormant Commerce Clause. The  
7 Constitution was not, as -- as commentators and  
8 I believe some of the founders explained, was  
9 not meant to replicate a European code of laws  
10 and regulations. There were some things that  
11 were understood and were fundamental to the  
12 union that are not expressed in texts like  
13 those doctrines.

14 JUSTICE SOTOMAYOR: Mr. Waxman, when  
15 the states disagreed with us in Chisholm about  
16 the ability to haul states into federal court,  
17 the states amended the Constitution. We got  
18 the Eleventh Amendment.

19 We have 44 states suggesting we  
20 overrule Hall. That's two-thirds of the  
21 states. Why don't they move to get the  
22 Constitution amended if we're getting it wrong?  
23 You're asking us to do their work.

24 If this is such a important principle  
25 to them, they could express it very directly

1 the way they did in -- in the Eleventh  
2 Amendment.

3 MR. WAXMAN: Well, that -- that  
4 statement, that observation, Justice  
5 Sotomayor -- and, by the way, I mean, including  
6 California, there are 47 states. So we have  
7 three states that haven't spoken.

8 JUSTICE SOTOMAYOR: They've got a lot  
9 of --

10 MR. WAXMAN: But a lot of states --

11 JUSTICE SOTOMAYOR: -- representatives  
12 in the House and in the Senate. If they're  
13 really excised, they can do something about it.

14 MR. WAXMAN: You know, Justice --

15 JUSTICE SOTOMAYOR: Except -- but,  
16 instead, they're choosing to let us decide --

17 MR. WAXMAN: You -- you could have  
18 said --

19 JUSTICE SOTOMAYOR: -- that an  
20 individual state doesn't have the right to  
21 protect its citizens.

22 MR. WAXMAN: You could have said  
23 exactly the same thing about why Parden  
24 shouldn't be overruled. You could say exactly  
25 the same thing about any number of outlier,

1 anomalous constitutional decisions of this  
2 Court that were then overruled.

3 There is always, of course, the option  
4 of amending the Constitution. The --

5 JUSTICE SOTOMAYOR: But this is a very  
6 serious step.

7 MR. WAXMAN: Yes.

8 JUSTICE SOTOMAYOR: We are entrenching  
9 very directly on the state's right to protect  
10 its citizens. And there are amici who suggest  
11 that there are principles that can cabin that.  
12 We've already recognized them. This turned --  
13 this turned from a multimillion-dollar case  
14 into, what, a \$100,000 case now?

15 MR. WAXMAN: And counting.

16 JUSTICE SOTOMAYOR: Well, that's  
17 because of the attorneys, but --

18 (Laughter.)

19 MR. WAXMAN: It's always the  
20 attorneys.

21 JUSTICE SOTOMAYOR: Always the  
22 attorneys.

23 MR. WAXMAN: Well, and the millions of  
24 dollars in costs that the sovereign State of  
25 California has expended defending itself. And



1 this is not some one-off problem. This is, in  
2 fact, a significant problem.

3 We cited a half a dozen recent cases.  
4 The -- the states themselves have added another  
5 10. And just this weekend, the newspapers  
6 reported -- I mean, this is -- this is  
7 astonishing -- in talking -- talking about  
8 disrespecting the dignity and sovereignty of  
9 states, a Nevada citizen sued the Commonwealth  
10 of Massachusetts in Nevada state court, Steve  
11 Wynn, the casino operator, and he sought and on  
12 Friday evening obtained an injunction from a  
13 Nevada state judge enjoining the Massachusetts  
14 Department of Gaming Regulation from issuing a  
15 report it had prepared evaluating the  
16 suitability of Mr. Wynn to operate a casino in  
17 the Boston area. That's the nature of the  
18 problem.

19 Now, yes, the states could propose an  
20 amendment to a constitution. Our Constitution  
21 is not amended lightly. And the fact of the  
22 matter is -- and we've cited a number of state  
23 court, state supreme court, decisions that  
24 followed Nevada versus Hall. They all express  
25 shock, the same kind of shock and surprise that

1 met Chisholm. It's true Chisholm produced a --  
2 a very under-inclusive constitutional  
3 amendment, but they were -- all these state  
4 supreme courts are basically saying, okay,  
5 well, you know, we all thought for 200 years  
6 before Nevada versus Hall that we couldn't  
7 exercise sovereignty, we couldn't exercise  
8 judicial power over another state's sovereign.

9 And, in fact, in 19 -- I think it was  
10 1961, in the Western Union case, this Court  
11 dismissed a suit in the Pennsylvania state  
12 courts on the grounds that New York was a  
13 necessary power -- was a necessary --

14 JUSTICE KAGAN: Mr. Waxman, if I could  
15 take you back to some of the questions you were  
16 previously asking, because I want to give you a  
17 chance to sort of give your best argument,  
18 which is, you know, given that you're claiming  
19 that the system of comity, which was working  
20 well for all the states, that this system was  
21 converted into a particular constitutional rule  
22 at the framing, and a very particular one,  
23 because there could have been other ways, as  
24 Professors Baude and Sachs suggest, for the  
25 states to protect themselves.

1           Given that that's what you're  
2           claiming, what is the best -- and I'll -- I'll  
3           expand what some of my colleagues had said.  
4           You don't have to give me even textual  
5           evidence. What's the best textual or  
6           historical evidence that the states made  
7           exactly this bargain at the framing?

8           MR. WAXMAN: Okay. Let me take a try  
9           with something I haven't hauled out yet.

10           Inherent in our federal union is the  
11           principle that no state may regulate the  
12           government of another state. And just as one  
13           state's governor can't direct the bureaucracy  
14           of another and one state's legislature can't  
15           regulate the government actions of another, one  
16           state's judiciary can't call another state's  
17           government to the bar of the court and sanction  
18           it for carrying out its own laws.

19           That is unconstitutional interference  
20           with the independence of the states, just as  
21           reflected in these other non-textual  
22           constitutional principles that I previously  
23           identified.

24           Now you've referred a couple times to  
25           this amicus brief by Professor -- Professors

1 Baude and Sachs. Professors Baude and Sachs  
2 acknowledge that there was a universal rule in  
3 the law of nations. Their argument is it  
4 wasn't constitutionalized; it just stayed some  
5 sort of common law rule. It wasn't abrogated,  
6 but it wasn't constitutionalized.

7 The world in which -- the regime they  
8 envision in which states can ignore what they  
9 acknowledge to be a universal rule but don't  
10 worry about it, because by invoking common law  
11 precedents superseded 150 years ago by *Pennoyer*  
12 versus *Neff*, states can just refuse to honor  
13 any resulting judgment.

14 That is not the constitutional union  
15 that the framers envisioned or produced.  
16 That's my -- that's my best shot. If I could  
17 reserve the balance of my time.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Chemerinsky.

21 ORAL ARGUMENT OF ERWIN CHEMERINSKY

22 ON BEHALF OF THE RESPONDENT

23 MR. CHEMERINSKY: Good morning,

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

25 Forty years ago in *Nevada versus Hall*,

1 this Court held that states may exercise their  
2 sovereign power under the Tenth Amendment to  
3 define the jurisdiction of the courts to  
4 protect their citizens when they're injured,  
5 including by other states. There's no  
6 compelling reason for overruling this  
7 precedent, discarding stare decisis. At the  
8 very least, in this case, under the law of the  
9 case doctrine, this is the established law.

10 In Nevada versus Hall, this Court  
11 concluded by saying that to prevent states from  
12 exercising their jurisdiction in this manner  
13 would be the real intrusion on the power of the  
14 states and the people of the United States.

15 Under the Tenth Amendment, the  
16 question for this Court is, is there anything  
17 in the Constitution that keeps states from  
18 exercising this jurisdiction? I'd suggest this  
19 Court can look to three sources: the text of  
20 the Constitution itself, the Constitutional  
21 Convention, and the pre-ratification history.

22 JUSTICE SOTOMAYOR: Mr. Chemerinsky,  
23 your -- Mr. Waxman did point to something  
24 that's important. Intuitively and otherwise,  
25 we would say it would be wrong for one state to

1 tell another state how to run its government or  
2 how to run an agency or what rules it should  
3 follow within its own state.

4 What in -- then what is it that keeps  
5 them from doing that if it's not the  
6 constitutional structure?

7 MR. CHEMERINSKY: First, comity  
8 protects states. This is the comity that  
9 existed at the pre-ratification period and  
10 continues. This case shows the importance of  
11 that comity.

12 Initially, the Nevada Supreme Court  
13 excluded all negligence claims based on comity.  
14 Then the Nevada Supreme Court struck a \$250  
15 million punitive damage award based on comity.  
16 It shows that comity was protection both in the  
17 pre-ratification period and now.

18 JUSTICE SOTOMAYOR: I -- I just don't  
19 see comity being enough. I know one of your  
20 amici suggested that questions of personal  
21 jurisdiction should take care of most cases.

22 And, actually, I did look at this case  
23 and I was trying to figure out what it was that  
24 Nevada did to intrude or what California did to  
25 intrude physically on Nevada. And I know that

1 the supposed agent who was doing this  
2 investigation -- not supposed, she is an agent  
3 -- crossed state lines, I think it was alleged,  
4 and rummaged through garbage and rummaged  
5 through personal mail. Is that correct?

6 MR. CHEMERINSKY: Well, they invaded  
7 his property rights. They defamed him. They  
8 also revealed private information about him to  
9 a large audience.

10 JUSTICE SOTOMAYOR: But was that in  
11 Nevada or in California?

12 MR. CHEMERINSKY: That was in Nevada  
13 at his home they did these things. And I think  
14 it's crucial, Justice Sotomayor, because while  
15 there's the importance of one state not  
16 regulating another, there's also the crucial  
17 interest that a state has in protecting its  
18 citizens when they're injured, including by  
19 another state. This Court has long recognized  
20 that as a vital interest of the states.

21 But, to go back to your initial  
22 question, in addition to comity, in addition to  
23 personal jurisdiction, this Court created a  
24 very important protection for states when this  
25 case was last there. This Court said that a

1 state, when suing another state, is liable for  
2 no more than the form state would be liable  
3 for. So the damage judgment on the basis of  
4 that rule, which this Court found on full faith  
5 and credit, was limited to \$100,000.

6 I'd go back to your initial question  
7 to Mr. Waxman, the text of the Constitution.  
8 Where the text of the Constitution wanted to  
9 limit state power, it did so explicitly: the  
10 full faith and credit clause, the fugitive  
11 slave clause, the privilege and immunities  
12 clause. There is no textual provision in the  
13 Constitution that limits the power of a state  
14 under the Tenth Amendment to define its own  
15 jurisdiction provide a remedy for others when  
16 they're injured.

17 If you -- if you look at the  
18 Constitutional Convention, this wasn't  
19 discussed at the Constitutional Convention. In  
20 fact, in Nevada versus Hall, this Court  
21 explicitly said, and I quote, "it was not a  
22 matter of concern."

23 And then you can go to the  
24 pre-ratification period, and, Justice Kagan,  
25 you summarized it accurately. In the



1 pre-ratification period, the protection that a  
2 state had from another state was based on  
3 comity. In fact, if you look at pages 31 and  
4 32 of the Petitioner's brief, it explicitly  
5 says in the pre-ratification period there was  
6 no protection based on sovereign immunity. It  
7 was comity, the same comity that exists today  
8 to protect a state from another state.

9 JUSTICE KAVANAUGH: What do you do  
10 with Federalist 81, which said that it was  
11 inherent in the nature of sovereignty not to be  
12 amenable to the suit of an individual without  
13 its consent and said that would remain with the  
14 states? That was Hamilton speaking in  
15 Federalist 81, reflecting a notion that it's  
16 inherent to the nature of sovereignty.

17 Is that incorrect?

18 MR. CHEMERINSKY: No, Your Honor, it's  
19 not incorrect, but you must put it in the  
20 context in which it's written. The concern at  
21 that time was whether the new government and  
22 these new federal courts were able to hold  
23 state governments liable. They were very  
24 afraid because of debts they might be bankrupt.

25 And so Hamilton was providing

1 assurance to the states that they wouldn't be  
2 held liable in federal court. That's what the  
3 Eleventh Amendment was about, overruling  
4 Chisholm versus Georgia. It was about limiting  
5 the power of the federal courts relative to  
6 state governments.

7 Alden versus Maine was about the power  
8 of Congress to require a state to have suits  
9 against itself. In Nevada versus Hall, this  
10 Court said sovereign immunity existed to  
11 protect a government from being sued in its own  
12 courts. It was only comity that protected  
13 other states from being sued.

14 JUSTICE ALITO: But do you think it's  
15 plausible that there would be a great concern  
16 about a state's being sued in a federal court,  
17 which is a more neutral tribunal, but no  
18 concern about a state being sued in the state  
19 -- in the courts of another state?

20 MR. CHEMERINSKY: Yes, for two  
21 reasons, Your Honor.

22 First, the framers were very  
23 concerned, especially the anti-federalists were  
24 concerned about the powers of this new level of  
25 government, the federal courts. They had

1 already seen that they had protection state to  
2 state based on comity.

3 And, second, Your Honor, quite  
4 important, the states didn't want to give up  
5 their own power. Had the states put in the  
6 Constitution a limit on the ability to hear  
7 suits against other states, put a limit on  
8 state power, the states didn't perceive it  
9 necessary because of comity, and they didn't  
10 want to restrict their own authority.

11 JUSTICE ALITO: But the comity that  
12 exists -- well, what is your answer to the --  
13 to the argument that -- that once the United  
14 States was formed, either under the articles or  
15 under the Constitution, the relationship  
16 between the states was entirely different from  
17 the relationship among foreign states?

18 MR. CHEMERINSKY: Yes, Your Honor, it  
19 was different. Where the Constitution wanted  
20 to make it different, it said so explicitly in  
21 provisions like the full faith and credit  
22 clause, the fugitive slave clause, and the  
23 privilege and immunities clause. There is no  
24 indication of such a limit in the text of the  
25 Constitution, in the Constitutional Convention,

1 or from the pre-ratification era.

2 JUSTICE ALITO: You know, if  
3 California were a republic, I mean, we had the  
4 -- if we had the California republic, which is  
5 something some people in California would like  
6 --

7 (Laughter.)

8 JUSTICE ALITO: -- it would have a lot  
9 of leverage over Nevada that it doesn't have  
10 now, wouldn't it?

11 MR. CHEMERINSKY: Well, yes and no,  
12 Your Honor. Certainly --

13 JUSTICE ALITO: We could have, you  
14 know, it overwhelms it in every respect. So  
15 Nevada would have to be careful about what it  
16 did to California. But the situation now is  
17 different because they're states in the union.

18 MR. CHEMERINSKY: I think Nevada might  
19 already feel that California overwhelms it too  
20 much.

21 (Laughter.)

22 MR. CHEMERINSKY: But, in terms of  
23 international, I go back to Justice Breyer's  
24 point with regard to his questions to Mr.  
25 Waxman.

1           The Schooner Exchange case said that  
2           under the national law, the only protection a  
3           foreign country had on another sovereign was  
4           based on comity. And there's no indication  
5           that that was insufficient.

6           The reality is that this is an issue  
7           that relatively rarely arises.

8           CHIEF JUSTICE ROBERTS: Well, the  
9           remedy for the failure to accord comity at  
10          international law was recognized to be war.  
11          What remedy do the states have under your view  
12          if a state chooses not to extend comity to a  
13          sister state?

14          MR. CHEMERINSKY: Well, they certainly  
15          have remedy in this Court based on Hyatt II.  
16          The damages would be limited to the amount that  
17          the forum state would be liable.

18          And, second, they have a perspective  
19          remedy that's quite important. States can  
20          enter into a compact with one another to  
21          prevent themselves from being sued.

22          Justice Sotomayor talked about --

23          CHIEF JUSTICE ROBERTS: That requires  
24          an agreement of the other states.

25          MR. CHEMERINSKY: Well, for example,

1 to go back to Justice Alito's question,  
2 California and Nevada could enter into a  
3 compact any time they want that they will not  
4 allow suits in their courts against the other  
5 state. There's nothing to keep the states from  
6 doing that.

7 CHIEF JUSTICE ROBERTS: Well, but you  
8 have to assume that the -- the two states are  
9 willing to do that. Nevada may think that  
10 given the disparity in a number of respects  
11 between them and -- and California that its  
12 best hope is to be able to sue California in  
13 its states.

14 So it has an entirely different view  
15 of the significance of that right than  
16 California would. The idea that, well, you can  
17 just go agree on something is not going to be a  
18 complete answer.

19 MR. CHEMERINSKY: Well, Your Honor,  
20 that's true, but then you go back to the Tenth  
21 Amendment. Does Nevada have the sovereign  
22 power as a state to choose to not enter a  
23 compact, to define the jurisdiction of its  
24 courts, and be able to provide a remedy when  
25 its citizens are injured by another state?

1           That is part of its sovereign power,  
2           which is exactly what Nevada versus Hall said.

3           Mr. Waxman says that there were no  
4           cases prior to Nevada versus Hall.  Actually,  
5           if you look at Footnote 29 in Nevada versus  
6           Hall, it does cite to a case, State of Georgia  
7           versus City of Chattanooga.  It says that, if a  
8           state owns property in another state, it's  
9           subject to eminent domain and judicial  
10          proceedings in that state, like any other owner  
11          of property.

12          I think the key is there weren't many  
13          cases either before Nevada versus Hall, and  
14          there aren't many cases since Nevada versus  
15          Hall.  That's because this isn't something that  
16          arises very frequently.  But, when it does  
17          arise, it is so important that a state be able  
18          to exercise its sovereign power.

19          But, Your Honor, I would stress to you  
20          that this doesn't come to the Court on a blank  
21          slate, that there's a 40-year-old precedent,  
22          and this Court has made clear that it will  
23          overrule stare decisis only if there's a  
24          compelling reason.

25          Everything that Mr. Waxman said to you

1 today about the plan of the convention was  
2 argued to this Court in 1979 in Nevada versus  
3 Hall. Nothing has changed since then.

4 Mr. Waxman in his brief points to this  
5 Court's sovereign immunity decisions, but  
6 they're quite distinguishable. Most of them  
7 have been about the Eleventh Amendment and the  
8 power of the federal courts. And, of course,  
9 that's quite different than whether or not the  
10 Constitution prohibits a state from hearing  
11 suits brought by citizens of another state.

12 Alden versus Maine is quite  
13 distinguishable because it involved whether  
14 Congress could force a state to have suits  
15 against itself. In Alden versus Maine, this  
16 Court explicitly drew a distinction between  
17 sovereign immunity court, a state in its own  
18 courts, as opposed to the ability to sue  
19 another -- citizens of another state to sue in  
20 state court. Alden versus Maine very clearly  
21 said that it was consistent with Nevada versus  
22 Hall.

23 And so, in that sense, there is  
24 nothing that is changed since this was argued  
25 to this Court in 1979. And there's no



1 compelling reason for overturning stare  
2 decisis.

3 Finally, I would argue to you that, at  
4 the very least, the law of the case doctrine is  
5 controlling in this case.

6 JUSTICE KAVANAUGH: Just on the stare  
7 decisis question --

8 MR. CHEMERINSKY: Yes, please.

9 JUSTICE KAVANAUGH: -- wouldn't --  
10 wouldn't it be relevant, though, that the case  
11 law that's developed subsequent to Nevada  
12 versus Hall seems quite inconsistent with the  
13 principles in the majority opinion and more  
14 consistent with the principles in Justice  
15 Rehnquist's dissent and the series of cases  
16 that you describe?

17 In other words, if we were five years  
18 after Nevada v. Hall being asked to overrule  
19 it, that might have been a harder hill to  
20 climb, but now that you have all these other  
21 cases, that might leave Nevada versus Hall  
22 seeming an outlier.

23 How do you respond to that argument?

24 MR. CHEMERINSKY: I -- I disagree. I  
25 think that all of the subsequent cases were in

1 a very distinguishable context. Primarily,  
2 they were about Congress's authority to  
3 authorize suits against states. They're about  
4 whether or not federal courts can enter suits  
5 against states. Alden versus Maine was whether  
6 or not Congress can require that a state court  
7 hear suits against the state.

8 None of them involved the Tenth  
9 Amendment question presented in this case: Is  
10 there anything in the Constitution that  
11 prohibits a state from exercising jurisdiction?

12 But I'd especially direct you to the  
13 language in Alden versus Maine at 527 at 738.  
14 The Constitution did not reflect an agreement  
15 among the states to respect the sovereign  
16 immunity of one another, or at the same  
17 decision, Alden versus Maine, pages 739 and  
18 740, says a distinction is drawn between a  
19 sovereign's immunity in its own courts and its  
20 immunity in the courts of another sovereign.

21 And so we're asking you not simply to  
22 adhere to Nevada versus Hall but also to adhere  
23 to what this Court said in Alden versus Maine.  
24 And so, in that sense, Justice Kavanaugh,  
25 nothing has changed since 1979 in the

1 jurisprudence of this Court that would cast  
2 doubt upon the holding in Nevada versus Hall.

3 JUSTICE KAGAN: How -- how should we  
4 think about the fact that 47 or 45 or whatever  
5 it is states have joined in this amicus brief,  
6 indicating that they think that their sovereign  
7 immunity power is a good deal more important  
8 than the power that you've referenced to  
9 protect their own citizens in their own courts?

10 MR. CHEMERINSKY: The attorney  
11 generals of those states filed a brief saying  
12 they don't want to have to defend suits. And I  
13 am sure the attorney generals of those states  
14 would like to see you overrule Nevada versus  
15 Hall, but I don't think you can equate a brief  
16 filed by state attorney generals with the  
17 position of state governments, either state  
18 legislatures or state judiciaries.

19 Indeed, if states cared so deeply, not  
20 only could they amend the Constitution, as  
21 Justice Sotomayor said, but as I said to Chief  
22 Justice Roberts, they could enter into compacts  
23 with one another to protect themselves from  
24 suit.

25 CHIEF JUSTICE ROBERTS: Well, it's a

1 pretty --

2 JUSTICE KAGAN: Have there been  
3 attempts --

4 CHIEF JUSTICE ROBERTS: It's a pretty  
5 remarkable assertion that we shouldn't  
6 understand representations of the states'  
7 attorneys general to represent the views of the  
8 state. I mean, each of the states have  
9 apparatus of their own if they don't think the  
10 attorney general -- and I don't know who you're  
11 speaking of, whether it's a legislature or the  
12 governor -- to direct the attorney general to  
13 -- I guess it varies from state to state, but,  
14 certainly, you would expect the attorney  
15 generals' views to reflect the views of the  
16 states.

17 MR. CHEMERINSKY: Your Honor, the  
18 attorney general is an officer of the state,  
19 but I don't necessarily know that in filing the  
20 brief in this Court, it's reflecting the views  
21 of the state legislatures or the judiciaries.  
22 The question is, do those state governments  
23 want to give up the power to define the  
24 jurisdiction of their courts and provide  
25 remedies?

1 CHIEF JUSTICE ROBERTS: Should we  
2 regard the submissions of the Solicitor General  
3 here as reflecting the views of the United  
4 States or simply the Solicitor General?

5 MR. CHEMERINSKY: The Solicitor  
6 General is representing the United States  
7 Government. That doesn't necessarily mean that  
8 Congress will agree with the position of the  
9 Solicitor General.

10 I'm not saying you should discard the  
11 brief of the attorney general, but, in answer  
12 to Justice Kagan, I was simply saying I  
13 wouldn't necessarily assume, because the  
14 attorney generals of the states don't want to  
15 be sued, that the state governments want to  
16 give up their sovereign power under the Tenth  
17 Amendment, what we're talking about here today.

18 JUSTICE KAGAN: Have there been  
19 attempts by the states to -- to enter into  
20 agreements of this sort?

21 MR. CHEMERINSKY: Not that I'm aware  
22 of, Your Honor, but I think that probably  
23 reflects this isn't a serious problem. It  
24 doesn't arise all that often.

25 For example, if you look at the brief

1 of those 44 states referred to, if you look at  
2 page 13, they identify a total of nine cases  
3 since 1979 where state governments have been  
4 sued in other state courts.

5 And I would think that states would  
6 want, if another state comes in and violates  
7 the rights of its citizens, as happened here,  
8 to be able to provide a remedy.

9 JUSTICE BREYER: Would the 47 states  
10 that don't like this rule make an effort to  
11 find things that has -- have happened to their  
12 citizens in this state caused by Nevada, and so  
13 they all start suing Nevada in their own  
14 courts, perhaps Nevada's attitude would change.

15 (Laughter.)

16 MR. CHEMERINSKY: It might, Your  
17 Honor, but the fact that that hasn't happened  
18 in 40 years --

19 JUSTICE BREYER: Not a problem?

20 MR. CHEMERINSKY: -- since Nevada  
21 versus Hall leads one to the conclusion it's  
22 not a problem. We can certainly hypothesize  
23 states could begin retaliating against other  
24 states, but it just hasn't happened. And if it  
25 does, states have the mechanism for protecting

1 themselves. And states are protected already.

2 On the other hand, in a situation like  
3 this, a citizen like Mr. Hyatt has no other  
4 remedy but the ability to sue in state court  
5 when he's injured by another state.

6 JUSTICE SOTOMAYOR: I'm sorry, he  
7 could have gone to the California courts.

8 MR. CHEMERINSKY: No, he couldn't have  
9 gone to the California courts because  
10 California gives sovereign immunity to itself  
11 and has a statute that gives broad protection.  
12 In fact, Hyatt I --

13 JUSTICE SOTOMAYOR: There's no --  
14 there's no administrative process against the  
15 -- the tax assessment that was laid against  
16 him?

17 MR. CHEMERINSKY: Well, there was an  
18 administrative proceeding with regard to the  
19 tax assessment, something that's been pending  
20 since the 1990s. But in terms of --

21 JUSTICE SOTOMAYOR: That -- that  
22 actually is a factual question I had. Did --  
23 was that ever adjudicated?

24 MR. CHEMERINSKY: Yes, Your Honor. In  
25 August of 2017, the California State Board of

1 Equalization overturned the Franchise Tax  
2 Board's findings against Mr. Hyatt both with  
3 regard to residency and fraud for 1991 and '92.  
4 That is now on appeal in the California Office  
5 of Tax Assessment.

6 But what's quite important, Your  
7 Honors, that was about his tax liability in  
8 California. This is a suit about the torts  
9 that were committed against him by California  
10 officials within the State of Nevada. For  
11 that, he had no remedy in California courts.

12 In fact, Hyatt I, the first time this  
13 case was before the court, was all about  
14 whether or not Nevada, under full faith and  
15 credit, had to accord sovereign immunity to  
16 California, as it would have had in the  
17 California courts.

18 JUSTICE SOTOMAYOR: Could the Nevada  
19 court have adjudicated the factual premises?  
20 Could he have brought some sort of suit in  
21 Nevada to adjudicate whether he was a resident  
22 of California or not or to find that he had no  
23 tax liability?

24 MR. CHEMERINSKY: I think a challenge  
25 to tax liability would be different, in part



1 because of the Tax Injunction Act, and also  
2 because of a different principle of comity  
3 under Fair Assessment in Real Estate versus  
4 McNary. What's crucial about this case is it's  
5 not about tax liability. It's about torts:  
6 the invasion of property rights, the  
7 defamation, the invasion of privacy rights that  
8 occurred.

9 CHIEF JUSTICE ROBERTS: Counsel, what  
10 do you do about the Petitioner's argument that  
11 it's incongruous that Indian tribes have this  
12 sort of immunity while states don't? The --  
13 the -- Chief Justice Marshall, who we've heard  
14 about, described the tribes, of course, as  
15 quasi-sovereigns, yet the states are recognized  
16 as -- as sovereigns. So we have the  
17 quasi-sovereigns enjoying immunity but the  
18 actual sovereigns not under your position.

19 MR. CHEMERINSKY: Two responses, Your  
20 Honor.

21 First, this Court has never decided  
22 whether state courts can hear tort claims  
23 against Indian tribes. In fact, in Michigan  
24 versus Bay Mills Indian Community, in Footnote  
25 8, the Court specifically said that was an open

1 question.

2           There's actually a cert petition on  
3 that question now pending before you. It's  
4 Wilkes versus PCI Gaming. The Alabama Supreme  
5 Court held that Indian tribes could be sued in  
6 tort in the cert petition before you.

7           CHIEF JUSTICE ROBERTS: So your answer  
8 is throw the Indian tribes under the bus? Well  
9 --

10           MR. CHEMERINSKY: No, Your Honor, I'm  
11 saying that it's an unresolved question. But  
12 there is a second point that may answer the  
13 comment that you just made. Congress has  
14 plenary power over Indian tribes. This has  
15 been understood since the founding to exclude  
16 state interference with Indian affairs.

17           In fact, this Court in the Kiowa Tribe  
18 of Oklahoma versus Manufacturing Technology  
19 case said that tribal immunity is a subject of  
20 federal law and is not subject to diminution by  
21 the states. The relationship of Congress to  
22 the Indian tribes is quite different than the  
23 relationship of Congress to the states.

24           And so Congress can limit state court  
25 jurisdiction with regard to Indian affairs in a

1 way that Congress can't limit state court  
2 jurisdiction under the Tenth Amendment. So  
3 it's quite distinguishable.

4 JUSTICE ALITO: The doctrine of stare  
5 decisis serves many valuable purposes. So  
6 which one would you say most strongly, or which  
7 ones would you say most strongly, supports your  
8 argument here? Is there any reliance here?  
9 And if not, what other stare decisis factors  
10 would you cite?

11 MR. CHEMERINSKY: Well, I'd go back to  
12 this Court's decision in the Hilton versus  
13 South Carolina case, and this Court there said  
14 adherence to precedent promotes stability,  
15 predictability, and respect for judicial  
16 authority.

17 And this was a case about overturning  
18 precedent in the area of constitutional law.  
19 This is about stability of law. For 40 years,  
20 this has been the law. It's about  
21 predictability. People have relied upon this  
22 in filing the suits.

23 But it's also about respect for  
24 judicial authority. This Court overturning its  
25 own precedents inherently undermines that

1 respect for judicial authority.

2           So I would say, in terms of all of the  
3 values that are identified in Hilton, stare  
4 decisis is important here. And it was in  
5 Hilton that the Court said there has to be a  
6 compelling reason. And there is no compelling  
7 reason. There's nothing that's been argued  
8 today that couldn't have been presented to this  
9 Court and wasn't in 1991.

10           JUSTICE KAVANAUGH: That -- that's  
11 often --

12           JUSTICE BREYER: I -- I want to follow  
13 that up, because this is a general question I  
14 have and I'd like to call on your knowledge on  
15 this, is this imaginary or not, what I'm about  
16 to say, that every time we overrule a case,  
17 it's like a little chink in an armor, because  
18 lawyers have to use our cases to talk to  
19 clients, and the client doesn't like what he's  
20 hearing. Can we do anything about it, whatever  
21 the field? And the more cases we overrule, the  
22 harder it is for the lawyer to say no.

23           And, therefore, in many areas, people  
24 start to ask us to overrule cases because, from  
25 my point of view, there are many wrong cases.

1 And that's true of every judge and law  
2 professor.

3 And once you start down the road, you  
4 have to be careful for that reason in part. Is  
5 that true, or am I making it up out of my  
6 imagination?

7 MR. CHEMERINSKY: Yes, Your Honor.

8 JUSTICE BREYER: I thought that would  
9 be your answer.

10 (Laughter.)

11 JUSTICE BREYER: Yes, I'm making it up  
12 out of my imagination or it's true?

13 MR. CHEMERINSKY: No. Yes, it is  
14 true, Your Honor, I totally agree with what you  
15 said about the importance of stare decisis, in  
16 fact, that --

17 JUSTICE ALITO: Well, Mr. Chemerinsky,  
18 do you think that the public would have greater  
19 respect for an institution that says, you know,  
20 we're never going to admit we made a mistake,  
21 because we said it and we decided it, we're  
22 going to stick to it even if we think it's  
23 wrong, or an institution that says, well, you  
24 know, we're generally going to stick to what  
25 we've done, but we're not perfect, and when we

1 look back and we think we made a big mistake,  
2 we're going to go back and correct it.

3 Which kind of institution would they  
4 respect more?

5 MR. CHEMERINSKY: Of course, this  
6 Court should overrule precedent at times. We  
7 all agree that Brown versus Board of Education  
8 needed to overrule Plessy versus Ferguson. But  
9 we also all agree that stare decisis matters.  
10 This is just what Justice Breyer was  
11 expressing.

12 And that's why I think this Court in  
13 Hilton got it exactly right. Precedent should  
14 be overruled only where there is a compelling  
15 reason for doing so.

16 And what I keep saying --

17 JUSTICE KAVANAUGH: But then the  
18 question is how we figure out what the  
19 compelling reason is, and that's very  
20 difficult.

21 And you say nothing has changed.  
22 That's true in a lot of cases where the Court  
23 has nonetheless overruled a prior decision.  
24 And so how are we supposed to think about it?

25 Is it enough, for example, if we think

1 it's egregiously wrong and the prior decision  
2 has severe practical consequences and there's  
3 no real reliance interest at stake? Is that  
4 enough? How to apply that to a particular case  
5 is hard, but what -- what I just said in terms  
6 of egregiously wrong, severe practical  
7 consequences, no real reliance, is that enough  
8 in your view to overrule?

9 MR. CHEMERINSKY: I think egregiously  
10 wrong, no practical consequence to overruling  
11 precedent, certainly go a long way to  
12 indicating there is a compelling reason for  
13 doing so. But I'd also start always by asking:  
14 Is there anything today that's before the Court  
15 that it didn't have when the earlier case was  
16 decided?

17 JUSTICE KAVANAUGH: Well, if we  
18 applied that strictly, a lot of cases that  
19 everyone agrees should be overruled would not  
20 have been overruled. And so I think -- I'm  
21 questioning that particular factor.

22 MR. CHEMERINSKY: But I think it's a  
23 starting point in the analysis. And then I am  
24 comfortable with the adverbs you use, like  
25 egregiously wrong.

1           And what I've argued here today is  
2           that Nevada versus Hall not only was not  
3           egregiously wrong but it was correctly decided.  
4           But I would emphasize in conclusion that this  
5           case is decided by the law of the case  
6           doctrine.

7           Here, in the second time the case was  
8           before you, you said you were affirming the  
9           judgment by a four-to-four decision. A  
10          four-to-four split is a decision on the merits.

11          It's argued in the reply brief that we  
12          waived this by not raising it in the brief in  
13          opposition. But, if you look at Rule 15.2 from  
14          the Supreme Court and the key language that was  
15          left out on page 3 of Petitioner's reply brief,  
16          it says: Any objection to consideration of a  
17          question presented based on what occurred in  
18          the proceedings below -- those are the words  
19          that are omitted in the reply brief -- if the  
20          objection does not go to jurisdiction may be  
21          waived and called to the court's attention in  
22          the brief in opposition.

23          No one in this litigation, not  
24          Petitioner or Respondent, questions anything  
25          that went on in the proceedings below. This is



1 entirely a question for this Court, whether to  
2 overrule Nevada versus Hall.

3 I would then conclude as I began. In  
4 Nevada versus Hall, this Court ended its  
5 decision by saying that the real intrusion on  
6 states were to keep them from exercising their  
7 sovereign power to define their jurisdiction to  
8 provide a remedy for their citizens when  
9 they're injured by another state. The Court  
10 said that would be a diminution of the powers  
11 of the people of the United States.

12 Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Four minutes, Mr. Waxman.

16 REBUTTAL ARGUMENT OF SETH P. WAXMAN

17 ON BEHALF OF THE PETITIONER

18 MR. WAXMAN: Thank you, Mr. Chief  
19 Justice.

20 In McCulloch versus Maryland, Chief  
21 Justice Marshall announced for the Court the  
22 constitutional principle, the atextual  
23 constitutional principle of intergovernmental  
24 immunity because, as he explained, the power of  
25 one sovereign to tax another is the power to

1 destroy.

2 Today, Hall versus Nevada stands as  
3 the only thing that states can do to each  
4 other, the power to render judgments against  
5 states that, when they entered the union, were  
6 effectively bankrupt. They were loaded with  
7 Revolutionary War debt.

8 That power to subject sovereign  
9 treasuries to judgments of other sovereigns'  
10 courts is very much the power to destroy. And  
11 had anyone thought at the framing that, by  
12 forming a more perfect union, that these  
13 states, burdened with this debt, were  
14 subjecting themselves to suits in other state  
15 courts, the Constitution would never have been  
16 adopted.

17 The notion that Chisholm's mistake was  
18 not suing Georgia in the state courts of his  
19 home state, South Carolina, would have been  
20 considered an absurdity.

21 Now, as to stare decisis, this really  
22 is a case where Hall is a "survivor of obsolete  
23 constitutional thinking."

24 The question was, you know, what has  
25 changed? What have we done? Recall that the

1 number of cases this Court has decided in the  
2 sovereign immunity area, we're talking, you  
3 know, not just Seminole Tribe but Union Gas,  
4 Welch, Kiowa, all of those cases, and the  
5 reasoning of those cases is the South Carolina  
6 Ports Authority case, all long followed this  
7 Court's decision.

8           And the basis for this Court's  
9 decision in Nevada versus Hall, both of which  
10 have been repudiated by this Court's later  
11 jurisprudence, are, number one, the Court said  
12 there's nothing explicit in the Constitution  
13 and we're not going to read a -- an immunity  
14 that is not explicit in the Constitution.

15           This Court in at least a dozen cases  
16 has subsequently held over and over again that  
17 what matters for the protection of sovereign  
18 immunity was the framers' understanding at the  
19 time of the framing and the postulates that  
20 underlie the principles of the consequences of  
21 giving up the wild west law of nations for a  
22 more perfect union in which states won't  
23 retaliate against each other by saying, well,  
24 now we're going to -- you know, we're going to  
25 allow everybody to sue other states in our

1 court and we're going to do this and we're  
2 going to do that.

3 The -- the other thing that is  
4 different is, in Nevada versus Hall, this Court  
5 identified one interest supported by the  
6 principle of state sovereign immunity, and that  
7 was the state's fiscs, which, of course, was  
8 overwhelmingly important at the time of the  
9 framing.

10 But, since then, this Court has said  
11 in at least a half a dozen cases that the  
12 dignity of states and their self-government  
13 autonomy are, as the -- as Justice Thomas  
14 explained for the Court in the Federal Maritime  
15 Commission case, the paramount interests to be  
16 protected by principles of sovereign immunity.

17 Neither of those two principles that  
18 have since been elucidated by the Court were  
19 referenced or acknowledged in Nevada versus  
20 Hall.

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
23 Waxman, counsel. The case is submitted.

24 (Whereupon, at 11:01 a.m., the case was  
25 submitted.)

## Official - Subject to Final Review

<b>\$</b>	<b>absurdity</b> <sup>[1]</sup> 57:20	16 34:12 37:18 44:11 49:7,12 52:9	<b>Bay</b> <sup>[1]</sup> 48:24
<b>\$100,000</b> <sup>[2]</sup> 23:14 31:5	<b>accord</b> <sup>[2]</sup> 36:9 47:15	<b>anti</b> <sup>[1]</sup> 10:4	<b>bear</b> <sup>[1]</sup> 17:10
<b>\$250</b> <sup>[1]</sup> 29:14	<b>accurately</b> <sup>[1]</sup> 31:25	<b>anti-federalists</b> <sup>[1]</sup> 33:23	<b>began</b> <sup>[1]</sup> 56:3
<b>1</b>	<b>acknowledge</b> <sup>[2]</sup> 27:2,9	<b>apparatus</b> <sup>[1]</sup> 43:9	<b>begin</b> <sup>[1]</sup> 45:23
<b>10</b> <sup>[2]</sup> 18:6 24:5	<b>acknowledged</b> <sup>[1]</sup> 59:19	<b>appeal</b> <sup>[1]</sup> 47:4	<b>behalf</b> <sup>[8]</sup> 1:19,21 2:4,7,10 3:8 27:22 56:17
<b>10:03</b> <sup>[2]</sup> 1:15 3:2	<b>Act</b> <sup>[1]</sup> 48:1	<b>appear</b> <sup>[2]</sup> 14:1,2	<b>believe</b> <sup>[2]</sup> 7:15 21:8
<b>100</b> <sup>[1]</sup> 12:13	<b>actions</b> <sup>[2]</sup> 6:16 26:15	<b>APPEARANCES</b> <sup>[1]</sup> 1:17	<b>below</b> <sup>[2]</sup> 55:18,25
<b>11:01</b> <sup>[1]</sup> 59:24	<b>actual</b> <sup>[1]</sup> 48:18	<b>applied</b> <sup>[2]</sup> 15:5 54:18	<b>Berkeley</b> <sup>[1]</sup> 1:20
<b>13</b> <sup>[1]</sup> 45:2	<b>actually</b> <sup>[4]</sup> 29:22 38:4 46:22 49:2	<b>apply</b> <sup>[2]</sup> 9:19 54:4	<b>best</b> <sup>[5]</sup> 25:17 26:2,5 27:16 37:12
<b>130</b> <sup>[1]</sup> 7:19	<b>added</b> <sup>[1]</sup> 24:4	<b>area</b> <sup>[3]</sup> 24:17 50:18 58:2	<b>between</b> <sup>[4]</sup> 34:16 37:11 39:16 41:18
<b>15.2</b> <sup>[1]</sup> 55:13	<b>addition</b> <sup>[2]</sup> 30:22,22	<b>areas</b> <sup>[1]</sup> 51:23	<b>big</b> <sup>[2]</sup> 17:6 53:1
<b>150</b> <sup>[1]</sup> 27:11	<b>address</b> <sup>[4]</sup> 4:8 5:7 7:20 13:10	<b>aren't</b> <sup>[1]</sup> 38:14	<b>blank</b> <sup>[1]</sup> 38:20
<b>17-1299</b> <sup>[1]</sup> 3:4	<b>addressed</b> <sup>[1]</sup> 4:20	<b>argue</b> <sup>[1]</sup> 40:3	<b>blockade</b> <sup>[2]</sup> 14:14 17:4
<b>19</b> <sup>[1]</sup> 25:9	<b>adhere</b> <sup>[3]</sup> 9:19 41:22,22	<b>argued</b> <sup>[5]</sup> 39:2,24 51:7 55:1,11	<b>BOARD</b> <sup>[4]</sup> 1:3 3:5 46:25 53:7
<b>1961</b> <sup>[1]</sup> 25:10	<b>adherence</b> <sup>[1]</sup> 50:14	<b>argument</b> <sup>[16]</sup> 1:14 2:2,5,8 3:4,7 4:8 16:9 25:17 27:3,21 34:13 40:23 48:10 50:8 56:16	<b>Board's</b> <sup>[1]</sup> 47:2
<b>1979</b> <sup>[4]</sup> 39:2,25 41:25 45:3	<b>adjudicate</b> <sup>[3]</sup> 13:15,16 47:21	<b>arguments</b> <sup>[1]</sup> 4:19	<b>borders</b> <sup>[1]</sup> 8:5
<b>1990s</b> <sup>[1]</sup> 46:20	<b>adjudicated</b> <sup>[2]</sup> 46:23 47:19	<b>arise</b> <sup>[2]</sup> 38:17 44:24	<b>Boston</b> <sup>[1]</sup> 24:17
<b>1991</b> <sup>[2]</sup> 47:3 51:9	<b>administrative</b> <sup>[2]</sup> 46:14,18	<b>arises</b> <sup>[2]</sup> 36:7 38:16	<b>both</b> <sup>[3]</sup> 29:16 47:2 58:9
<b>2</b>	<b>admit</b> <sup>[1]</sup> 52:20	<b>armor</b> <sup>[1]</sup> 51:17	<b>BREYER</b> <sup>[19]</sup> 10:13,24 11:2 12:3,15,18,21 13:2 14:16,21 15:4,7,16 45:9,19 51:12 52:8,11 53:10
<b>200</b> <sup>[2]</sup> 5:11 25:5	<b>adopted</b> <sup>[2]</sup> 13:8 57:16	<b>around</b> <sup>[1]</sup> 6:13	<b>Breyer's</b> <sup>[1]</sup> 35:23
<b>2017</b> <sup>[1]</sup> 46:25	<b>adverbs</b> <sup>[1]</sup> 54:24	<b>Article</b> <sup>[1]</sup> 18:6	<b>brief</b> <sup>[15]</sup> 5:3 26:25 32:4 39:4 42:5,11,15 43:20 44:11,25 55:11,12,15,19,22
<b>2019</b> <sup>[1]</sup> 1:11	<b>affairs</b> <sup>[2]</sup> 49:16,25	<b>Articles</b> <sup>[2]</sup> 9:1 34:14	<b>bringing</b> <sup>[1]</sup> 11:13
<b>27</b> <sup>[1]</sup> 2:7	<b>affirming</b> <sup>[1]</sup> 55:8	<b>aside</b> <sup>[1]</sup> 4:24	<b>broad</b> <sup>[1]</sup> 46:11
<b>29</b> <sup>[1]</sup> 38:5	<b>afraid</b> <sup>[1]</sup> 32:24	<b>aspects</b> <sup>[2]</sup> 17:25 19:3	<b>brought</b> <sup>[2]</sup> 39:11 47:20
<b>3</b>	<b>agency</b> <sup>[1]</sup> 29:2	<b>assertion</b> <sup>[1]</sup> 43:5	<b>Brown</b> <sup>[1]</sup> 53:7
<b>3</b> <sup>[2]</sup> 2:4 55:15	<b>agent</b> <sup>[2]</sup> 30:1,2	<b>assessment</b> <sup>[4]</sup> 46:15,19 47:5 48:3	<b>burdened</b> <sup>[1]</sup> 57:13
<b>31</b> <sup>[1]</sup> 32:3	<b>ago</b> <sup>[2]</sup> 27:11,25	<b>assume</b> <sup>[2]</sup> 37:8 44:13	<b>bureaucracy</b> <sup>[1]</sup> 26:13
<b>32</b> <sup>[1]</sup> 32:4	<b>agree</b> <sup>[5]</sup> 37:17 44:8 52:14 53:7,9	<b>assurance</b> <sup>[1]</sup> 33:1	<b>bus</b> <sup>[1]</sup> 49:8
<b>4</b>	<b>agreement</b> <sup>[2]</sup> 36:24 41:14	<b>assured</b> <sup>[1]</sup> 10:8	<b>C</b>
<b>4</b> <sup>[1]</sup> 14:21	<b>agreements</b> <sup>[1]</sup> 44:20	<b>astonishing</b> <sup>[1]</sup> 24:7	<b>cabin</b> <sup>[1]</sup> 23:11
<b>40</b> <sup>[2]</sup> 45:18 50:19	<b>agrees</b> <sup>[1]</sup> 54:19	<b>atextual</b> <sup>[1]</sup> 56:22	<b>CALIFORNIA</b> <sup>[27]</sup> 1:3,20 3:5 22:6 23:25 29:24 30:11 35:3,4,5,16,19 37:2,11,12,16 46:7,9,10,25 47:4,8,9,11,16,17,22
<b>40-year-old</b> <sup>[1]</sup> 38:21	<b>Alabama</b> <sup>[1]</sup> 49:4	<b>attempts</b> <sup>[2]</sup> 43:3 44:19	<b>call</b> <sup>[2]</sup> 26:16 51:14
<b>44</b> <sup>[2]</sup> 21:19 45:1	<b>Alden</b> <sup>[11]</sup> 5:20 10:1 18:24 33:7 39:12,15,20 41:5,13,17,23	<b>attention</b> <sup>[1]</sup> 55:21	<b>called</b> <sup>[1]</sup> 55:21
<b>45</b> <sup>[1]</sup> 42:4	<b>ALITO</b> <sup>[12]</sup> 9:22 15:18,21 18:10,12 33:14 34:11 35:2,8,13 50:4 52:17	<b>attitude</b> <sup>[1]</sup> 45:14	<b>calling</b> <sup>[1]</sup> 3:20
<b>47</b> <sup>[3]</sup> 22:6 42:4 45:9	<b>Alito's</b> <sup>[1]</sup> 37:1	<b>attorney</b> <sup>[9]</sup> 42:10,13,16 43:10,12,14,18 44:11,14	<b>came</b> <sup>[1]</sup> 1:13
<b>472</b> <sup>[1]</sup> 14:22	<b>alleged</b> <sup>[1]</sup> 30:3	<b>attorneys</b> <sup>[4]</sup> 23:17,20,22 43:7	<b>care</b> <sup>[1]</sup> 29:21
<b>5</b>	<b>allow</b> <sup>[2]</sup> 37:4 58:25	<b>audience</b> <sup>[1]</sup> 30:9	<b>careful</b> <sup>[1]</sup> 42:19
<b>527</b> <sup>[1]</sup> 41:13	<b>Almost</b> <sup>[2]</sup> 11:22 12:21	<b>August</b> <sup>[1]</sup> 46:25	<b>careful</b> <sup>[2]</sup> 35:15 52:4
<b>56</b> <sup>[1]</sup> 2:10	<b>already</b> <sup>[5]</sup> 18:25 23:12 34:1 35:19 46:1	<b>authority</b> <sup>[11]</sup> 11:16,17 13:10 14:6,17 34:10 41:2 50:16,24 51:1 58:6	<b>Carolina</b> <sup>[3]</sup> 50:13 57:19 58:5
<b>7</b>	<b>amenable</b> <sup>[1]</sup> 32:12	<b>authorize</b> <sup>[1]</sup> 41:3	<b>carrying</b> <sup>[1]</sup> 26:18
<b>738</b> <sup>[1]</sup> 41:13	<b>amend</b> <sup>[1]</sup> 42:20	<b>autonomy</b> <sup>[1]</sup> 59:13	<b>Case</b> <sup>[43]</sup> 3:4 4:7,8,14 5:10,18 6:19,20,25 9:16 13:25 14:8,18 23:13,14 25:10 28:8,9 29:10,22 30:25 36:1 38:6 40:4,5,10 41:9 47:13 48:4 49:19 50:13,17 51:16 54:4,15 55:5,5,7 57:22 58:6 59:15,23,24
<b>739</b> <sup>[1]</sup> 41:17	<b>amended</b> <sup>[3]</sup> 21:17,22 24:21	<b>award</b> <sup>[1]</sup> 29:15	<b>cases</b> <sup>[24]</sup> 5:14 8:25 10:1 12:13 24:3 29:21 38:4,13,14 40:15,21,25 45:2 51:18,21,24,25 53:22 54:18 58:1,4,5,15 59:11
<b>740</b> <sup>[1]</sup> 41:18	<b>amending</b> <sup>[1]</sup> 23:4	<b>aware</b> <sup>[1]</sup> 44:21	<b>casino</b> <sup>[2]</sup> 24:11,16
<b>8</b>	<b>Amendment</b> <sup>[15]</sup> 18:7 20:18 21:18 22:2 24:20 25:3 28:2,15 31:14 33:3 37:21 39:7 41:9 44:17 50:2	<b>B</b>	<b>cast</b> <sup>[1]</sup> 42:1
<b>8</b> <sup>[1]</sup> 48:25	<b>amici</b> <sup>[2]</sup> 23:10 29:20	<b>back</b> <sup>[10]</sup> 16:21 25:15 30:21 31:6 35:23 37:1,20 50:11 53:1,2	<b>caused</b> <sup>[1]</sup> 45:12
<b>81</b> <sup>[2]</sup> 32:10,15	<b>amicus</b> <sup>[2]</sup> 26:25 42:5	<b>balance</b> <sup>[1]</sup> 27:17	<b>cert</b> <sup>[2]</sup> 49:2,6
<b>9</b>	<b>among</b> <sup>[3]</sup> 3:23 34:17 41:15	<b>Bank</b> <sup>[2]</sup> 9:15,15	
<b>9</b> <sup>[1]</sup> 1:11	<b>amount</b> <sup>[1]</sup> 36:16	<b>bankrupt</b> <sup>[2]</sup> 32:24 57:6	
<b>92</b> <sup>[1]</sup> 47:3	<b>analysis</b> <sup>[1]</sup> 54:23	<b>bar</b> <sup>[1]</sup> 26:17	
<b>A</b>	<b>announced</b> <sup>[1]</sup> 56:21	<b>bargain</b> <sup>[2]</sup> 19:11 26:7	
<b>a.m</b> <sup>[3]</sup> 1:15 3:2 59:24	<b>anomalous</b> <sup>[1]</sup> 23:1	<b>based</b> <sup>[8]</sup> 29:13,15 32:2,6 34:2 36:4,15 55:17	
<b>ability</b> <sup>[8]</sup> 5:12 7:12 17:14 19:4 21:16 34:6 39:18 46:4	<b>another</b> <sup>[36]</sup> 3:21 5:13 6:16 7:2,3 13:16,17 17:12 19:22 24:4 25:8 26:12,14,15,16 29:1 30:16,19 31:1 32:2,8 33:19 36:3,20 37:25 38:8 39:11,19,19 41:16,20 42:23 45:6 46:5 56:9,25	<b>basic</b> <sup>[2]</sup> 16:9,17	
<b>able</b> <sup>[5]</sup> 32:22 37:12,24 38:17 45:8	<b>another's</b> <sup>[1]</sup> 13:15	<b>basically</b> <sup>[1]</sup> 25:4	
<b>above-entitled</b> <sup>[1]</sup> 1:13	<b>answer</b> <sup>[11]</sup> 5:13 11:9 13:2 18:12,	<b>basis</b> <sup>[3]</sup> 7:16 31:3 58:8	
<b>abrogated</b> <sup>[1]</sup> 27:5		<b>Baude</b> <sup>[4]</sup> 17:11 25:24 27:1,1	
<b>absolute</b> <sup>[4]</sup> 7:7 10:11 13:22,22			

## Official - Subject to Final Review

<p><b>certain</b> <sup>[1]</sup> 14:3  <b>certainly</b> <sup>[7]</sup> 9:1,24 35:12 36:14  43:14 45:22 54:11  <b>chairing</b> <sup>[1]</sup> 3:18  <b>challenge</b> <sup>[1]</sup> 47:24  <b>chance</b> <sup>[1]</sup> 25:17  <b>change</b> <sup>[1]</sup> 45:14  <b>changed</b> <sup>[8]</sup> 5:9 6:13 13:7 39:3,24  41:25 53:21 57:25  <b>characterized</b> <sup>[1]</sup> 9:24  <b>Chattanooga</b> <sup>[1]</sup> 38:7  <b>CHEMERINSKY</b> <sup>[39]</sup> 1:20 2:6 27:  20,21,23 28:22 29:7 30:6,12 32:  18 33:20 34:18 35:11,18,22 36:14,  25 37:19 40:8,24 42:10 43:17 44:  5,21 45:16,20 46:8,17,24 47:24  48:19 49:10 50:11 52:7,13,17 53:  5 54:9,22  <b>CHIEF</b> <sup>[23]</sup> 3:3,9 13:20 15:8 19:18  20:22 27:18,24 36:8,23 37:7 42:  21,25 43:4 44:1 48:9,13 49:7 56:  13,18,20 59:21,22  <b>China</b> <sup>[1]</sup> 9:15  <b>chink</b> <sup>[1]</sup> 51:17  <b>Chisholm</b> <sup>[5]</sup> 3:24 21:15 25:1,1  33:4  <b>Chisholm's</b> <sup>[1]</sup> 57:17  <b>choose</b> <sup>[1]</sup> 37:22  <b>chooses</b> <sup>[1]</sup> 36:12  <b>choosing</b> <sup>[1]</sup> 22:16  <b>cite</b> <sup>[2]</sup> 38:6 50:10  <b>cited</b> <sup>[3]</sup> 5:13 24:3,22  <b>citing</b> <sup>[1]</sup> 13:9  <b>citizen</b> <sup>[2]</sup> 24:9 46:3  <b>citizens</b> <sup>[14]</sup> 6:16 7:13 18:4 22:21  23:10 28:4 30:18 37:25 39:11,19  42:9 45:7,12 56:8  <b>City</b> <sup>[2]</sup> 9:14 38:7  <b>claim</b> <sup>[1]</sup> 13:16  <b>claiming</b> <sup>[2]</sup> 25:18 26:2  <b>claims</b> <sup>[3]</sup> 13:16 29:13 48:22  <b>clause</b> <sup>[8]</sup> 18:4 21:6 31:10,11,12  34:22,22,23  <b>clear</b> <sup>[2]</sup> 5:2 38:22  <b>clearly</b> <sup>[1]</sup> 39:20  <b>client</b> <sup>[1]</sup> 51:19  <b>clients</b> <sup>[1]</sup> 51:19  <b>climb</b> <sup>[1]</sup> 40:20  <b>code</b> <sup>[1]</sup> 21:9  <b>colleagues</b> <sup>[1]</sup> 26:3  <b>colonies</b> <sup>[1]</sup> 18:2  <b>come</b> <sup>[1]</sup> 38:20  <b>comes</b> <sup>[1]</sup> 45:6  <b>comfortable</b> <sup>[1]</sup> 54:24  <b>comity</b> <sup>[27]</sup> 7:22,22 8:20 9:12,18  11:4 16:10 25:19 29:7,8,11,13,15,  16,19 30:22 32:3,7,7 33:12 34:2,9,  11 36:4,9,12 48:2  <b>commandeering</b> <sup>[1]</sup> 21:1  <b>comment</b> <sup>[1]</sup> 49:13  <b>commentators</b> <sup>[2]</sup> 13:11 21:7  <b>Commerce</b> <sup>[1]</sup> 21:6  <b>Commission</b> <sup>[1]</sup> 59:15  <b>committed</b> <sup>[1]</sup> 47:9</p>	<p><b>common</b> <sup>[2]</sup> 27:5,10  <b>Commonwealth</b> <sup>[1]</sup> 24:9  <b>Community</b> <sup>[1]</sup> 48:24  <b>compact</b> <sup>[3]</sup> 36:20 37:3,23  <b>compacts</b> <sup>[1]</sup> 42:22  <b>compel</b> <sup>[1]</sup> 5:13  <b>compelling</b> <sup>[9]</sup> 4:9 28:6 38:24 40:  1 51:6,6 53:14,19 54:12  <b>complete</b> <sup>[2]</sup> 10:19 37:18  <b>concern</b> <sup>[4]</sup> 31:22 32:20 33:15,18  <b>concerned</b> <sup>[2]</sup> 33:23,24  <b>conclude</b> <sup>[1]</sup> 56:3  <b>concluded</b> <sup>[1]</sup> 28:11  <b>conclusion</b> <sup>[2]</sup> 45:21 55:4  <b>Confederation</b> <sup>[2]</sup> 9:2 19:15  <b>Congress</b> <sup>[9]</sup> 33:8 39:14 41:6 44:  8 49:13,21,23,24 50:1  <b>Congress's</b> <sup>[1]</sup> 41:2  <b>consent</b> <sup>[8]</sup> 10:17,21 11:5 14:9,24  15:2,4 32:13  <b>consented</b> <sup>[1]</sup> 15:10  <b>consequence</b> <sup>[1]</sup> 54:10  <b>consequences</b> <sup>[3]</sup> 54:2,7 58:20  <b>consideration</b> <sup>[1]</sup> 55:16  <b>considered</b> <sup>[1]</sup> 57:20  <b>consistent</b> <sup>[2]</sup> 39:21 40:14  <b>constitute</b> <sup>[1]</sup> 16:23  <b>constitution</b> <sup>[45]</sup> 3:13 4:2,5 5:25  7:11,17 8:8,18 9:3 12:4 13:8,9 18:  6,15,18,20 19:9,13,14 20:3,4,9,16  21:7,17,22 23:4 24:20 28:17,  20 31:7,8,13 34:6,15,19,25 39:10  41:10,14 42:20 57:15 58:12,14  <b>constitutional</b> <sup>[22]</sup> 5:23 6:14 7:8,  10 16:16,18,24 20:24 23:1 25:2,  21 26:22 27:14 28:20 29:6 31:18,  19 34:25 50:18 56:22,23 57:23  <b>constitutionalize</b> <sup>[1]</sup> 17:25  <b>constitutionalized</b> <sup>[2]</sup> 27:4,6  <b>context</b> <sup>[2]</sup> 32:20 41:1  <b>continues</b> <sup>[1]</sup> 29:10  <b>contours</b> <sup>[1]</sup> 10:2  <b>controlling</b> <sup>[1]</sup> 40:5  <b>Convention</b> <sup>[10]</sup> 3:19 14:10 15:1,  24 16:15 28:21 31:18,19 34:25 39:  1  <b>converted</b> <sup>[1]</sup> 25:21  <b>correct</b> <sup>[4]</sup> 8:22 16:17 30:5 53:2  <b>correctly</b> <sup>[1]</sup> 55:3  <b>costs</b> <sup>[1]</sup> 23:24  <b>couldn't</b> <sup>[5]</sup> 11:7 25:6,7 46:8 51:8  <b>Counsel</b> <sup>[5]</sup> 3:25 27:19 48:9 56:14  59:23  <b>counting</b> <sup>[1]</sup> 23:15  <b>countries</b> <sup>[1]</sup> 12:21  <b>country</b> <sup>[2]</sup> 12:24 36:3  <b>couple</b> <sup>[1]</sup> 26:24  <b>course</b> <sup>[11]</sup> 10:18 11:5,11 12:18  13:21 18:7 23:3 39:8 48:14 53:5  59:7  <b>COURT</b> <sup>[85]</sup> 1:1,14 3:10 4:20 5:7,  11,16,16,20 7:4,18 9:10,14 10:1,7  12:12 18:22,24 19:9 20:11 21:2,  16 23:2 24:10,23,23 25:10 26:17</p>	<p>27:24 28:1,10,16,19 29:12,14 30:  19,23,25 31:4,20 33:2,10,16 36:15  38:20,22 39:2,16,17,20,25 41:6,23  42:1 43:20 46:4 47:13,19 48:21,  25 49:5,17,24 50:1,13,24 51:5,9  53:6,12,22 54:14 55:14 56:1,4,9,  21 58:1,11,15 59:1,4,10,14,18  <b>Court's</b> <sup>[7]</sup> 8:25 39:5 50:12 55:21  58:7,8,10  <b>courts</b> <sup>[32]</sup> 3:14,17 9:9 14:7 19:22  25:4,12 28:3 32:22 33:5,12,19,25  37:4,24 39:8,18 41:4,19,20 42:9  43:24 45:4,14 46:7,9 47:11,17 48:  22 57:10,15,18  <b>created</b> <sup>[1]</sup> 30:23  <b>credit</b> <sup>[4]</sup> 31:5,10 34:21 47:15  <b>crossed</b> <sup>[1]</sup> 30:3  <b>crucial</b> <sup>[3]</sup> 30:14,16 48:4  <b>Cuba</b> <sup>[1]</sup> 9:16  <b>customary</b> <sup>[1]</sup> 6:4</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D.C</b> <sup>[2]</sup> 1:10,18  <b>damage</b> <sup>[2]</sup> 29:15 31:3  <b>damages</b> <sup>[1]</sup> 36:16  <b>deal</b> <sup>[1]</sup> 42:7  <b>debate</b> <sup>[2]</sup> 13:13 16:24  <b>debates</b> <sup>[1]</sup> 3:12  <b>debt</b> <sup>[2]</sup> 57:7,13  <b>debts</b> <sup>[1]</sup> 32:24  <b>decide</b> <sup>[1]</sup> 22:16  <b>decided</b> <sup>[7]</sup> 5:17 48:21 52:21 54:  16 55:3,5 58:1  <b>decision</b> <sup>[9]</sup> 41:17 50:12 53:23 54:  1 55:9,10 56:5 58:7,9  <b>decisions</b> <sup>[3]</sup> 23:1 24:23 39:5  <b>decisis</b> <sup>[10]</sup> 28:7 38:23 40:2,7 50:  5,9 51:4 52:15 53:9 57:21  <b>declare</b> <sup>[1]</sup> 8:5  <b>deemed</b> <sup>[3]</sup> 14:5 15:10 19:19  <b>deeply</b> <sup>[1]</sup> 42:19  <b>defamation</b> <sup>[1]</sup> 48:7  <b>defamed</b> <sup>[1]</sup> 30:7  <b>defend</b> <sup>[1]</sup> 42:12  <b>defending</b> <sup>[1]</sup> 23:25  <b>define</b> <sup>[5]</sup> 28:3 31:14 37:23 43:23  56:7  <b>demarcated</b> <sup>[1]</sup> 5:21  <b>Department</b> <sup>[1]</sup> 24:14  <b>derives</b> <sup>[1]</sup> 5:24  <b>describe</b> <sup>[2]</sup> 20:2 40:16  <b>described</b> <sup>[1]</sup> 48:14  <b>design</b> <sup>[3]</sup> 5:23 6:14 7:8  <b>designated</b> <sup>[1]</sup> 7:11  <b>destroy</b> <sup>[2]</sup> 57:1,10  <b>details</b> <sup>[1]</sup> 20:6  <b>deter</b> <sup>[1]</sup> 16:2  <b>determined</b> <sup>[1]</sup> 10:3  <b>developed</b> <sup>[1]</sup> 40:11  <b>different</b> <sup>[13]</sup> 11:20,20 20:22 34:  16,19,20 35:17 37:14 39:9 47:25  48:2 49:22 59:4  <b>difficult</b> <sup>[1]</sup> 53:20  <b>dignity</b> <sup>[2]</sup> 24:8 59:12</p>	<p><b>diminution</b> <sup>[2]</sup> 49:20 56:10  <b>direct</b> <sup>[3]</sup> 26:13 41:12 43:12  <b>directly</b> <sup>[3]</sup> 6:17 21:25 23:9  <b>disagree</b> <sup>[1]</sup> 40:24  <b>disagreed</b> <sup>[2]</sup> 3:12 21:15  <b>disagreement</b> <sup>[1]</sup> 17:24  <b>discard</b> <sup>[1]</sup> 44:10  <b>discarding</b> <sup>[1]</sup> 28:7  <b>discretion</b> <sup>[2]</sup> 6:8 13:23  <b>discussed</b> <sup>[1]</sup> 31:19  <b>dismissed</b> <sup>[1]</sup> 25:11  <b>disparity</b> <sup>[1]</sup> 37:10  <b>disrespecting</b> <sup>[1]</sup> 24:8  <b>dissent</b> <sup>[2]</sup> 20:17 40:15  <b>distinction</b> <sup>[2]</sup> 39:16 41:18  <b>distinguishable</b> <sup>[4]</sup> 39:6,13 41:1  50:3  <b>doctrine</b> <sup>[5]</sup> 21:6 28:9 40:4 50:4  55:6  <b>doctrines</b> <sup>[1]</sup> 21:13  <b>document</b> <sup>[1]</sup> 20:5  <b>doing</b> <sup>[5]</sup> 29:5 30:1 37:6 53:15 54:  13  <b>dollars</b> <sup>[1]</sup> 23:24  <b>domain</b> <sup>[1]</sup> 38:9  <b>done</b> <sup>[3]</sup> 12:11 52:25 57:25  <b>Dormant</b> <sup>[1]</sup> 21:6  <b>doubt</b> <sup>[1]</sup> 42:2  <b>down</b> <sup>[1]</sup> 52:3  <b>dozen</b> <sup>[4]</sup> 12:13 24:3 58:15 59:11  <b>drawn</b> <sup>[1]</sup> 41:18  <b>drew</b> <sup>[1]</sup> 39:16</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> <sup>[15]</sup> 8:3,5,6,10 9:4 10:10 14:  14,14,15 16:13 19:17,22 43:8 57:  3 58:23  <b>earlier</b> <sup>[1]</sup> 54:15  <b>echoing</b> <sup>[1]</sup> 3:21  <b>Edmund</b> <sup>[2]</sup> 3:18,24  <b>Education</b> <sup>[1]</sup> 53:7  <b>effect</b> <sup>[1]</sup> 9:11  <b>effectively</b> <sup>[1]</sup> 57:6  <b>effort</b> <sup>[1]</sup> 45:10  <b>egregiously</b> <sup>[5]</sup> 54:1,6,9,25 55:3  <b>either</b> <sup>[4]</sup> 19:4 34:14 38:13 42:17  <b>Eleventh</b> <sup>[6]</sup> 18:7 20:18 21:18 22:  1 33:3 39:7  <b>elucidated</b> <sup>[1]</sup> 59:18  <b>embargo</b> <sup>[1]</sup> 14:14  <b>eminent</b> <sup>[1]</sup> 38:9  <b>emphasize</b> <sup>[1]</sup> 55:4  <b>ended</b> <sup>[1]</sup> 56:4  <b>enforce</b> <sup>[3]</sup> 7:25 16:3 17:15  <b>enforced</b> <sup>[1]</sup> 19:9  <b>enjoying</b> <sup>[1]</sup> 24:13  <b>enjoying</b> <sup>[1]</sup> 48:17  <b>enough</b> <sup>[4]</sup> 29:19 53:25 54:4,7  <b>enter</b> <sup>[6]</sup> 36:20 37:2,22 41:4 42:22  44:19  <b>entered</b> <sup>[1]</sup> 57:5  <b>entirely</b> <sup>[3]</sup> 34:16 37:14 56:1  <b>entrenching</b> <sup>[1]</sup> 23:8  <b>enumerated</b> <sup>[2]</sup> 15:13 18:21</p>
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## Official - Subject to Final Review

<p><b>envision</b> <sup>[1]</sup> 27:8  <b>envisioned</b> <sup>[1]</sup> 27:15  <b>equal</b> <sup>[1]</sup> 21:5  <b>Equalization</b> <sup>[1]</sup> 47:1  <b>equate</b> <sup>[1]</sup> 42:15  <b>era</b> <sup>[1]</sup> 35:1  <b>ERWIN</b> <sup>[3]</sup> 1:20 2:6 27:21  <b>especially</b> <sup>[2]</sup> 33:23 41:12  <b>ESQ</b> <sup>[5]</sup> 1:18,20 2:3,6,9  <b>essence</b> <sup>[2]</sup> 6:5 9:7  <b>essentially</b> <sup>[1]</sup> 16:11  <b>established</b> <sup>[1]</sup> 28:9  <b>Estate</b> <sup>[1]</sup> 48:3  <b>European</b> <sup>[1]</sup> 21:9  <b>evaluating</b> <sup>[1]</sup> 24:15  <b>even</b> <sup>[5]</sup> 15:19,19,22 26:4 52:22  <b>evening</b> <sup>[1]</sup> 24:12  <b>event</b> <sup>[1]</sup> 9:2  <b>Everybody</b> <sup>[2]</sup> 16:25 58:25  <b>everyone</b> <sup>[2]</sup> 10:8 54:19  <b>Everything</b> <sup>[1]</sup> 38:25  <b>evidence</b> <sup>[7]</sup> 16:22 17:9,20,22,23 26:5,6  <b>exactly</b> <sup>[5]</sup> 22:23,24 26:7 38:2 53:13  <b>example</b> <sup>[3]</sup> 36:25 44:25 53:25  <b>except</b> <sup>[2]</sup> 9:20 22:15  <b>exceptions</b> <sup>[1]</sup> 10:19  <b>Exchange</b> <sup>[7]</sup> 9:17 13:6,20 15:7 17:3 19:5 36:1  <b>excised</b> <sup>[1]</sup> 22:13  <b>exclude</b> <sup>[1]</sup> 49:15  <b>excluded</b> <sup>[1]</sup> 29:13  <b>exercise</b> <sup>[5]</sup> 14:7 25:7,7 28:1 38:18  <b>exercising</b> <sup>[4]</sup> 28:12,18 41:11 56:6  <b>existed</b> <sup>[2]</sup> 29:9 33:10  <b>exists</b> <sup>[2]</sup> 32:7 34:12  <b>expand</b> <sup>[1]</sup> 26:3  <b>expect</b> <sup>[1]</sup> 43:14  <b>expanded</b> <sup>[1]</sup> 23:25  <b>experience</b> <sup>[1]</sup> 19:15  <b>explained</b> <sup>[7]</sup> 5:20 9:14 14:7 20:17 21:8 56:24 59:14  <b>explaining</b> <sup>[1]</sup> 20:11  <b>explains</b> <sup>[1]</sup> 15:13  <b>explicit</b> <sup>[2]</sup> 58:12,14  <b>explicitly</b> <sup>[5]</sup> 31:9,21 32:4 34:20 39:16  <b>express</b> <sup>[3]</sup> 18:5 21:25 24:24  <b>expressed</b> <sup>[2]</sup> 10:4 21:12  <b>expressing</b> <sup>[1]</sup> 53:11  <b>extend</b> <sup>[1]</sup> 36:12</p>	<p><b>faith</b> <sup>[4]</sup> 31:4,10 34:21 47:14  <b>federal</b> <sup>[16]</sup> 5:11 10:7 11:13,13,14 21:16 26:10 32:22 33:2,5,16,25 39:8 41:4 49:20 59:14  <b>Federalist</b> <sup>[2]</sup> 32:10,15  <b>federalists</b> <sup>[3]</sup> 10:5,5,7  <b>feel</b> <sup>[1]</sup> 35:19  <b>felt</b> <sup>[1]</sup> 4:1  <b>Ferguson</b> <sup>[1]</sup> 53:8  <b>field</b> <sup>[1]</sup> 51:21  <b>figure</b> <sup>[2]</sup> 29:23 53:18  <b>filed</b> <sup>[2]</sup> 42:11,16  <b>filing</b> <sup>[2]</sup> 43:19 50:22  <b>Finally</b> <sup>[1]</sup> 40:3  <b>find</b> <sup>[5]</sup> 11:2,23 16:20 45:11 47:22  <b>findings</b> <sup>[1]</sup> 47:2  <b>first</b> <sup>[7]</sup> 4:22 7:20 9:14 29:7 33:22 47:12 48:21  <b>fiscs</b> <sup>[1]</sup> 59:7  <b>five</b> <sup>[1]</sup> 40:17  <b>follow</b> <sup>[3]</sup> 11:5 29:3 51:12  <b>followed</b> <sup>[3]</sup> 6:12 24:24 58:6  <b>footing</b> <sup>[1]</sup> 21:5  <b>Footnote</b> <sup>[2]</sup> 38:5 48:24  <b>force</b> <sup>[1]</sup> 39:14  <b>foreign</b> <sup>[5]</sup> 6:8 8:19 14:25 34:17 36:3  <b>forgot</b> <sup>[1]</sup> 13:10  <b>form</b> <sup>[3]</sup> 8:8 15:25 31:2  <b>formed</b> <sup>[1]</sup> 34:14  <b>former</b> <sup>[1]</sup> 18:2  <b>forming</b> <sup>[1]</sup> 57:12  <b>Forty</b> <sup>[1]</sup> 27:25  <b>forum</b> <sup>[1]</sup> 36:17  <b>found</b> <sup>[4]</sup> 11:3,16 18:15 31:4  <b>founders</b> <sup>[2]</sup> 11:11 21:8  <b>founders'</b> <sup>[1]</sup> 10:3  <b>founding</b> <sup>[1]</sup> 49:15  <b>Four</b> <sup>[1]</sup> 56:15  <b>four-to-four</b> <sup>[2]</sup> 55:9,10  <b>framers</b> <sup>[3]</sup> 17:24 27:15 33:22  <b>framers'</b> <sup>[1]</sup> 58:18  <b>framing</b> <sup>[5]</sup> 25:22 26:7 57:11 58:19 59:9  <b>FRANCHISE</b> <sup>[3]</sup> 1:3 3:5 47:1  <b>fraud</b> <sup>[1]</sup> 47:3  <b>frequently</b> <sup>[1]</sup> 38:16  <b>Friday</b> <sup>[1]</sup> 24:12  <b>friendly</b> <sup>[5]</sup> 8:2 9:21 10:11 13:25 15:14  <b>fugitive</b> <sup>[2]</sup> 31:10 34:22  <b>full</b> <sup>[5]</sup> 10:19 31:4,10 34:21 47:14  <b>fundamental</b> <sup>[5]</sup> 5:22 17:25 19:2 20:14 21:11</p>	<p><b>generals'</b> <sup>[1]</sup> 43:15  <b>genius</b> <sup>[1]</sup> 19:12  <b>Georgia</b> <sup>[3]</sup> 33:4 38:6 57:18  <b>getting</b> <sup>[1]</sup> 21:22  <b>gigantic</b> <sup>[1]</sup> 16:23  <b>GILBERT</b> <sup>[1]</sup> 1:6  <b>give</b> <sup>[10]</sup> 6:15 7:15 11:22 17:3 25:16,17 26:4 34:4 43:23 44:16  <b>given</b> <sup>[8]</sup> 3:22 19:23 20:1,1,4 25:18 26:1 37:10  <b>gives</b> <sup>[3]</sup> 20:15 46:10,11  <b>giving</b> <sup>[1]</sup> 58:21  <b>got</b> <sup>[4]</sup> 20:6 21:17 22:8 53:13  <b>government</b> <sup>[8]</sup> 26:12,15,17 29:1 32:21 33:11,25 44:7  <b>governments</b> <sup>[6]</sup> 32:23 33:6 42:17 43:22 44:15 45:3  <b>governor</b> <sup>[2]</sup> 26:13 43:12  <b>great</b> <sup>[1]</sup> 33:15  <b>greater</b> <sup>[1]</sup> 52:18  <b>grounds</b> <sup>[1]</sup> 25:12  <b>guarantee</b> <sup>[1]</sup> 19:6  <b>guess</b> <sup>[3]</sup> 16:19 17:17 43:13</p>	<p><b>hypotheses</b> <sup>[1]</sup> 17:19  <b>hypothesize</b> <sup>[2]</sup> 17:18 45:22</p> <hr/> <p><b>I</b></p> <p><b>idea</b> <sup>[2]</sup> 17:2 37:16  <b>identified</b> <sup>[3]</sup> 26:23 51:3 59:5  <b>identify</b> <sup>[1]</sup> 45:2  <b>ignore</b> <sup>[1]</sup> 27:8  <b>Il</b> <sup>[1]</sup> 36:15  <b>imaginary</b> <sup>[1]</sup> 51:15  <b>imagination</b> <sup>[2]</sup> 52:6,12  <b>immunities</b> <sup>[3]</sup> 18:4 31:11 34:23  <b>immunity</b> <sup>[39]</sup> 5:18,21,24 6:4,7 8:3,20 10:2,12 11:22 12:22 13:14 15:11 17:5,13,16 20:13,13,22,25 32:6 33:10 39:5,17 41:16,19,20 42:7 46:10 47:15 48:12,17 49:19 56:24 58:2,13,18 59:6,16  <b>implicit</b> <sup>[3]</sup> 5:22 7:17 14:9  <b>implied</b> <sup>[1]</sup> 14:25  <b>importance</b> <sup>[3]</sup> 29:10 30:15 52:15  <b>important</b> <sup>[12]</sup> 20:2,8 21:24 28:24 30:24 34:4 36:19 38:17 42:7 47:6 51:4 59:8  <b>impossibility</b> <sup>[1]</sup> 3:20  <b>including</b> <sup>[5]</sup> 18:6 20:16 22:5 28:5 30:18  <b>incongruous</b> <sup>[1]</sup> 48:11  <b>inconsistent</b> <sup>[1]</sup> 40:12  <b>incorrect</b> <sup>[2]</sup> 32:17,19  <b>indeed</b> <sup>[1]</sup> 42:19  <b>independence</b> <sup>[1]</sup> 26:20  <b>Indian</b> <sup>[9]</sup> 48:11,23,24 49:5,8,14,16,22,25  <b>indicating</b> <sup>[2]</sup> 42:6 54:12  <b>indication</b> <sup>[2]</sup> 34:24 36:4  <b>individual</b> <sup>[2]</sup> 22:20 32:12  <b>information</b> <sup>[1]</sup> 30:8  <b>Inherent</b> <sup>[3]</sup> 26:10 32:11,16  <b>inherently</b> <sup>[1]</sup> 50:25  <b>initial</b> <sup>[2]</sup> 30:21 31:6  <b>Initially</b> <sup>[1]</sup> 29:12  <b>injunction</b> <sup>[2]</sup> 24:12 48:1  <b>injured</b> <sup>[6]</sup> 28:4 30:18 31:16 37:25 46:5 56:9  <b>instances</b> <sup>[1]</sup> 15:12  <b>instead</b> <sup>[1]</sup> 22:16  <b>institution</b> <sup>[3]</sup> 52:19,23 53:3  <b>insufficient</b> <sup>[1]</sup> 36:5  <b>intended</b> <sup>[1]</sup> 17:24  <b>interest</b> <sup>[4]</sup> 30:17,20 54:3 59:5  <b>interests</b> <sup>[1]</sup> 59:15  <b>interference</b> <sup>[2]</sup> 26:19 49:16  <b>intergovernmental</b> <sup>[2]</sup> 20:25 56:23  <b>international</b> <sup>[10]</sup> 7:21,22 8:15 11:8,16,17,25 14:11 35:23 36:10  <b>intrude</b> <sup>[3]</sup> 6:17 29:24,25  <b>intrusion</b> <sup>[2]</sup> 28:13 56:5  <b>Intuitively</b> <sup>[1]</sup> 28:24  <b>invaded</b> <sup>[1]</sup> 30:6  <b>invasion</b> <sup>[2]</sup> 48:6,7  <b>investigation</b> <sup>[1]</sup> 30:2  <b>invoking</b> <sup>[1]</sup> 27:10</p>
<p style="text-align: center;"><b>F</b></p> <p><b>fact</b> <sup>[13]</sup> 15:23 24:2,21 25:9 31:20 32:3 42:4 45:17 46:12 47:12 48:23 49:17 52:16  <b>factor</b> <sup>[1]</sup> 54:21  <b>factors</b> <sup>[1]</sup> 50:9  <b>factual</b> <sup>[2]</sup> 46:22 47:19  <b>failure</b> <sup>[1]</sup> 36:9  <b>Fair</b> <sup>[1]</sup> 48:3</p>	<p style="text-align: center;"><b>G</b></p> <p><b>Gaming</b> <sup>[2]</sup> 24:14 49:4  <b>garbage</b> <sup>[1]</sup> 30:4  <b>Gas</b> <sup>[1]</sup> 58:3  <b>gave</b> <sup>[2]</sup> 8:10 16:14  <b>general</b> <sup>[10]</sup> 43:7,10,12,18 44:2,4,6,9,11 51:13  <b>generally</b> <sup>[1]</sup> 52:24  <b>generals</b> <sup>[4]</sup> 42:11,13,16 44:14</p>	<p style="text-align: center;"><b>H</b></p> <p><b>half</b> <sup>[3]</sup> 12:13 24:3 59:11  <b>Hall</b> <sup>[36]</sup> 4:14,20 5:8,10 12:10,12 20:18 21:20 24:24 25:6 27:25 28:10 31:20 33:9 38:2,4,6,13,15 39:3,22 40:12,18,21 41:22 42:2,15 45:21 55:2 56:2,4 57:2,22 58:9 59:4,20  <b>Hamilton</b> <sup>[3]</sup> 3:22 32:14,25  <b>hand</b> <sup>[1]</sup> 46:2  <b>Hans</b> <sup>[2]</sup> 5:17 20:12  <b>happen</b> <sup>[1]</sup> 14:18  <b>happened</b> <sup>[4]</sup> 45:7,11,17,24  <b>hard</b> <sup>[1]</sup> 54:5  <b>harder</b> <sup>[2]</sup> 40:19 51:22  <b>harp</b> <sup>[1]</sup> 5:1  <b>haul</b> <sup>[3]</sup> 9:8 19:21 21:16  <b>hauled</b> <sup>[2]</sup> 7:4 26:9  <b>hear</b> <sup>[5]</sup> 3:3 11:9 34:6 41:7 48:22  <b>heard</b> <sup>[1]</sup> 48:13  <b>hearing</b> <sup>[2]</sup> 39:10 51:20  <b>held</b> <sup>[6]</sup> 13:13,17 28:1 33:2 49:5 58:16  <b>hill</b> <sup>[1]</sup> 40:19  <b>Hilton</b> <sup>[4]</sup> 50:12 51:3,5 53:13  <b>historical</b> <sup>[1]</sup> 26:6  <b>history</b> <sup>[2]</sup> 4:4 28:21  <b>hold</b> <sup>[1]</sup> 32:22  <b>holding</b> <sup>[1]</sup> 42:2  <b>home</b> <sup>[2]</sup> 30:13 57:19  <b>honor</b> <sup>[17]</sup> 27:12 32:18 33:21 34:3,18 35:12 37:19 38:19 43:17 44:22 45:17 46:24 48:20 49:10 52:7,14 56:12  <b>Honors</b> <sup>[1]</sup> 47:7  <b>hope</b> <sup>[1]</sup> 37:12  <b>host</b> <sup>[2]</sup> 6:8 14:4  <b>House</b> <sup>[1]</sup> 22:12  <b>HYATT</b> <sup>[7]</sup> 1:6 3:5 36:15 46:3,12 47:2,12</p>	

## Official - Subject to Final Review

<p><b>involved</b> [2] 39:13 41:8  <b>involving</b> [1] 6:5  <b>isn't</b> [4] 5:15 12:16 38:15 44:23  <b>issue</b> [2] 20:7 36:6  <b>issues</b> [1] 16:25  <b>issuing</b> [1] 24:14  <b>itself</b> [12] 3:24 7:17 9:17 10:22 15:24 18:8 20:19 23:25 28:20 33:9 39:15 46:10</p>	<p><b>law</b> [37] 6:4 7:23 8:1,2,15 9:5,6,7, 20 10:11 11:8,25 13:18,24 14:3,4, 5,11 19:6,7,21 27:3,5,10 28:8,9 36:2,10 40:4,11 49:20 50:18,19, 20 52:1 55:5 58:21  <b>laws</b> [2] 21:9 26:18  <b>lawyer</b> [1] 51:22  <b>lawyers</b> [1] 51:18  <b>leads</b> [1] 45:21  <b>least</b> [7] 5:16 16:11 20:11 28:8 40:4 58:15 59:11  <b>leave</b> [1] 40:21  <b>left</b> [1] 55:15  <b>legal</b> [3] 8:10,21 19:17  <b>legislative</b> [1] 4:4  <b>legislature</b> [2] 26:14 43:11  <b>legislatures</b> [2] 42:18 43:21  <b>less</b> [1] 12:5  <b>letter</b> [1] 6:12  <b>level</b> [1] 33:24  <b>leverage</b> [1] 35:9  <b>liability</b> [4] 47:7,23,25 48:5  <b>liable</b> [5] 31:1,2 32:23 33:2 36:17  <b>light</b> [1] 7:9  <b>lightly</b> [1] 24:21  <b>limit</b> [7] 13:14 31:9 34:6,7,24 49:24 50:1  <b>limitation</b> [1] 18:5  <b>limitations</b> [1] 18:5  <b>limited</b> [2] 31:5 36:16  <b>limiting</b> [1] 33:4  <b>limits</b> [1] 31:13  <b>lines</b> [1] 30:3  <b>litigation</b> [1] 55:23  <b>little</b> [1] 51:17  <b>loaded</b> [1] 57:6  <b>long</b> [4] 6:6 30:19 54:11 58:6  <b>look</b> [10] 14:21 28:19 29:22 31:17 32:3 38:5 44:25 45:1 53:1 55:13  <b>looked</b> [1] 11:15  <b>lot</b> [9] 4:3 6:4 17:22 20:6 22:8,10 35:8 53:22 54:18  <b>Louisiana</b> [1] 5:17</p>	<p><b>Massachusetts</b> [2] 24:10,13  <b>matter</b> [10] 1:13 8:20,21 9:11 11:4, 4 14:5 15:23 24:22 31:22  <b>matters</b> [2] 53:9 58:17  <b>McCulloch</b> [2] 20:23 56:20  <b>McFaddon</b> [1] 10:14  <b>McNary</b> [1] 48:4  <b>mean</b> [14] 4:14 10:18 12:23 16:20 17:5,10,22 19:24 20:10 22:5 24:6 35:3 43:8 44:7  <b>meaning</b> [1] 20:15  <b>means</b> [1] 16:1  <b>meant</b> [2] 9:18 21:9  <b>measures</b> [1] 14:13  <b>mechanism</b> [2] 7:25 45:25  <b>mentioned</b> [1] 20:9  <b>merits</b> [2] 5:3 55:10  <b>met</b> [1] 25:1  <b>Michigan</b> [1] 48:23  <b>might</b> [7] 6:17 12:22 32:24 35:18 40:19,21 45:16  <b>million</b> [1] 29:15  <b>millions</b> [1] 23:23  <b>Mills</b> [1] 48:24  <b>minute</b> [1] 20:7  <b>minutes</b> [1] 56:15  <b>missed</b> [1] 5:7  <b>mistake</b> [3] 52:20 53:1 57:17  <b>Mister</b> [1] 15:18  <b>moment</b> [1] 17:11  <b>morning</b> [2] 3:4 27:23  <b>most</b> [7] 5:18 6:3 11:5 29:21 39:6 50:6,7  <b>move</b> [1] 21:21  <b>much</b> [2] 35:20 57:10  <b>multimillion-dollar</b> [1] 23:13  <b>must</b> [2] 10:20 32:19  <b>myself</b> [1] 16:20</p>	<p><b>never</b> [4] 14:23 48:21 52:20 57:15  <b>new</b> [11] 3:12,14 4:11,16,22 5:15 21:2 25:12 32:21,22 33:24  <b>newspapers</b> [1] 24:5  <b>nice</b> [1] 3:25  <b>nine</b> [1] 45:2  <b>non-textual</b> [1] 26:21  <b>None</b> [1] 41:8  <b>nonetheless</b> [1] 53:23  <b>nor</b> [2] 10:15,16  <b>nothing</b> [7] 37:5 39:3,24 41:25 51:7 53:21 58:12  <b>notion</b> [2] 32:15 57:17  <b>number</b> [5] 22:25 24:22 37:10 58:1,11</p>
<b>J</b>			
<p><b>January</b> [1] 1:11  <b>joined</b> [1] 42:5  <b>Joseph</b> [1] 10:15  <b>judge</b> [2] 24:13 52:1  <b>judgment</b> [3] 27:13 31:3 55:9  <b>judgments</b> [4] 8:6 17:15 57:4,9  <b>judicial</b> [5] 25:8 38:9 50:15,24 51:1  <b>judiciaries</b> [2] 42:18 43:21  <b>judiciary</b> [1] 26:16  <b>jurisdiction</b> [15] 3:21 14:7 28:3,12, 18 29:21 30:23 31:15 37:23 41:11 43:24 49:25 50:2 55:20 56:7  <b>jurisprudence</b> [3] 13:12 42:1 58:11  <b>JUSTICE</b> [120] 3:3,9,25 4:11,15,18, 23 5:4 6:2,11,24 8:12,16 9:22 10:13,24 11:2,10 12:1,3,15,18,21 13:2,21 14:16,21 15:4,7,8,8,16,18,21 16:4,8,19,21 17:8 18:10,12,16,21, 23 19:10,18,23 20:1,17,20,22 21:4, 14 22:4,8,11,14,15,19 23:5,8,16, 21 25:14 27:18,24 28:22 29:18 30:10,14 31:24 32:9 33:14 34:11 35:2,8,13,23 36:8,22,23 37:1,7 40:6,9, 14 41:24 42:3,21,22,25 43:2,4 44:1,12,18 45:9,19 46:6,13,21 47:18 48:9,13 49:7 50:4 51:10,12 52:8, 11,17 53:10,17 54:17 56:13,19,21 59:13,21,22</p>	<p><b>made</b> [5] 26:6 38:22 49:13 52:20 53:1  <b>Madison</b> [2] 3:23 10:8  <b>mail</b> [1] 30:5  <b>Maine</b> [8] 33:7 39:12,15,20 41:5, 13,17,23  <b>majestic</b> [1] 20:5  <b>majority</b> [1] 40:13  <b>mandatory</b> [1] 13:14  <b>manner</b> [1] 28:12  <b>Manufacturing</b> [1] 49:18  <b>many</b> [7] 10:1 11:17 38:12,14 50:5 51:23,25  <b>Mar</b> [1] 15:8  <b>Maritime</b> [1] 59:14  <b>Marshall</b> [10] 3:23 10:8,14 11:18 13:3,21 14:16,17 48:13 56:21  <b>Marshall's</b> [3] 15:9 19:19 20:23  <b>Maryland</b> [2] 20:24 56:20</p>	<p><b>nation</b> [4] 9:7 10:20,21 15:14  <b>national</b> [3] 7:22 9:14 36:2  <b>nations</b> [25] 7:23,23 8:1,2,4,19 9:5, 6,20,21 10:12 11:5 13:18,24,25 14:4,5,12 16:2 19:5,6,8,21 27:3 58:21  <b>nature</b> [3] 24:17 32:11,16  <b>necessarily</b> [3] 43:19 44:7,13  <b>necessary</b> [3] 25:13,13 34:9  <b>needed</b> [1] 53:8  <b>Neff</b> [1] 27:12  <b>negligence</b> [1] 29:13  <b>negotiations</b> [1] 17:6  <b>Neither</b> [1] 59:17  <b>neutral</b> [1] 33:17  <b>Nevada</b> [56] 4:7,14,19 5:7,9 12:10, 12 20:18 24:9,10,13,24 25:6 27:25 28:10 29:12,14,24,25 30:11,12 31:20 33:9 35:9,15,18 37:2,9,21 38:2,4,5,13,14 39:2,21 40:11,18, 21 41:22 42:2,14 45:12,13,20 47:10,14,18,21 55:2 56:2,4 57:2 58:9 59:4,19  <b>Nevada's</b> [1] 45:14</p>	<p><b>objection</b> [2] 55:16,20  <b>obligation</b> [3] 8:2 9:8,19  <b>obligations</b> [1] 9:4  <b>observation</b> [1] 22:4  <b>obsolete</b> [1] 57:22  <b>obtained</b> [1] 24:12  <b>occurred</b> [2] 48:8 55:17  <b>odd</b> [1] 10:13  <b>Office</b> [1] 47:4  <b>officer</b> [1] 43:18  <b>officials</b> [1] 47:10  <b>often</b> [2] 44:24 51:11  <b>Okay</b> [4] 7:14 14:22 25:4 26:8  <b>Oklahoma</b> [1] 49:18  <b>omitted</b> [1] 55:19  <b>once</b> [2] 34:13 52:3  <b>one</b> [25] 5:12 6:15 7:2 12:9,23 13:15 15:14 17:11 19:22 25:22 26:12, 14,15 28:25 29:19 30:15 36:20 41:16 42:23 45:21 50:6 55:23 56:25 58:11 59:5  <b>one-for-one</b> [2] 17:3 19:11  <b>one-off</b> [1] 24:1  <b>ones</b> [1] 50:7  <b>only</b> [10] 5:9,10 18:8 33:12 36:2 38:23 42:20 53:14 55:2 57:3  <b>open</b> [1] 48:25  <b>operate</b> [1] 24:16  <b>operator</b> [1] 24:11  <b>opinion</b> [3] 15:9 18:22 40:13  <b>opposed</b> [1] 39:18  <b>opposition</b> [2] 55:13,22  <b>option</b> [1] 23:3  <b>oral</b> [5] 1:14 2:2,5 3:7 27:21  <b>order</b> [2] 15:25 16:2  <b>original</b> [4] 4:7,7,14 5:25  <b>other</b> [39] 3:17 8:10,19 9:4,20 10:1, 10 11:23 13:11 14:14,14,15 15:11 16:14 19:5,17,18 20:15 25:23 26:21 28:5 33:13 34:7 36:24 37:4 38:10 40:17,20 45:4,23 46:2,3 50:9 57:4,9,14 58:23,25 59:3  <b>other's</b> [4] 8:3,5,6 19:22  <b>others</b> [2] 3:23 31:15  <b>otherwise</b> [1] 28:24  <b>out</b> [9] 4:21 5:8 26:9,18 29:23 52:5, 12 53:18 55:15</p>
<b>K</b>			
<p><b>KAGAN</b> [13] 8:12,16 16:4,8,19 17:8 19:10 25:14 31:24 42:3 43:2 44:12,18  <b>KAVANAUGH</b> [10] 19:23 20:1,21 32:9 40:6,9 41:24 51:10 53:17 54:17  <b>keep</b> [3] 37:5 53:16 56:6  <b>keeps</b> [2] 28:17 29:4  <b>Kennedy</b> [1] 18:23  <b>key</b> [2] 38:12 55:14  <b>kind</b> [2] 24:25 53:3  <b>Kiowa</b> [2] 49:17 58:4  <b>knowledge</b> [1] 51:14</p>	<p><b>M</b></p>	<p><b>nation</b> [4] 9:7 10:20,21 15:14  <b>national</b> [3] 7:22 9:14 36:2  <b>nations</b> [25] 7:23,23 8:1,2,4,19 9:5, 6,20,21 10:12 11:5 13:18,24,25 14:4,5,12 16:2 19:5,6,8,21 27:3 58:21  <b>nature</b> [3] 24:17 32:11,16  <b>necessarily</b> [3] 43:19 44:7,13  <b>necessary</b> [3] 25:13,13 34:9  <b>needed</b> [1] 53:8  <b>Neff</b> [1] 27:12  <b>negligence</b> [1] 29:13  <b>negotiations</b> [1] 17:6  <b>Neither</b> [1] 59:17  <b>neutral</b> [1] 33:17  <b>Nevada</b> [56] 4:7,14,19 5:7,9 12:10, 12 20:18 24:9,10,13,24 25:6 27:25 28:10 29:12,14,24,25 30:11,12 31:20 33:9 35:9,15,18 37:2,9,21 38:2,4,5,13,14 39:2,21 40:11,18, 21 41:22 42:2,14 45:12,13,20 47:10,14,18,21 55:2 56:2,4 57:2 58:9 59:4,19  <b>Nevada's</b> [1] 45:14</p>	<p><b>objection</b> [2] 55:16,20  <b>obligation</b> [3] 8:2 9:8,19  <b>obligations</b> [1] 9:4  <b>observation</b> [1] 22:4  <b>obsolete</b> [1] 57:22  <b>obtained</b> [1] 24:12  <b>occurred</b> [2] 48:8 55:17  <b>odd</b> [1] 10:13  <b>Office</b> [1] 47:4  <b>officer</b> [1] 43:18  <b>officials</b> [1] 47:10  <b>often</b> [2] 44:24 51:11  <b>Okay</b> [4] 7:14 14:22 25:4 26:8  <b>Oklahoma</b> [1] 49:18  <b>omitted</b> [1] 55:19  <b>once</b> [2] 34:13 52:3  <b>one</b> [25] 5:12 6:15 7:2 12:9,23 13:15 15:14 17:11 19:22 25:22 26:12, 14,15 28:25 29:19 30:15 36:20 41:16 42:23 45:21 50:6 55:23 56:25 58:11 59:5  <b>one-for-one</b> [2] 17:3 19:11  <b>one-off</b> [1] 24:1  <b>ones</b> [1] 50:7  <b>only</b> [10] 5:9,10 18:8 33:12 36:2 38:23 42:20 53:14 55:2 57:3  <b>open</b> [1] 48:25  <b>operate</b> [1] 24:16  <b>operator</b> [1] 24:11  <b>opinion</b> [3] 15:9 18:22 40:13  <b>opposed</b> [1] 39:18  <b>opposition</b> [2] 55:13,22  <b>option</b> [1] 23:3  <b>oral</b> [5] 1:14 2:2,5 3:7 27:21  <b>order</b> [2] 15:25 16:2  <b>original</b> [4] 4:7,7,14 5:25  <b>other</b> [39] 3:17 8:10,19 9:4,20 10:1, 10 11:23 13:11 14:14,14,15 15:11 16:14 19:5,17,18 20:15 25:23 26:21 28:5 33:13 34:7 36:24 37:4 38:10 40:17,20 45:4,23 46:2,3 50:9 57:4,9,14 58:23,25 59:3  <b>other's</b> [4] 8:3,5,6 19:22  <b>others</b> [2] 3:23 31:15  <b>otherwise</b> [1] 28:24  <b>out</b> [9] 4:21 5:8 26:9,18 29:23 52:5, 12 53:18 55:15</p>
<b>L</b>			
<p><b>laid</b> [1] 46:15  <b>language</b> [3] 11:3 41:13 55:14  <b>large</b> [1] 30:9  <b>last</b> [1] 30:25  <b>later</b> [1] 58:10  <b>Laughter</b> [6] 6:23 23:18 35:7,21 45:15 52:10</p>	<p><b>M</b></p>	<p><b>nation</b> [4] 9:7 10:20,21 15:14  <b>national</b> [3] 7:22 9:14 36:2  <b>nations</b> [25] 7:23,23 8:1,2,4,19 9:5, 6,20,21 10:12 11:5 13:18,24,25 14:4,5,12 16:2 19:5,6,8,21 27:3 58:21  <b>nature</b> [3] 24:17 32:11,16  <b>necessarily</b> [3] 43:19 44:7,13  <b>necessary</b> [3] 25:13,13 34:9  <b>needed</b> [1] 53:8  <b>Neff</b> [1] 27:12  <b>negligence</b> [1] 29:13  <b>negotiations</b> [1] 17:6  <b>Neither</b> [1] 59:17  <b>neutral</b> [1] 33:17  <b>Nevada</b> [56] 4:7,14,19 5:7,9 12:10, 12 20:18 24:9,10,13,24 25:6 27:25 28:10 29:12,14,24,25 30:11,12 31:20 33:9 35:9,15,18 37:2,9,21 38:2,4,5,13,14 39:2,21 40:11,18, 21 41:22 42:2,14 45:12,13,20 47:10,14,18,21 55:2 56:2,4 57:2 58:9 59:4,19  <b>Nevada's</b> [1] 45:14</p>	<p><b>objection</b> [2] 55:16,20  <b>obligation</b> [3] 8:2 9:8,19  <b>obligations</b> [1] 9:4  <b>observation</b> [1] 22:4  <b>obsolete</b> [1] 57:22  <b>obtained</b> [1] 24:12  <b>occurred</b> [2] 48:8 55:17  <b>odd</b> [1] 10:13  <b>Office</b> [1] 47:4  <b>officer</b> [1] 43:18  <b>officials</b> [1] 47:10  <b>often</b> [2] 44:24 51:11  <b>Okay</b> [4] 7:14 14:22 25:4 26:8  <b>Oklahoma</b> [1] 49:18  <b>omitted</b> [1] 55:19  <b>once</b> [2] 34:13 52:3  <b>one</b> [25] 5:12 6:15 7:2 12:9,23 13:15 15:14 17:11 19:22 25:22 26:12, 14,15 28:25 29:19 30:15 36:20 41:16 42:23 45:21 50:6 55:23 56:25 58:11 59:5  <b>one-for-one</b> [2] 17:3 19:11  <b>one-off</b> [1] 24:1  <b>ones</b> [1] 50:7  <b>only</b> [10] 5:9,10 18:8 33:12 36:2 38:23 42:20 53:14 55:2 57:3  <b>open</b> [1] 48:25  <b>operate</b> [1] 24:16  <b>operator</b> [1] 24:11  <b>opinion</b> [3] 15:9 18:22 40:13  <b>opposed</b> [1] 39:18  <b>opposition</b> [2] 55:13,22  <b>option</b> [1] 23:3  <b>oral</b> [5] 1:14 2:2,5 3:7 27:21  <b>order</b> [2] 15:25 16:2  <b>original</b> [4] 4:7,7,14 5:25  <b>other</b> [39] 3:17 8:10,19 9:4,20 10:1, 10 11:23 13:11 14:14,14,15 15:11 16:14 19:5,17,18 20:15 25:23 26:21 28:5 33:13 34:7 36:24 37:4 38:10 40:17,20 45:4,23 46:2,3 50:9 57:4,9,14 58:23,25 59:3  <b>other's</b> [4] 8:3,5,6 19:22  <b>others</b> [2] 3:23 31:15  <b>otherwise</b> [1] 28:24  <b>out</b> [9] 4:21 5:8 26:9,18 29:23 52:5, 12 53:18 55:15</p>



## Official - Subject to Final Review

<p><b>outlier</b> <sup>[4]</sup> 11:23 12:6 22:25 40:22</p> <p><b>over</b> <sup>[8]</sup> 7:19 12:13 13:23 25:8 35:9 49:14 58:16,16</p> <p><b>overrule</b> <sup>[11]</sup> 21:20 38:23 40:18 42:14 51:16,21,24 53:6,8 54:8 56:2</p> <p><b>overruled</b> <sup>[6]</sup> 22:24 23:2 53:14,23 54:19,20</p> <p><b>overruling</b> <sup>[3]</sup> 28:6 33:3 54:10</p> <p><b>overturned</b> <sup>[1]</sup> 47:1</p> <p><b>overturning</b> <sup>[3]</sup> 40:1 50:17,24</p> <p><b>overwhelmingly</b> <sup>[1]</sup> 59:8</p> <p><b>overwhelms</b> <sup>[2]</sup> 35:14,19</p> <p><b>own</b> <sup>[19]</sup> 6:16 7:13,13 10:20 13:23 17:16 26:18 29:3 31:14 33:11 34:5,10 39:17 41:19 42:9,9 43:9 45:13 50:25</p> <p><b>owner</b> <sup>[1]</sup> 38:10</p> <p><b>owns</b> <sup>[2]</sup> 7:3 38:8</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>PAGE</b> <sup>[3]</sup> 2:2 45:2 55:15</p> <p><b>pages</b> <sup>[3]</sup> 14:23 32:3 41:17</p> <p><b>paramount</b> <sup>[1]</sup> 59:15</p> <p><b>Parden</b> <sup>[1]</sup> 22:23</p> <p><b>part</b> <sup>[4]</sup> 16:12 38:1 47:25 52:4</p> <p><b>participants</b> <sup>[1]</sup> 3:11</p> <p><b>particular</b> <sup>[4]</sup> 25:21,22 54:4,21</p> <p><b>pattern</b> <sup>[1]</sup> 6:12</p> <p><b>PCI</b> <sup>[1]</sup> 49:4</p> <p><b>pending</b> <sup>[2]</sup> 46:19 49:3</p> <p><b>Pendleton</b> <sup>[1]</sup> 3:18</p> <p><b>Pennoyer</b> <sup>[1]</sup> 27:11</p> <p><b>Pennsylvania</b> <sup>[1]</sup> 25:11</p> <p><b>people</b> <sup>[6]</sup> 11:14 28:14 35:5 50:21 51:23 56:11</p> <p><b>perceive</b> <sup>[1]</sup> 34:8</p> <p><b>perfect</b> <sup>[5]</sup> 8:9 15:25 52:25 57:12 58:22</p> <p><b>perhaps</b> <sup>[2]</sup> 8:11 45:14</p> <p><b>period</b> <sup>[5]</sup> 29:9,17 31:24 32:1,5</p> <p><b>personal</b> <sup>[3]</sup> 29:20 30:5,23</p> <p><b>perspective</b> <sup>[1]</sup> 36:18</p> <p><b>petition</b> <sup>[3]</sup> 5:3 49:2,6</p> <p><b>Petitioner</b> <sup>[7]</sup> 1:4,19 2:4,10 3:8 55:24 56:17</p> <p><b>Petitioner's</b> <sup>[3]</sup> 32:4 48:10 55:15</p> <p><b>physically</b> <sup>[1]</sup> 29:25</p> <p><b>plain</b> <sup>[1]</sup> 4:4</p> <p><b>plan</b> <sup>[5]</sup> 7:17 14:10 15:24 19:12 39:1</p> <p><b>plausible</b> <sup>[1]</sup> 33:15</p> <p><b>please</b> <sup>[3]</sup> 3:10 27:24 40:8</p> <p><b>plenary</b> <sup>[1]</sup> 49:14</p> <p><b>Plessy</b> <sup>[1]</sup> 53:8</p> <p><b>point</b> <sup>[11]</sup> 4:21 5:8 7:21 13:7 18:18,20 28:23 35:24 49:12 51:25 54:23</p> <p><b>points</b> <sup>[1]</sup> 39:4</p> <p><b>ports</b> <sup>[3]</sup> 14:1,2 58:6</p> <p><b>position</b> <sup>[5]</sup> 5:5 8:18 42:17 44:8 48:18</p> <p><b>possibly</b> <sup>[1]</sup> 7:7</p> <p><b>postulate</b> <sup>[2]</sup> 7:18 20:14</p> <p><b>postulates</b> <sup>[2]</sup> 5:22 58:19</p>	<p><b>power</b> <sup>[34]</sup> 6:15 8:1,4 10:20 11:3,13,14 13:15 17:4 25:8,13 28:2,13 31:9,13 33:5,7 34:5,8 37:22 38:1,18 39:8 42:7,8 43:23 44:16 49:14 56:7,24,25 57:4,8,10</p> <p><b>powers</b> <sup>[7]</sup> 7:11 8:9 16:13,14 19:16 33:24 56:10</p> <p><b>practical</b> <sup>[3]</sup> 54:2,6,10</p> <p><b>pre</b> <sup>[1]</sup> 8:18</p> <p><b>pre-ratification</b> <sup>[7]</sup> 28:21 29:9,17 31:24 32:1,5 35:1</p> <p><b>precedent</b> <sup>[7]</sup> 28:7 38:21 50:14,18 53:6,13 54:11</p> <p><b>precedents</b> <sup>[2]</sup> 27:11 50:25</p> <p><b>predictability</b> <sup>[2]</sup> 50:15,21</p> <p><b>premises</b> <sup>[1]</sup> 47:19</p> <p><b>prepared</b> <sup>[1]</sup> 24:15</p> <p><b>prerogative</b> <sup>[1]</sup> 19:20</p> <p><b>presented</b> <sup>[3]</sup> 41:9 51:8 55:17</p> <p><b>preserving</b> <sup>[1]</sup> 19:2</p> <p><b>pretty</b> <sup>[3]</sup> 14:17 43:1,4</p> <p><b>prevent</b> <sup>[2]</sup> 28:11 36:21</p> <p><b>previously</b> <sup>[2]</sup> 25:16 26:22</p> <p><b>Primarily</b> <sup>[1]</sup> 41:1</p> <p><b>principle</b> <sup>[15]</sup> 12:9 13:24 19:7,21 20:12,21,24,25 21:3,24 26:11 48:2 56:22,23 59:6</p> <p><b>principles</b> <sup>[8]</sup> 14:3 23:11 26:22 40:13,14 58:20 59:16,17</p> <p><b>Printz</b> <sup>[2]</sup> 18:22 21:2</p> <p><b>prior</b> <sup>[7]</sup> 5:11 8:25 9:1,3 38:4 53:23 54:1</p> <p><b>privacy</b> <sup>[1]</sup> 48:7</p> <p><b>private</b> <sup>[1]</sup> 30:8</p> <p><b>privilege</b> <sup>[2]</sup> 31:11 34:23</p> <p><b>privileges</b> <sup>[1]</sup> 18:3</p> <p><b>probably</b> <sup>[1]</sup> 44:22</p> <p><b>problem</b> <sup>[6]</sup> 24:1,2,18 44:23 45:19,22</p> <p><b>proceeding</b> <sup>[1]</sup> 46:18</p> <p><b>proceedings</b> <sup>[3]</sup> 38:10 55:18,25</p> <p><b>process</b> <sup>[1]</sup> 46:14</p> <p><b>proclaimed</b> <sup>[1]</sup> 3:19</p> <p><b>produced</b> <sup>[2]</sup> 25:1 27:15</p> <p><b>Professor</b> <sup>[2]</sup> 26:25 52:2</p> <p><b>Professors</b> <sup>[4]</sup> 17:11 25:24 26:25 27:1</p> <p><b>prohibits</b> <sup>[2]</sup> 39:10 41:11</p> <p><b>promotes</b> <sup>[1]</sup> 50:14</p> <p><b>property</b> <sup>[6]</sup> 7:3,5 30:7 38:8,11 48:6</p> <p><b>propose</b> <sup>[1]</sup> 24:19</p> <p><b>protect</b> <sup>[11]</sup> 6:15 7:12 19:4 22:21 23:9 25:25 28:4 32:8 33:11 42:9,23</p> <p><b>protected</b> <sup>[4]</sup> 19:8 33:12 46:1 59:16</p> <p><b>protecting</b> <sup>[2]</sup> 30:17 45:25</p> <p><b>protection</b> <sup>[8]</sup> 29:16 30:24 32:1,6 34:1 36:2 46:11 58:17</p> <p><b>protects</b> <sup>[1]</sup> 29:8</p> <p><b>provide</b> <sup>[5]</sup> 31:15 37:24 43:24 45:8 56:8</p> <p><b>providing</b> <sup>[1]</sup> 32:25</p>	<p><b>provision</b> <sup>[1]</sup> 31:12</p> <p><b>provisions</b> <sup>[5]</sup> 18:17,20 19:13 20:15 34:21</p> <p><b>public</b> <sup>[1]</sup> 52:18</p> <p><b>punish</b> <sup>[1]</sup> 16:6</p> <p><b>punitive</b> <sup>[1]</sup> 29:15</p> <p><b>purposes</b> <sup>[1]</sup> 50:5</p> <p><b>put</b> <sup>[4]</sup> 4:2 32:19 34:5,7</p> <p><b>Putting</b> <sup>[1]</sup> 4:24</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>quasi-sovereigns</b> <sup>[2]</sup> 48:15,17</p> <p><b>question</b> <sup>[26]</sup> 7:1,7 10:17 11:9 12:1,16,25 16:22 18:13,17 28:16 30:22 31:6 37:1 40:7 41:9 43:22 46:22 49:1,3,11 51:13 53:18 55:17 56:1 57:24</p> <p><b>questioning</b> <sup>[1]</sup> 54:21</p> <p><b>questions</b> <sup>[4]</sup> 25:15 29:20 35:24 55:24</p> <p><b>quiet</b> <sup>[2]</sup> 7:2,4</p> <p><b>quite</b> <sup>[10]</sup> 12:16 34:3 36:19 39:6,9,12 40:12 47:6 49:22 50:3</p> <p><b>quote</b> <sup>[1]</sup> 31:21</p> <p><b>quoted</b> <sup>[1]</sup> 13:5</p> <p><b>quotes</b> <sup>[1]</sup> 14:21</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raised</b> <sup>[1]</sup> 4:19</p> <p><b>raising</b> <sup>[1]</sup> 55:12</p> <p><b>Randolph</b> <sup>[1]</sup> 3:24</p> <p><b>rarely</b> <sup>[1]</sup> 36:7</p> <p><b>rather</b> <sup>[1]</sup> 8:21</p> <p><b>ratification</b> <sup>[3]</sup> 3:11 12:10 13:13</p> <p><b>ratifying</b> <sup>[2]</sup> 8:8 19:16</p> <p><b>raw</b> <sup>[3]</sup> 8:1,4 11:3</p> <p><b>read</b> <sup>[5]</sup> 10:18 14:23,23 18:14 58:13</p> <p><b>real</b> <sup>[5]</sup> 28:13 48:3 54:3,7 56:5</p> <p><b>reality</b> <sup>[1]</sup> 36:6</p> <p><b>really</b> <sup>[3]</sup> 19:11 22:13 57:21</p> <p><b>reason</b> <sup>[9]</sup> 28:6 38:24 40:1 51:6,7 52:4 53:15,19 54:12</p> <p><b>reasoning</b> <sup>[1]</sup> 58:5</p> <p><b>reasons</b> <sup>[1]</sup> 33:21</p> <p><b>REBUTTAL</b> <sup>[2]</sup> 2:8 56:16</p> <p><b>Recall</b> <sup>[1]</sup> 57:25</p> <p><b>recent</b> <sup>[2]</sup> 5:18 24:3</p> <p><b>recently</b> <sup>[2]</sup> 6:18,25</p> <p><b>recited</b> <sup>[1]</sup> 19:1</p> <p><b>recognition</b> <sup>[1]</sup> 20:23</p> <p><b>recognize</b> <sup>[5]</sup> 8:6 12:8,22,24 15:11</p> <p><b>recognized</b> <sup>[11]</sup> 5:12 7:19 8:25 9:21 10:10 18:25 21:1 23:12 30:19 36:10 48:15</p> <p><b>recognizing</b> <sup>[1]</sup> 6:7</p> <p><b>reference</b> <sup>[2]</sup> 18:2,3</p> <p><b>referenced</b> <sup>[4]</sup> 13:5,12 42:8 59:19</p> <p><b>referred</b> <sup>[4]</sup> 9:10 19:10 26:24 45:1</p> <p><b>reflect</b> <sup>[2]</sup> 41:14 43:15</p> <p><b>reflected</b> <sup>[2]</sup> 9:17 26:21</p> <p><b>reflecting</b> <sup>[3]</sup> 32:15 43:20 44:3</p> <p><b>reflects</b> <sup>[2]</sup> 6:14 44:23</p>	<p><b>refuse</b> <sup>[3]</sup> 8:6 12:8 27:12</p> <p><b>regard</b> <sup>[6]</sup> 20:20 35:24 44:2 46:18 47:3 49:25</p> <p><b>regime</b> <sup>[1]</sup> 27:7</p> <p><b>regulate</b> <sup>[2]</sup> 26:11,15</p> <p><b>regulating</b> <sup>[1]</sup> 30:16</p> <p><b>Regulation</b> <sup>[1]</sup> 24:14</p> <p><b>regulations</b> <sup>[1]</sup> 21:10</p> <p><b>Rehnquist</b> <sup>[1]</sup> 20:17</p> <p><b>Rehnquist's</b> <sup>[1]</sup> 40:15</p> <p><b>reiterated</b> <sup>[1]</sup> 18:23</p> <p><b>relationship</b> <sup>[4]</sup> 34:15,17 49:21,23</p> <p><b>relative</b> <sup>[1]</sup> 33:5</p> <p><b>relatively</b> <sup>[2]</sup> 5:2 36:7</p> <p><b>relevant</b> <sup>[1]</sup> 40:10</p> <p><b>reliance</b> <sup>[3]</sup> 50:8 54:3,7</p> <p><b>relied</b> <sup>[1]</sup> 50:21</p> <p><b>relying</b> <sup>[2]</sup> 4:3,4</p> <p><b>remain</b> <sup>[1]</sup> 32:13</p> <p><b>remarkable</b> <sup>[1]</sup> 43:5</p> <p><b>remedies</b> <sup>[1]</sup> 43:25</p> <p><b>remedy</b> <sup>[10]</sup> 31:15 36:9,11,15,19 37:24 45:8 46:4 47:11 56:8</p> <p><b>remember</b> <sup>[1]</sup> 6:20</p> <p><b>render</b> <sup>[1]</sup> 57:4</p> <p><b>repeatedly</b> <sup>[1]</sup> 5:19</p> <p><b>replaced</b> <sup>[2]</sup> 16:15,16</p> <p><b>replicate</b> <sup>[1]</sup> 21:9</p> <p><b>reply</b> <sup>[3]</sup> 55:11,15,19</p> <p><b>report</b> <sup>[1]</sup> 24:15</p> <p><b>reported</b> <sup>[1]</sup> 24:6</p> <p><b>represent</b> <sup>[1]</sup> 43:7</p> <p><b>representations</b> <sup>[1]</sup> 43:6</p> <p><b>representatives</b> <sup>[1]</sup> 22:11</p> <p><b>representing</b> <sup>[1]</sup> 44:6</p> <p><b>represents</b> <sup>[1]</sup> 5:10</p> <p><b>republic</b> <sup>[2]</sup> 35:3,4</p> <p><b>repudiated</b> <sup>[1]</sup> 58:10</p> <p><b>require</b> <sup>[2]</sup> 33:8 41:6</p> <p><b>requirement</b> <sup>[1]</sup> 8:22</p> <p><b>requires</b> <sup>[1]</sup> 36:23</p> <p><b>reservation</b> <sup>[1]</sup> 7:10</p> <p><b>reserve</b> <sup>[1]</sup> 27:17</p> <p><b>residency</b> <sup>[1]</sup> 47:3</p> <p><b>resident</b> <sup>[1]</sup> 47:21</p> <p><b>respect</b> <sup>[12]</sup> 8:3 9:4,20 12:5 15:6 35:14 41:15 50:15,23 51:1 52:19 53:4</p> <p><b>respects</b> <sup>[2]</sup> 11:21 37:10</p> <p><b>respond</b> <sup>[1]</sup> 40:23</p> <p><b>Respondent</b> <sup>[5]</sup> 1:7,21 2:7 27:22 55:24</p> <p><b>response</b> <sup>[1]</sup> 13:18</p> <p><b>responses</b> <sup>[1]</sup> 48:19</p> <p><b>rested</b> <sup>[1]</sup> 15:2</p> <p><b>restrict</b> <sup>[1]</sup> 34:10</p> <p><b>resulting</b> <sup>[1]</sup> 27:13</p> <p><b>retained</b> <sup>[1]</sup> 17:14</p> <p><b>retaliate</b> <sup>[1]</sup> 58:23</p> <p><b>retaliating</b> <sup>[1]</sup> 45:23</p> <p><b>retaliatory</b> <sup>[2]</sup> 14:13 16:1</p> <p><b>revealed</b> <sup>[1]</sup> 30:8</p> <p><b>Revolutionary</b> <sup>[1]</sup> 57:7</p>
---	--	--	---

## Official - Subject to Final Review

<p><b>rightly</b> <sup>[1]</sup> 20:8  <b>rights</b> <sup>[5]</sup> 7:25 <b>30</b>:7 <b>45</b>:7 <b>48</b>:6,7  <b>road</b> <sup>[1]</sup> 52:3  <b>ROBERTS</b> <sup>[13]</sup> 3:3 <b>27</b>:18 <b>36</b>:8,23  <b>37</b>:7 <b>42</b>:22,25 <b>43</b>:4 <b>44</b>:1 <b>48</b>:9 <b>49</b>:7  <b>56</b>:13 <b>59</b>:22  <b>rule</b> <sup>[11]</sup> 7:6 <b>16</b>:16 <b>17</b>:4,13 <b>25</b>:21  <b>27</b>:2,5,9 <b>31</b>:4 <b>45</b>:10 <b>55</b>:13  <b>rules</b> <sup>[1]</sup> 29:2  <b>rummaged</b> <sup>[2]</sup> 30:4,4  <b>run</b> <sup>[2]</sup> 29:1,2</p>	<p><b>soon-to-be</b> <sup>[1]</sup> 3:14  <b>sorry</b> <sup>[2]</sup> 15:20 <b>46</b>:6  <b>sort</b> <sup>[6]</sup> 16:20 <b>25</b>:17 <b>27</b>:5 <b>44</b>:20 <b>47</b>:  20 <b>48</b>:12  <b>sorts</b> <sup>[2]</sup> 14:13,15  <b>SOTOMAYOR</b> <sup>[31]</sup> 3:25 <b>4</b>:11,15,  18,23 <b>5</b>:4 <b>6</b>:2,11,24 <b>11</b>:10 <b>21</b>:4,14  <b>22</b>:5,8,11,15,19 <b>23</b>:5,8,16,21 <b>28</b>:  <b>22</b> <b>29</b>:18 <b>30</b>:10,14 <b>36</b>:22 <b>42</b>:21 <b>46</b>:  6,13,21 <b>47</b>:18  <b>Sotomayor's</b> <sup>[3]</sup> 12:1 <b>16</b>:21 <b>18</b>:17  <b>sought</b> <sup>[1]</sup> 24:11  <b>sources</b> <sup>[1]</sup> 28:19  <b>South</b> <sup>[3]</sup> 50:13 <b>57</b>:19 <b>58</b>:5  <b>sovereign</b> <sup>[55]</sup> 3:15,20,21 <b>5</b>:18,21,  23 <b>6</b>:3,7 <b>7</b>:24 <b>8</b>:3 <b>9</b>:9,21 <b>10</b>:2 <b>12</b>:5,  22 <b>13</b>:14,15,17,22 <b>14</b>:2,6,25 <b>15</b>:10,  11 <b>17</b>:5,13 <b>18</b>:9 <b>19</b>:20 <b>20</b>:12,13,  21 <b>23</b>:24 <b>25</b>:8 <b>28</b>:2 <b>32</b>:6 <b>33</b>:10 <b>36</b>:  3 <b>37</b>:21 <b>38</b>:1,18 <b>39</b>:5,17 <b>41</b>:15,20  <b>42</b>:6 <b>44</b>:16 <b>46</b>:10 <b>47</b>:15 <b>56</b>:7,25  <b>57</b>:8 <b>58</b>:2,17 <b>59</b>:6,16  <b>sovereign's</b> <sup>[1]</sup> 41:19  <b>sovereigns</b> <sup>[3]</sup> 15:12 <b>48</b>:16,18  <b>sovereigns'</b> <sup>[1]</sup> 57:9  <b>sovereignty</b> <sup>[8]</sup> 18:1 <b>19</b>:3,4,7 <b>24</b>:  8 <b>25</b>:7 <b>32</b>:11,16  <b>speaking</b> <sup>[2]</sup> 32:14 <b>43</b>:11  <b>specific</b> <sup>[1]</sup> 20:6  <b>specifically</b> <sup>[1]</sup> 48:25  <b>specificity</b> <sup>[1]</sup> 20:5  <b>speeches</b> <sup>[1]</sup> 3:22  <b>split</b> <sup>[1]</sup> 55:10  <b>spoken</b> <sup>[1]</sup> 22:7  <b>stability</b> <sup>[2]</sup> 50:14,19  <b>stake</b> <sup>[1]</sup> 54:3  <b>stands</b> <sup>[1]</sup> 57:2  <b>stare</b> <sup>[10]</sup> 28:7 <b>38</b>:23 <b>40</b>:1,6 <b>50</b>:4,9  <b>51</b>:3 <b>52</b>:15 <b>53</b>:9 <b>57</b>:21  <b>start</b> <sup>[4]</sup> 45:13 <b>51</b>:24 <b>52</b>:3 <b>54</b>:13  <b>starting</b> <sup>[1]</sup> 54:23  <b>state</b> <sup>[102]</sup> 5:10,12,13,21 <b>6</b>:8,9,15,  17 <b>7</b>:1,2,2,3 <b>10</b>:18 <b>11</b>:23 <b>12</b>:9 <b>14</b>:  4 <b>15</b>:9 <b>20</b>:13,21 <b>22</b>:20 <b>23</b>:24 <b>24</b>:  10,13,22,23 <b>25</b>:3,11 <b>26</b>:11,12 <b>28</b>:  25 <b>29</b>:1,3 <b>30</b>:3,15,17,19 <b>31</b>:1,1,2,9,  13 <b>32</b>:2,2,8,8,23 <b>33</b>:6,8,18,18,19  <b>34</b>:1,2,8 <b>36</b>:12,13,17 <b>37</b>:5,22,25  <b>38</b>:6,8,8,10,17 <b>39</b>:10,11,14,17,19,  20 <b>41</b>:6,7,11 <b>42</b>:16,17,17,18 <b>43</b>:8,  13,13,18,21,22 <b>44</b>:15 <b>45</b>:3,4,6,12  <b>46</b>:4,5,25 <b>47</b>:10 <b>48</b>:22 <b>49</b>:16,24  <b>50</b>:1 <b>56</b>:9 <b>57</b>:14,18,19 <b>59</b>:6  <b>state's</b> <sup>[8]</sup> 23:9 <b>25</b>:8 <b>26</b>:13,14,16,  16 <b>33</b>:16 <b>59</b>:7  <b>stated</b> <sup>[2]</sup> 5:19 <b>13</b>:13  <b>statement</b> <sup>[1]</sup> 22:4  <b>STATES</b> <sup>[106]</sup> 1:1,15 <b>3</b>:13,16,17 <b>6</b>:  6,19 <b>7</b>:10,13 <b>8</b>:3,7,17 <b>9</b>:3,13,24  <b>10</b>:6,10 <b>11</b>:19,25 <b>12</b>:8 <b>14</b>:11 <b>15</b>:  10,25 <b>16</b>:12 <b>17</b>:14 <b>18</b>:3,4,8 <b>19</b>:5,  14 <b>21</b>:3,15,16,17,19,21 <b>22</b>:6,7,10  <b>24</b>:4,9,19 <b>25</b>:20,25 <b>26</b>:6,20 <b>27</b>:8,  12 <b>28</b>:1,5,11,14,14,17 <b>29</b>:8 <b>30</b>:20,</p>	<p><b>24</b> <b>32</b>:14 <b>33</b>:1,13 <b>34</b>:4,5,7,8,14,16,  17 <b>35</b>:17 <b>36</b>:11,19,24 <b>37</b>:5,8,13  <b>41</b>:3,5,15 <b>42</b>:5,11,13,19 <b>43</b>:8,16  <b>44</b>:4,6,14,19 <b>45</b>:1,5,9,23,24,25 <b>46</b>:  1 <b>48</b>:12,15 <b>49</b>:21,23 <b>56</b>:6,11 <b>57</b>:3,  5,13 <b>58</b>:22,25 <b>59</b>:12  <b>states'</b> <sup>[1]</sup> 43:6  <b>statute</b> <sup>[1]</sup> 46:11  <b>stayed</b> <sup>[1]</sup> 27:4  <b>step</b> <sup>[1]</sup> 23:6  <b>Steve</b> <sup>[1]</sup> 24:10  <b>stick</b> <sup>[2]</sup> 52:22,24  <b>still</b> <sup>[1]</sup> 18:13  <b>stood</b> <sup>[1]</sup> 9:3  <b>Story</b> <sup>[4]</sup> 10:15 <b>11</b>:19 <b>13</b>:3 <b>16</b>:17  <b>strangers</b> <sup>[2]</sup> 8:10 <b>19</b>:17  <b>stress</b> <sup>[1]</sup> 38:19  <b>stretching</b> <sup>[1]</sup> 12:13  <b>strictly</b> <sup>[1]</sup> 54:18  <b>strongly</b> <sup>[2]</sup> 50:6,7  <b>struck</b> <sup>[1]</sup> 29:14  <b>structural</b> <sup>[1]</sup> 19:13  <b>structure</b> <sup>[3]</sup> 5:24 <b>6</b>:3 <b>29</b>:6  <b>subject</b> <sup>[5]</sup> 3:13 <b>38</b>:9 <b>49</b>:19,20 <b>57</b>:  8  <b>subjecting</b> <sup>[1]</sup> 57:14  <b>submissions</b> <sup>[1]</sup> 44:2  <b>submitted</b> <sup>[2]</sup> 59:23,25  <b>subsequent</b> <sup>[2]</sup> 40:11,25  <b>subsequently</b> <sup>[1]</sup> 58:16  <b>sue</b> <sup>[6]</sup> 11:14 <b>37</b>:12 <b>39</b>:18,19 <b>46</b>:4  <b>58</b>:25  <b>sued</b> <sup>[13]</sup> 3:17 <b>6</b>:19 <b>7</b>:1 <b>10</b>:6 <b>24</b>:9  <b>33</b>:11,13,16,18 <b>36</b>:21 <b>44</b>:15 <b>45</b>:4  <b>49</b>:5  <b>suggest</b> <sup>[3]</sup> 23:10 <b>25</b>:24 <b>28</b>:18  <b>suggested</b> <sup>[1]</sup> 29:20  <b>suggesting</b> <sup>[1]</sup> 21:19  <b>suggests</b> <sup>[1]</sup> 15:1  <b>suing</b> <sup>[3]</sup> 31:1 <b>45</b>:13 <b>57</b>:18  <b>suit</b> <sup>[7]</sup> 3:14 <b>11</b>:13 <b>25</b>:11 <b>32</b>:12 <b>42</b>:  24 <b>47</b>:8,20  <b>suitability</b> <sup>[1]</sup> 24:16  <b>suits</b> <sup>[11]</sup> 33:8 <b>34</b>:7 <b>37</b>:4 <b>39</b>:11,14  <b>41</b>:3,4,7 <b>42</b>:12 <b>50</b>:22 <b>57</b>:14  <b>summarized</b> <sup>[1]</sup> 31:25  <b>superior</b> <sup>[3]</sup> 3:15 <b>7</b>:24,24  <b>superseded</b> <sup>[1]</sup> 27:11  <b>supported</b> <sup>[1]</sup> 59:5  <b>supports</b> <sup>[1]</sup> 50:7  <b>supposed</b> <sup>[3]</sup> 30:1,2 <b>53</b>:24  <b>SUPREME</b> <sup>[8]</sup> 1:1,14 <b>24</b>:23 <b>25</b>:4  <b>29</b>:12,14 <b>49</b>:4 <b>55</b>:14  <b>surprise</b> <sup>[1]</sup> 24:25  <b>surrendered</b> <sup>[3]</sup> 8:9 <b>16</b>:1 <b>19</b>:16  <b>survivor</b> <sup>[1]</sup> 57:22  <b>system</b> <sup>[3]</sup> 16:10 <b>25</b>:19,20</p>	<p><b>TAX</b> <sup>[12]</sup> 1:3 <b>3</b>:5 <b>46</b>:15,19 <b>47</b>:1,5,7,  23,25 <b>48</b>:1,5 <b>56</b>:25  <b>Technology</b> <sup>[1]</sup> 49:18  <b>Tenth</b> <sup>[7]</sup> 28:2,15 <b>31</b>:14 <b>37</b>:20 <b>41</b>:8  <b>44</b>:16 <b>50</b>:2  <b>terms</b> <sup>[4]</sup> 35:22 <b>46</b>:20 <b>51</b>:2 <b>54</b>:5  <b>terrific</b> <sup>[1]</sup> 10:6  <b>territory</b> <sup>[3]</sup> 10:20 <b>13</b>:22,23  <b>text</b> <sup>[10]</sup> 4:5 <b>13</b>:9 <b>15</b>:24 <b>18</b>:16 <b>20</b>:3,  9 <b>28</b>:19 <b>31</b>:7,8 <b>34</b>:24  <b>texts</b> <sup>[1]</sup> 21:12  <b>textual</b> <sup>[5]</sup> 7:16,16 <b>26</b>:4,5 <b>31</b>:12  <b>themselves</b> <sup>[6]</sup> 24:4 <b>25</b>:25 <b>36</b>:21  <b>42</b>:23 <b>46</b>:1 <b>57</b>:14  <b>there's</b> <sup>[18]</sup> 6:4,25 <b>17</b>:2,23 <b>28</b>:5 <b>30</b>:  15,16 <b>36</b>:4 <b>37</b>:5 <b>38</b>:21,23 <b>39</b>:25  <b>46</b>:13,14 <b>49</b>:2 <b>51</b>:7 <b>54</b>:2 <b>58</b>:12  <b>therefore</b> <sup>[2]</sup> 9:11 <b>51</b>:23  <b>They've</b> <sup>[1]</sup> 22:8  <b>thinking</b> <sup>[2]</sup> 16:20 <b>57</b>:23  <b>Thomas</b> <sup>[1]</sup> 59:13  <b>though</b> <sup>[1]</sup> 40:10  <b>thousand</b> <sup>[1]</sup> 16:24  <b>three</b> <sup>[2]</sup> 22:7 <b>28</b>:19  <b>throw</b> <sup>[1]</sup> 49:8  <b>title</b> <sup>[2]</sup> 7:2,4  <b>today</b> <sup>[7]</sup> 32:7 <b>39</b>:1 <b>44</b>:17 <b>51</b>:8 <b>54</b>:  14 <b>55</b>:1 <b>57</b>:2  <b>tort</b> <sup>[2]</sup> 48:22 <b>49</b>:6  <b>torts</b> <sup>[2]</sup> 47:8 <b>48</b>:5  <b>total</b> <sup>[1]</sup> 45:2  <b>totally</b> <sup>[1]</sup> 52:14  <b>traced</b> <sup>[1]</sup> 10:21  <b>trade</b> <sup>[3]</sup> 17:9,12,12  <b>trades</b> <sup>[1]</sup> 17:18  <b>treasuries</b> <sup>[1]</sup> 57:9  <b>treat</b> <sup>[2]</sup> 8:10 <b>19</b>:17  <b>tribal</b> <sup>[1]</sup> 49:19  <b>Tribe</b> <sup>[2]</sup> 49:17 <b>58</b>:3  <b>tribes</b> <sup>[7]</sup> 48:11,14,23 <b>49</b>:5,8,14,22  <b>tribunal</b> <sup>[1]</sup> 33:17  <b>Trinidad</b> <sup>[1]</sup> 10:15  <b>true</b> <sup>[10]</sup> 7:23 <b>9</b>:7,10 <b>25</b>:1 <b>37</b>:20 <b>52</b>:  1,5,12,14 <b>53</b>:22  <b>try</b> <sup>[1]</sup> 26:8  <b>trying</b> <sup>[1]</sup> 29:23  <b>turned</b> <sup>[2]</sup> 23:12,13  <b>two</b> <sup>[5]</sup> 11:20 <b>33</b>:20 <b>37</b>:8 <b>48</b>:19 <b>59</b>:  17  <b>two-thirds</b> <sup>[1]</sup> 21:20</p>
<b>S</b>			
<p><b>Sabbatino</b> <sup>[1]</sup> 9:16  <b>Sachs</b> <sup>[4]</sup> 17:12 <b>25</b>:24 <b>27</b>:1,1  <b>same</b> <sup>[6]</sup> 8:18 <b>22</b>:23,25 <b>24</b>:25 <b>32</b>:7  <b>41</b>:16  <b>sanction</b> <sup>[1]</sup> 26:17  <b>Santissima</b> <sup>[1]</sup> 10:15  <b>saying</b> <sup>[11]</sup> 8:17 <b>17</b>:17 <b>25</b>:4 <b>28</b>:11  <b>42</b>:11 <b>44</b>:10,12 <b>49</b>:11 <b>53</b>:16 <b>56</b>:5  <b>58</b>:23  <b>says</b> <sup>[15]</sup> 12:6 <b>13</b>:21 <b>14</b>:22,22,24,  24 <b>15</b>:4,7 <b>32</b>:5 <b>38</b>:3,7 <b>41</b>:18 <b>52</b>:19,  23 <b>55</b>:16  <b>Scalia</b> <sup>[1]</sup> 18:21  <b>Schooner</b> <sup>[6]</sup> 9:17 <b>10</b>:14 <b>13</b>:6,20  <b>15</b>:7 <b>36</b>:1  <b>second</b> <sup>[4]</sup> 34:3 <b>36</b>:18 <b>49</b>:12 <b>55</b>:7  <b>Section</b> <sup>[1]</sup> 18:6  <b>see</b> <sup>[3]</sup> 7:9 <b>29</b>:19 <b>42</b>:14  <b>seeming</b> <sup>[1]</sup> 40:22  <b>seems</b> <sup>[1]</sup> 40:12  <b>seen</b> <sup>[1]</sup> 34:1  <b>self-government</b> <sup>[1]</sup> 59:12  <b>Seminole</b> <sup>[1]</sup> 58:3  <b>Senate</b> <sup>[1]</sup> 22:12  <b>sense</b> <sup>[3]</sup> 18:8 <b>39</b>:23 <b>41</b>:24  <b>series</b> <sup>[1]</sup> 40:15  <b>serious</b> <sup>[2]</sup> 23:6 <b>44</b>:23  <b>serves</b> <sup>[1]</sup> 50:5  <b>SETH</b> <sup>[5]</sup> 1:18 <b>2</b>:3,9 <b>3</b>:7 <b>56</b>:16  <b>several</b> <sup>[1]</sup> 15:8  <b>severe</b> <sup>[2]</sup> 54:2,6  <b>ships</b> <sup>[2]</sup> 14:1,2  <b>shock</b> <sup>[2]</sup> 24:25,25  <b>shot</b> <sup>[1]</sup> 27:16  <b>shouldn't</b> <sup>[2]</sup> 22:24 <b>43</b>:5  <b>show</b> <sup>[1]</sup> 17:9  <b>shows</b> <sup>[2]</sup> 29:10,16  <b>significance</b> <sup>[1]</sup> 37:15  <b>significant</b> <sup>[1]</sup> 24:2  <b>simply</b> <sup>[3]</sup> 41:21 <b>44</b>:4,12  <b>since</b> <sup>[12]</sup> 6:3 <b>20</b>:11 <b>38</b>:14 <b>39</b>:3,24  <b>41</b>:25 <b>45</b>:3,20 <b>46</b>:20 <b>49</b>:15 <b>59</b>:10,  18  <b>sister</b> <sup>[1]</sup> 36:13  <b>situation</b> <sup>[4]</sup> 9:13 <b>11</b>:12 <b>35</b>:16 <b>46</b>:  2  <b>slate</b> <sup>[1]</sup> 38:21  <b>slave</b> <sup>[2]</sup> 31:11 <b>34</b>:22  <b>Solicitor</b> <sup>[4]</sup> 44:2,4,5,9  <b>somebody</b> <sup>[1]</sup> 11:7  <b>somehow</b> <sup>[1]</sup> 20:8</p>	<p><b>table</b> <sup>[1]</sup> 16:25  <b>tacit</b> <sup>[1]</sup> 15:1  <b>talked</b> <sup>[1]</sup> 36:22  <b>Tasmania</b> <sup>[1]</sup> 12:23  <b>Tate</b> <sup>[1]</sup> 6:12</p>	<p style="text-align: center;"><b>T</b></p>	<p style="text-align: center;"><b>U</b></p> <p><b>U.S.</b> <sup>[1]</sup> 6:11  <b>unanimous</b> <sup>[1]</sup> 3:15  <b>unconsenting</b> <sup>[1]</sup> 9:8  <b>unconstitutional</b> <sup>[1]</sup> 26:19  <b>under</b> <sup>[2]</sup> 7:22,25 <b>9</b>:4 <b>11</b>:14 <b>14</b>:2,  3 <b>19</b>:7 <b>28</b>:2,8,15 <b>31</b>:14 <b>34</b>:14,15  <b>36</b>:2,11 <b>44</b>:16 <b>47</b>:14 <b>48</b>:3,18 <b>49</b>:8  <b>50</b>:2  <b>under-inclusive</b> <sup>[1]</sup> 25:2  <b>underlie</b> <sup>[1]</sup> 58:20  <b>underlies</b> <sup>[1]</sup> 20:15  <b>underlying</b> <sup>[1]</sup> 7:18</p>

## Official - Subject to Final Review

<b>undermines</b> <sup>[1]</sup> 50:25	<b>20:10 21:4,5,14 22:3,10,14,17,22</b>
<b>understand</b> <sup>[3]</sup> 8:13,17 43:6	<b>23:7,15,19,23 25:14 26:8 28:23</b>
<b>understanding</b> <sup>[4]</sup> 3:16 10:3,4 58:18	<b>31:7 35:25 38:3,25 39:4 56:15,16,18 59:23</b>
<b>understood</b> <sup>[5]</sup> 10:9 16:5,9 21:11 49:15	<b>way</b> <sup>[6]</sup> 4:1 6:6 22:1,5 50:1 54:11
<b>unenforceable</b> <sup>[1]</sup> 9:9	<b>ways</b> <sup>[1]</sup> 25:23
<b>uniformly</b> <sup>[1]</sup> 5:19	<b>Wednesday</b> <sup>[1]</sup> 1:11
<b>union</b> <sup>[13]</sup> 8:7,9 9:25 15:25 21:12 25:10 26:10 27:14 35:17 57:5,12 58:3,22	<b>weekend</b> <sup>[1]</sup> 24:5
<b>UNITED</b> <sup>[9]</sup> 1:1,15 6:6 21:2 28:14 34:13 44:3,6 56:11	<b>Welch</b> <sup>[1]</sup> 58:4
<b>universal</b> <sup>[2]</sup> 27:2,9	<b>west</b> <sup>[2]</sup> 8:14 58:21
<b>unless</b> <sup>[1]</sup> 17:8	<b>Western</b> <sup>[1]</sup> 25:10
<b>unresolved</b> <sup>[1]</sup> 49:11	<b>whatever</b> <sup>[5]</sup> 5:17 10:16 19:20 42:4 51:20
<b>unsatisfactory</b> <sup>[1]</sup> 19:15	<b>Whereupon</b> <sup>[1]</sup> 59:24
<b>until</b> <sup>[2]</sup> 5:17 12:10	<b>whether</b> <sup>[12]</sup> 3:12 7:1 32:21 39:9,13 41:4,5 43:11 47:14,21 48:22 56:1
<b>up</b> <sup>[12]</sup> 6:15 8:11 10:21 16:14 17:3 34:4 43:23 44:16 51:13 52:5,11 58:21	<b>wild</b> <sup>[2]</sup> 8:14 58:21
<b>V</b>	<b>Wilkes</b> <sup>[1]</sup> 49:4
<b>valuable</b> <sup>[1]</sup> 50:5	<b>will</b> <sup>[3]</sup> 37:3 38:22 44:8
<b>values</b> <sup>[1]</sup> 51:3	<b>willing</b> <sup>[2]</sup> 7:12 37:9
<b>varies</b> <sup>[1]</sup> 43:13	<b>willingness</b> <sup>[1]</sup> 6:14
<b>Vattel</b> <sup>[8]</sup> 10:16 13:3,4,6,11 14:22,22,24	<b>withdrawing</b> <sup>[1]</sup> 19:3
<b>versus</b> <sup>[58]</sup> 3:5 4:14,19 5:7,10,17 9:15,16 12:10,12 20:18,23 21:2 24:24 25:6 27:12,25 28:10 31:20 33:4,7,9 38:2,4,5,7,13,14 39:2,12,15,20,21 40:12,21 41:5,13,17,22,23 42:2,14 45:21 48:3,24 49:4,18 50:12 53:7,8 55:2 56:2,4,20 57:2 58:9 59:4,19	<b>within</b> <sup>[3]</sup> 10:20 29:3 47:10
<b>view</b> <sup>[8]</sup> 8:23,23 20:4,5 36:11 37:14 51:25 54:8	<b>without</b> <sup>[1]</sup> 32:12
<b>views</b> <sup>[5]</sup> 43:7,15,15,20 44:3	<b>words</b> <sup>[5]</sup> 8:19 19:18,19 40:17 55:18
<b>vigilant</b> <sup>[1]</sup> 18:14	<b>work</b> <sup>[2]</sup> 17:6 21:23
<b>violate</b> <sup>[3]</sup> 8:1,4 19:21	<b>worked</b> <sup>[1]</sup> 16:11
<b>violated</b> <sup>[2]</sup> 11:8 17:15	<b>working</b> <sup>[1]</sup> 25:19
<b>violates</b> <sup>[2]</sup> 11:24 45:6	<b>world</b> <sup>[1]</sup> 27:7
<b>violation</b> <sup>[2]</sup> 13:18 14:12	<b>worried</b> <sup>[1]</sup> 11:12
<b>violations</b> <sup>[1]</sup> 16:6	<b>worry</b> <sup>[1]</sup> 27:10
<b>Virginia</b> <sup>[1]</sup> 3:19	<b>writings</b> <sup>[1]</sup> 3:22
<b>vis-a-vis</b> <sup>[1]</sup> 19:4	<b>written</b> <sup>[1]</sup> 32:20
<b>visiting</b> <sup>[1]</sup> 15:14	<b>wrongness</b> <sup>[2]</sup> 4:24 5:2
<b>vital</b> <sup>[1]</sup> 30:20	<b>Wynn</b> <sup>[2]</sup> 24:11,16
<b>W</b>	<b>Y</b>
<b>waiting</b> <sup>[1]</sup> 18:16	<b>years</b> <sup>[9]</sup> 5:11 7:19 12:14 25:5 27:11,25 40:17 45:18 50:19
<b>waive</b> <sup>[1]</sup> 19:19	<b>York</b> <sup>[2]</sup> 21:2 25:12
<b>waived</b> <sup>[3]</sup> 14:6 55:12,21	<b>Z</b>
<b>wanted</b> <sup>[2]</sup> 31:8 34:19	<b>zero</b> <sup>[1]</sup> 5:13
<b>war</b> <sup>[5]</sup> 8:5 13:19 14:15 36:10 57:7	
<b>warship</b> <sup>[1]</sup> 15:14	
<b>Washington</b> <sup>[2]</sup> 1:10,18	
<b>waste</b> <sup>[1]</sup> 15:17	
<b>WAXMAN</b> <sup>[65]</sup> 1:18 2:3,9 3:6,7,9 4:10,13,17,21,25 5:6 6:10,21 7:14 8:14,16,23 9:23 10:23 11:1 12:2,7,17,20 13:1,4 14:20 15:3,6,19,22 16:6,8,18 17:7,21 18:11,19 19:24	