

| | | |
|----|-----------------------------|-------|
| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF: | PAGE: |
| 3 | STEVEN M. SULLIVAN, ESQ. | |
| 4 | On behalf of the Appellants | 3 |
| 5 | ORAL ARGUMENT OF: | |
| 6 | MICHAEL B. KIMBERLY, ESQ. | |
| 7 | on behalf of the Appellees | 31 |
| 8 | REBUTTAL ARGUMENT OF: | |
| 9 | STEVEN M. SULLIVAN, ESQ. | |
| 10 | On behalf of the Appellants | 66 |
| 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 (11:25 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-726, Lamone versus
5 Benisek.

6 Mr. Sullivan.

7 ORAL ARGUMENT OF STEVEN M. SULLIVAN

8 ON BEHALF OF THE APPELLANTS

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

11 I'd like quickly to try to reorient
12 the Court to Maryland's case and then, if I
13 can, address some of the concerns that I heard
14 in the argument that you just had.

15 In this case, the Court should reverse
16 and vacate for three reasons. The First
17 Amendment retaliation test that was adopted --
18 a single test was used here -- fails to provide
19 a manageable standard because it does not give
20 courts and legislators the means to distinguish
21 between excessive political considerations and
22 those that have been deemed constitutionally
23 acceptable.

24 JUSTICE KAGAN: Was -- was this an
25 excessive political consideration?

1 MR. SULLIVAN: I don't think it was,
2 Your Honor. Whether you -- the Court may like
3 it or not, this is the norm. For states where
4 one party receives more than 60 percent of the
5 vote in congressional elections, those states
6 have a line up and see --

7 JUSTICE KAGAN: Well, if that's right,
8 then your defense is not really that we can't
9 tell the difference between excessive and
10 non-excessive because, under any measure, this
11 is excessive, isn't it? I mean, you'd only
12 need 10,000 votes to -- to do the -- the
13 population measure that -- that Baker requires,
14 and instead map makers moved 66,000 Republicans
15 out of the district, 24,000 Democrats into the
16 District, flips the composition of the district
17 from 47 percent Republicans and 36 percent
18 Democrats to, instead, 45 percent Democrats and
19 34 percent Republicans, effectively ensuring
20 that Republicans will never win this seat again
21 and that -- and that Maryland, which has about
22 35 percent Republicans, is going to have one
23 Republican House member for the foreseeable
24 future. How is that not excessive?

25 MR. SULLIVAN: There's a number of

1 things wrong with that, Your Honor,
2 respectfully. One is it starts from the
3 perspective that we take one district and we
4 assume that it's the whole universe. It's like
5 the famous New Yorker cartoon; all you see is
6 New York buildings and not the rest of the
7 country. Maps are formed piecing together
8 parts of the entire state.

9 This one, the Sixth District, was
10 heavily influenced by the decision that had
11 nothing to do with partisan politics, and that
12 was to remove a crossing across the Chesapeake
13 Bay that was instituted --

14 JUSTICE KAVANAUGH: That -- the stated
15 goal was seven/one.

16 MR. SULLIVAN: For some, it was. But
17 it was a goal --

18 JUSTICE KAVANAUGH: The governor and
19 others.

20 JUSTICE KAGAN: Well, for some, the
21 governor, the speaker.

22 JUSTICE KAVANAUGH: I mean, I don't
23 think you should run away from the obvious. I
24 mean, the crossing the bay thing is not very
25 persuasive, given all the evidence that this

1 was just seven/one. And, you -- you know,
2 you've got Easton grouped in with Carroll
3 County, Talbot County, Wicomico County grouped
4 in with west of Baltimore. That's just -- as
5 opposed to just crossing the bay, when
6 everyone's saying we want seven/one. I don't
7 -- I just don't know, in response to Justice
8 Kagan's question, you should run away from the
9 obvious.

10 MR. SULLIVAN: Well, I don't think
11 it's running away to say that there were a lot
12 of other factors that -- that had to do with
13 this. The change in the First District that
14 resulted from the bay crossing changed a
15 competitive district that Democrats had
16 actually been able to win to a heavily leaning
17 Republican district that Democrats --

18 JUSTICE KAVANAUGH: Well, sure, to
19 make the others all the other way, and to get
20 from six/two to seven/one or from five/three or
21 six/two to seven/one, you --

22 MR. SULLIVAN: Well --

23 JUSTICE KAVANAUGH: -- you get the
24 sixth and eighth, both Democratic, the first is
25 going to be Republican for the foreseeable

1 future, as Justice Kagan says, but it's going
2 to be seven/one. That's the stated goal.
3 That's the goal that's effectuated.

4 MR. SULLIVAN: Well, to get to that,
5 you have to discount other statements in the
6 record, which you can't do on summary judgment,
7 such as Governor O'Malley's statement that,
8 given the population growth in the western part
9 of the central part of the state -- Montgomery
10 County, primarily, had the largest growth --
11 you're going to see the most changes out the
12 I-270 corridor. He also said that.

13 So you'd have to say, well, we're
14 getting in the --

15 JUSTICE KAVANAUGH: And the I-270
16 corridor is a community of interest?

17 MR. SULLIVAN: It is. That was
18 established in this record. It's from
19 independent sources that have nothing to do
20 with --

21 JUSTICE SOTOMAYOR: Well, they should
22 have put it in the Eighth District then.

23 MR. SULLIVAN: What's that?

24 JUSTICE SOTOMAYOR: If the idea was to
25 unify the I-270 corridor, they could -- I look

1 at the map, and it's very simple, put it in the
2 Eighth District.

3 MR. SULLIVAN: Well, that would be an
4 injury according to Plaintiffs' own complaint,
5 because they say packing is an injury that's
6 remediable. And that would be packing the
7 Democrats in -- that's a heavily Democratic
8 area that had more growth than any of the
9 surrounding areas in the entire state, the most
10 growth right there.

11 And so it had to go somewhere, and
12 north was a reasonable direction for it to go.

13 JUSTICE BREYER: Yes, but --

14 MR. SULLIVAN: Then the Eighth
15 District went north.

16 JUSTICE BREYER: -- suppose,
17 hypothetically, to get away from these facts,
18 that what we had used the three-part test that
19 you just heard. One, there are 42 bishops
20 before whom they swear that they did this just
21 to help the Democrats. Now we look at the map
22 they used and the map, by the way, showed in
23 state-wide elections, governor, the Republicans
24 won. But 42 bishops say, they swore; in other
25 words, it's indisputable.

1 Second, that this will, in fact, make
2 a difference of who -- how many Republicans
3 there are. And, third, that it's absolutely
4 durable, and there we get the greatest
5 staticians -- statisticians in the universe in
6 there, okay?

7 Now imagine this is -- I've
8 exaggerated enormously, but if that were true,
9 then would you say this Court should intervene?

10 MR. SULLIVAN: I'm not sure I
11 understand all of that, and we may have an --

12 JUSTICE BREYER: In other words, if
13 it's absolutely indisputed that there was a
14 clear and absolute intent to do this just so
15 the Democrats could get the district. Number
16 two, it is indisputed this will have an effect
17 of giving this district to the Democrats, and
18 number three -- it's a big effect. And, number
19 three, it will happen for the next 20 years.
20 Okay? So we got all three parts, I think, if I
21 understand it correctly.

22 On that assumption, would you say this
23 Court should intervene?

24 MR. SULLIVAN: I don't know that I can
25 because, Justice Breyer, you expressed the need

1 to limit it to the extreme circumstance.

2 JUSTICE BREYER: Well, I just pictured
3 a --

4 MR. SULLIVAN: If you have that
5 circumstance, then you're going to have to
6 intervene in Arkansas, Kansas, Massachusetts,
7 Oklahoma, Alabama, Kentucky, Tennessee, and
8 Utah, all states where more than 60 percent of
9 the votes are cast for one party. That's in
10 the record at 871 and 1012. It was established
11 and was unrebutted that in states that have a
12 similar political makeup to Maryland, you end
13 up with a congressional delegation that looks
14 very similar to Maryland.

15 So, if you're concerned about limiting
16 the Court's intervention to the extreme
17 circumstance, at least under the current state
18 of affairs in these United States, you would
19 not be limiting it to extreme. You would be
20 saying get ready, Arkansas, Kansas,
21 Massachusetts, Oklahoma, Alabama, Kentucky,
22 Tennessee.

23 JUSTICE KAGAN: Well, why -- why
24 should we assume, Mr. Sullivan, that everything
25 would stay the same? If the Court said that

1 something was unconstitutional, don't we
2 usually assume that people change their
3 behavior when the Court sets down a
4 constitutional rule?

5 I mean, the reason why, in this case
6 and in the case just before you, all these
7 politicians are bragging about the amount of
8 partisanship they can put into the maps is
9 because they think it's perfectly legal to do
10 so.

11 If the Court said it's not legal to do
12 so, presumably, some actors would change their
13 behavior. No?

14 MR. SULLIVAN: Yes, Your Honor. And
15 we certainly would in Maryland because every
16 time there's a redistricting, before the
17 redistricting, the legislators and the governor
18 are briefed on all the legal requirements, as
19 happened here. And that would happen in
20 Maryland and I'm sure in other states as well.

21 JUSTICE ALITO: What would be an
22 example of a situation where a -- the drawing
23 of a district would be impermissible, would
24 constitute impermissible political
25 gerrymandering in your opinion?

1 MR. SULLIVAN: Well, we've said in our
2 brief, certainly, as indicated in the prior
3 argument where the minority vote getters
4 dictate the results for the majority, that
5 would be a situation where certainly the Court
6 ought to be able to remedy that.

7 JUSTICE GINSBURG: How does the
8 majority -- minority get to do that? I mean,
9 they have to -- this has to start with a
10 legislature, both houses being controlled by
11 the same party. I don't understand how a
12 minority could force its will.

13 MR. SULLIVAN: Well, if -- in
14 Maryland, there's history for this. If the --
15 if the people are upset with the way the
16 redistricting happens, they can take it to
17 referendum.

18 And in 1962, a Democratic governor,
19 legislature, both houses controlled by
20 Democrats, adopted a redistricting plan and it
21 was taken to referendum and the people of
22 Maryland rejected it at referendum. And that's
23 in our record.

24 JUSTICE GINSBURG: And then what
25 happened?

1 MR. SULLIVAN: Then a new map was
2 drawn. Presumably, the people were happy with
3 that.

4 Here, in this case, this map was also
5 taken to referendum and the people
6 overwhelmingly approved it, 1.5 million voters,
7 including in counties where Republicans
8 outnumbered Democrats.

9 JUSTICE GINSBURG: It has been
10 suggested from reading what was on the ballot
11 that most citizens wouldn't understand at all
12 what they were voting for.

13 MR. SULLIVAN: Three things, Your
14 Honor. First, that wasn't litigated in this
15 case. It was not even mentioned by -- by the
16 plaintiffs in their -- in their complaint or in
17 their motion for summary judgment.

18 It was litigated in a court of
19 competent jurisdiction in Maryland state court,
20 and our intermediate appellate court determined
21 that the language was sufficient, especially
22 when read in light of the individual notices
23 that each voter received before the election
24 explaining the referendum question.

25 And in the Washington State Grains

1 case, this Court said that such notices
2 eliminate any threat of voter confusion. So
3 that's really just not a reason for --

4 JUSTICE KAVANAUGH: You -- you brought
5 it up. You think most -- you're going to
6 dispute Justice Ginsburg and say most voters
7 knew what they were voting for there?

8 MR. SULLIVAN: I'm going to agree with
9 our intermediate appellate court, which had a
10 more full record before it than Justice
11 Ginsburg does.

12 But, also, this Court has -- has not
13 presumed that voters don't understand. In the
14 Anderson case on which plaintiffs rely, the
15 court said that people -- the court's going to
16 presume that people are informed, that they
17 read the paper.

18 And, here, you'll find at page 70 of
19 Joint Appendix unrebutted testimony that The
20 Washington Post ran three lead editorials
21 urging the people of Maryland to reject this
22 plan.

23 So it was not a secret ballot. It was
24 -- it was simply a big issue in the state and
25 the people overwhelmingly approved it, and

1 we've heard --

2 JUSTICE BREYER: Well, what I read
3 there is the exact words of the thing they
4 voted for or against, that this referendum,
5 petition, "establishes the boundaries for the
6 state's eight United States congressional
7 districts based on recent Census figures, as
8 required by the United States Constitution."

9 MR. SULLIVAN: Right.

10 JUSTICE BREYER: All right? Now is
11 that sufficient?

12 MR. SULLIVAN: If that were the only
13 thing the voters knew, but this Court presumes
14 that they read the paper, they watch TV, they
15 talk to each other, they have forums, as were
16 held here, they read through the notice.

17 JUSTICE BREYER: But if this were the
18 only thing, if I thought that at least a large
19 number of them, that this was the only thing
20 they knew, which is what you just mentioned,
21 then is it sufficient?

22 MR. SULLIVAN: No, it's not sufficient
23 for this Court to conclude that there was a
24 problem because its precedent says you have to
25 have proof that there was actual confusion.

1 And we have no proof in this case because it
2 was not litigated at all.

3 JUSTICE SOTOMAYOR: Am I understanding
4 you to be saying that partisan gerrymandering
5 is always non-justiciable?

6 MR. SULLIVAN: No. No, Your Honor,
7 not at all. And as I started to outline what
8 is at stake in this case, it's just the
9 specific test that our court applied at
10 plaintiffs' urging --

11 JUSTICE SOTOMAYOR: All right. So
12 that you've heard the argument in the Rucho
13 case. Are you saying that those tests are
14 better, just this one's not? I'm not quite
15 sure what your -- your -- your position is.

16 MR. SULLIVAN: They may be, but we --
17 in our case, we've only had a chance to
18 litigate and have an experience with the one
19 test that our court used, so we don't really
20 have that benefit of being able to tell you
21 with the informed level of analysis that
22 counsel did in the prior argument.

23 JUSTICE SOTOMAYOR: Well, but, you
24 know, you've had time to --

25 MR. SULLIVAN: Yes.

1 JUSTICE SOTOMAYOR: And I'm assuming
2 you would have. Are you okay with any of the
3 Rucho tests?

4 MR. SULLIVAN: I -- I'm not going to
5 take a position, Your Honor. It's -- it's not
6 in our case. And, typically, what the Court
7 has said in Vieth, it's the plaintiff's
8 obligation to come up with the standard.
9 Plaintiff came up with the standard that they
10 wanted to use in our case and it was used by
11 the district court.

12 And just we're here to argue that that
13 was -- that standard is not manageable.

14 JUSTICE KAVANAUGH: You start your
15 brief by saying that you agree partisan
16 gerrymandering poses a threat to democracy.

17 MR. SULLIVAN: Yes. This Court has
18 said that.

19 JUSTICE KAVANAUGH: So what -- what
20 should we -- what should the test be then?

21 MR. SULLIVAN: Well, I -- again, I
22 can't speak beyond what's in our record. I
23 believe there are tests that can be -- can be
24 adopted and this Court can come up with them.

25 JUSTICE KAGAN: What is the thread

1 that --

2 JUSTICE ALITO: Well, is it your -- is
3 it your position that this -- what -- what was
4 done in Maryland would be okay under any test,
5 but you're not going to tell us which of the
6 possible tests is the right test, or are you
7 just saying the wrong test was done, was used
8 here, so we should send it back to -- for the
9 Court to find some other test which you're not
10 going to identify and then apply that to the
11 facts of your case?

12 MR. SULLIVAN: Well, it would be for
13 --

14 JUSTICE ALITO: I -- I just don't
15 understand what you're saying.

16 MR. SULLIVAN: -- it would be for
17 plaintiff to identify it if you keep with the
18 analysis in Vieth. But this Court in Davis v.
19 Bandemer held that a -- an equal protection
20 standard is justiciable.

21 And that was reaffirmed by a majority
22 of the Justices who spoke in Vieth, and
23 reiterated in the Arizona state legislature
24 case.

25 And in this very case, we wouldn't

1 still be here if the Court hadn't found in the
2 first go-around that some form of First
3 Amendment standard is not foreclosed by this
4 Court's precedent; otherwise, the Court would
5 have had to have affirmed dismissal.

6 JUSTICE KAVANAUGH: Well, I'll ask you
7 the question that I asked Mr. Clement, which
8 is, why can't the Constitution be interpreted
9 to require something close to a proportional
10 representation in your view?

11 MR. SULLIVAN: Well, in my personal
12 view, it could be, but I don't think you need
13 to get that far to -- to say that you could use
14 proportionality.

15 JUSTICE KAVANAUGH: It could be? You
16 -- you -- you're saying the Constitution could
17 be interpreted to require something close to
18 proportional representation?

19 MR. SULLIVAN: Justice --

20 JUSTICE KAVANAUGH: Then you would
21 lose, wouldn't you?

22 MR. SULLIVAN: No, if proportionality
23 is interpreted in light of the reality that, as
24 both experts testified in this case or have
25 written at least, when one party gets a super

1 majority of votes, they tend to get a higher
2 percentage of seats than they would get from
3 the straight vote count.

4 And as Dr. McDonald, plaintiff's
5 expert, has written, if there is any
6 correspondence between those two, it's merely
7 accidental because, typically, it's going to be
8 a higher seat count.

9 So the Court has acknowledged that
10 this can be justiciable, and I think the Court
11 can come up with a standard.

12 CHIEF JUSTICE ROBERTS: It's -- it --
13 I'd like to have you discuss the First
14 Amendment argument a little bit. I mean, it
15 does seem that this is a situation where the
16 state is taking retaliatory action against
17 Republicans who were in that district and had a
18 more effective vote, and penalizing them for
19 exercising their right to vote by moving them
20 out to a different district.

21 What -- what's wrong with that
22 argument?

23 MR. SULLIVAN: Well, as we've
24 explained in our brief, retaliation, that whole
25 analysis, has never been used in the

1 legislative realm.

2 And to say that legislation results
3 because the party that had the more votes was
4 retaliating against the other parties' views
5 has -- is a position that's been repeatedly
6 rejected in the cases we cited since the
7 O'Brien case from this Court.

8 CHIEF JUSTICE ROBERTS: Well, you say
9 we haven't done it in the past, but we're being
10 asked to do a lot of things we haven't done in
11 the past, and -- and it's because there's been
12 a change in how redistricting has been done.

13 And I guess I don't understand. I
14 mean, if you have, I don't know, any other kind
15 of state employee and you don't like her
16 exercise of First Amendment rights, and you
17 fire her, there -- there's pretty well
18 established analysis for approaching that case.
19 And I don't know why the same wouldn't reply --
20 apply here.

21 MR. SULLIVAN: Well, in the employment
22 context, you can't really -- unless it's a
23 policy-making employee, you can't take into
24 account the employee's political views pretty
25 much at all.

1 But, in legislating, political views
2 have to be taken into account. People have to
3 speak and have to express their political views
4 in -- whenever there's a legislature enacting
5 it or when the people of the state enacted it,
6 as happened here.

7 So you're in two different contexts,
8 one where -- where speech is prohibited to be a
9 basis for action in the employment context, and
10 legislation where speech is inherent and
11 necessary in order to reach the result.

12 CHIEF JUSTICE ROBERTS: Well -- well,
13 but speech against other legislators or against
14 voters? I mean, are -- are -- you think it's
15 all right to retaliate against the Republicans
16 from the District that were moved out because
17 of how they voted?

18 MR. SULLIVAN: I -- I don't think
19 that's a fair characterization of what
20 legislators do. And, here, it's a question of
21 about who are you retaliating against.

22 Washington County before the
23 redistricting voted for the Republican, Mr.
24 Bartlett, overwhelmingly.

25 The first election held after

1 redistricting, the same county, totally intact,
2 presumably, the same voters that had voted in
3 2010, voted for the Democratic candidate.

4 So drawing those kind of distinctions
5 in Maryland is very difficult. The evidence in
6 the record of across -- across-the-aisle voting
7 was very strong.

8 CHIEF JUSTICE ROBERTS: Are you
9 suggesting that the redistricting here was --
10 was not successful?

11 MR. SULLIVAN: Well, if -- if you say
12 the intent was -- was a partisan intent, yes,
13 it was successful, except you still have a
14 district that's capable of voting Republican.

15 The sixth District voted
16 overwhelmingly for our Republican governor,
17 Larry Hogan. So it's not a district that's
18 locked in for Democrats.

19 JUSTICE KAVANAUGH: Well, that then --

20 JUSTICE BREYER: Why don't you improve
21 that?

22 JUSTICE KAVANAUGH: You can't use the
23 government.

24 JUSTICE BREYER: Why not say that
25 would be a good defense? But -- but what you

1 can't do is, if a party uses a map for its
2 district, which is a statewide map, you used a
3 statewide map, the Republicans won two
4 statewide elections for governor, and so even a
5 party with 60 percent of the votes cannot
6 intentionally -- they have to prove it, you
7 know -- intentionally draw these maps just so
8 they increase their majority beyond two-thirds
9 of the seats.

10 I mean, I picked those numbers out.
11 You can use other numbers if you want. But you
12 get the idea.

13 MR. SULLIVAN: Right.

14 JUSTICE BREYER: The idea is looking
15 into the minds of the legislators, which is
16 difficult --

17 MR. SULLIVAN: Uh-huh.

18 JUSTICE BREYER: -- not impossible,
19 and then applying it to extreme situations, and
20 I just used numbers like two-thirds and so
21 forth and majorities in order to show it's not
22 impossible to generate analogous numbers from a
23 constitution.

24 MR. SULLIVAN: Your Honor, the problem
25 with using the intent as your guide, as here,

1 intent was the dominant factor that the Court
2 relied on, is because, in -- in Davis versus
3 Bandemer, the Court pointed out how easy it is
4 to show partisan intent because that's the air
5 that politicians breathe. It's how they get
6 where they are.

7 And in Vieth, a majority of the
8 justices agreed that some partisan effort to
9 affect the vote through the redistricting is
10 going to be present in every redistricting.

11 JUSTICE GINSBURG: But, when the
12 legislature and the government, the legislative
13 leaders and the governor, say we want 7 to 1,
14 we want to shrink Republican representation by
15 one, map makers, achieve that for us, I mean,
16 is there any genuine doubt that that was the
17 aim from the beginning, to shrink Republican
18 districts by one?

19 MR. SULLIVAN: I think there is doubt.
20 I think, if you read the entire record,
21 including what Governor O'Malley said elsewhere
22 in places not quoted by Plaintiffs or the
23 district court, where he said that what he
24 wanted was for the constitution, the statutes,
25 and all case law to be complied with, and after

1 all of that, he would hope that a Democrat
2 would be elected in that district.

3 JUSTICE BREYER: So you may be able to
4 prove it. I'm just saying what you'd have to
5 prove. But it's not the case, in my mind, that
6 every politician considers politics and so
7 forth up in the air.

8 Of course, you're right, they do, but
9 there's a classical reason that they should.
10 And the classical reason is to produce
11 stability in a legislature so that small shifts
12 of voting behavior don't make big shifts in
13 legislatures. But there's no -- if that's the
14 reason, that doesn't apply in the case where
15 one party already controls 60 percent of the
16 seats.

17 MR. SULLIVAN: Well, we do have a fair
18 amount of stability in Maryland or --

19 JUSTICE BREYER: Yes, I know. That's
20 a problem because -- I'm not saying it's a
21 solution. You have the stability. So your
22 response was: Well, politicians will consider
23 politics. Yeah. Of course.

24 But our problem is to say when that's
25 too much and why isn't it too much?

1 MR. SULLIVAN: Well, I think in other
2 areas of your First Amendment law that
3 Plaintiffs have cited for you, for example,
4 Crawford versus Marion County Board of
5 Elections, didn't really care very much, the
6 Court didn't, about the intent. It's let's
7 look at -- let's look at the burdens that are
8 alleged, identify them, measure them, how much
9 of a burden is on how many people, and then
10 make the call whether the state's justification
11 overcomes that.

12 We didn't have that analysis here.
13 There was no measuring. It's any practical
14 difference, is what the Court said, is
15 sufficient to trigger invalidating a map. And
16 any practical difference is going to happen to
17 voters in every single redistricting. Somebody
18 is going to have a difference because of the
19 line change.

20 JUSTICE ALITO: Now you say that
21 partisan gerrymandering is justiciable. Under
22 which provision of the Constitution? First
23 Amendment, the Equal Protection Clause, the
24 Elections Clause, or something else?

25 MR. SULLIVAN: Well, I will say under

1 the Equal Protection Clause because that's this
2 Court's precedent.

3 JUSTICE ALITO: That's the only one?

4 MR. SULLIVAN: And First Amendment is
5 also present in this very case.

6 JUSTICE ALITO: So both of them?

7 MR. SULLIVAN: At least law of the
8 case in this particular case.

9 JUSTICE ALITO: Both of them?

10 MR. SULLIVAN: What's that?

11 JUSTICE ALITO: Both of them? Your
12 answer is both of them?

13 MR. SULLIVAN: Both -- both of them
14 are potentially sources for a standard.

15 JUSTICE ALITO: And what is the test
16 under -- let's go to the First Amendment.
17 What's your test under the First Amendment?

18 MR. SULLIVAN: I don't have a specific
19 test to propose, but, as I indicated in my
20 answer to Justice Breyer, I think anything the
21 Court can do to get away from an intent-based
22 standard where you have a realm, politics,
23 where political aims are just endemic.

24 JUSTICE ALITO: Do you think the First
25 Amendment and equal protection dictate the same

1 standard or different standards?

2 MR. SULLIVAN: I -- I would imagine
3 they would have to be different in some --
4 because you have completely different bodies of
5 -- of case law that the Court has developed in
6 those two, so I would imagine there would have
7 to be some difference between the two.

8 JUSTICE ALITO: Okay.

9 JUSTICE KAVANAUGH: You don't --

10 JUSTICE ALITO: And what -- what's the
11 test under the -- you can't tell me what the
12 test is under the First Amendment. What is the
13 test under the Equal Protection Clause?

14 MR. SULLIVAN: It's intent, effects,
15 and injure -- intent and effects.

16 JUSTICE ALITO: What -- what degree of
17 intent?

18 MR. SULLIVAN: Well, I tried listening
19 to the prior argument, but I -- I -- I lost
20 count of the tally of what -- where it came
21 out. But, in racial gerrymandering, it's a --
22 it has to be a preponderance.

23 JUSTICE ALITO: But, if you're back
24 before the district court, what are you going
25 to tell the district court? We should win, but

1 are you going to try to explain to the district
2 court why you should win?

3 MR. SULLIVAN: Well, first of all, the
4 other arguments -- one of the other arguments
5 we make is how -- given the Plaintiffs' delay,
6 which this Court found last time, puts us in a
7 category of cases that we've cited where courts
8 have determined that where there is delay and
9 you're this close to the census, it's not
10 equitable and it's no longer in the public
11 interest to redraw the map because the same
12 kind of disruption that Plaintiffs compare --
13 complain about, you redraw the lines, you
14 change all our associational interests, you
15 affect our representation. That's going to
16 happen with redrawing the map, and then you're
17 going to have redraw the map again in -- within
18 a two-year span. So we would --

19 JUSTICE ALITO: You think there's
20 going to be a different map drawn after the
21 2020 census?

22 MR. SULLIVAN: There will be a
23 different map. Our laws require it.

24 I would like to reserve whatever time
25 I have left. Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Kimberly.

4 ORAL ARGUMENT OF MICHAEL B. KIMBERLY
5 ON BEHALF OF THE APPELLEES

6 MR. KIMBERLY: Thank you, Mr. Chief
7 Justice, and may it please the Court:

8 I'd like to begin with just a very
9 succinct statement of what our claim is and
10 what our theory is. When state officials use
11 redistricting to burden a particular group of
12 voters because of their political views, with
13 the express goal of making it harder for those
14 -- for that group of voters to win elections,
15 and when that goal is achieved so that group of
16 voters is ordinarily doomed to usual electoral
17 defeat under the map, and when the state cannot
18 come forward with a legitimate governmental
19 interest to justify the burdens imposed, the
20 map has to be neutrally redrawn.

21 That, in a nutshell, is our claim.
22 And all of the evidence in our case proves that
23 the 2011 redistricting in Maryland violated
24 that theory.

25 CHIEF JUSTICE ROBERTS: It's -- it's a

1 -- it's a test that would be met in every
2 particular, except for the one about durability
3 that you mentioned. In every redistricting,
4 partisanship is going to play a significant
5 role, and because you can always do it to one
6 degree or another, it is always going to have
7 an effect.

8 It seems to me that your focus is
9 entirely on durability.

10 MR. KIMBERLY: Well, I -- I do think
11 all that the Court needs to say in this case is
12 that dooming the targeted voters to electoral
13 failure is enough to state a claim.

14 I -- I think what's helpful, Your
15 Honor, is that coupling that burden with intent
16 makes sense because that is the intent that all
17 map drawers who set out to gerrymander harbor.
18 They -- gerrymanderers don't set out to fiddle
19 at the margins; they set out to fix electoral
20 outcomes.

21 And that is exactly what the evidence
22 in this case shows. They don't set out to make
23 it slightly easier for their candidates to win
24 or slightly more difficult for their opponents
25 to win. They set out to change the electoral

1 outcomes.

2 And using metrics like the Democratic
3 performance index in this case and the partisan
4 voter index under the Cook Political Report,
5 all of the evidence is that, as of the time
6 that the map was enacted, the map drawers
7 understood that this previously safe Republican
8 district would become a safe Democratic
9 district.

10 JUSTICE SOTOMAYOR: How do you see
11 your test? I mean, you introduced the Gingle
12 factors, which the district court didn't rely
13 on here. You say implicitly it did, but it
14 really doesn't anywhere mention Gingle --
15 Gingles.

16 How does your test differ from the
17 Rucho test? From either the Women League or
18 the Common Cause?

19 MR. KIMBERLY: Well, I actually don't
20 see a whole lot of daylight between our test
21 and the tests that are presented in those
22 cases. I'll take --

23 JUSTICE SOTOMAYOR: Except that your
24 test doesn't look at durability at all.

25 MR. KIMBERLY: Well, it doesn't look

1 at durability as such, but the -- the focus
2 last term was on the difference between vote
3 dilution that would make a practical difference
4 versus vote dilution that would result in a de
5 minimis impact.

6 And I think what would be more helpful
7 to focus on, rather than what counts as de
8 minimis, is to what -- is to focus on what
9 counts as a practical burden. And we think the
10 great range of cases in which practical burdens
11 that would be actionable arise, it's going to
12 be the situation that I was just explaining to
13 the Chief Justice, that it's where the map
14 drawers set out to doom the targeted voters
15 because of their politics to usual electoral
16 failure under the map as drawn.

17 That is, I think, in -- in essence,
18 the -- the range of cases in which a practical
19 difference will be made. And I think it
20 overlaps substantively with the League of Women
21 Voters' approach towards durability. And --

22 JUSTICE ALITO: If your -- if your
23 claim is based on the First Amendment, doesn't
24 that necessarily mean that partisanship cannot
25 be taken into account at all, not one iota?

1 MR. KIMBERLY: No, I don't think so,
2 Your Honor.

3 JUSTICE ALITO: Why is that -- why is
4 that -- that not so? Have we ever said that
5 there's such a thing as benign viewpoint
6 discrimination under the First Amendment?

7 MR. KIMBERLY: I -- I --

8 JUSTICE ALITO: Or, you know, you can
9 discriminate on the basis of viewpoint, but it
10 just has to be small?

11 MR. KIMBERLY: I -- I think most of
12 this work is done at the -- at the
13 justification stage. And this might mirror
14 something like Anderson/Burdick balancing. It
15 doesn't have to.

16 But our view is, as long as
17 consideration of -- of the way that people have
18 voted in the past and intent to make it more
19 difficult for those voters to achieve electoral
20 success is in service of a legitimate
21 government interest, then it would be
22 permissible.

23 JUSTICE ALITO: What would be a
24 potentially legitimate government interest?

25 MR. KIMBERLY: I think it would be

1 pursuit of balanced maps, as the Court said in
2 Gaffney against Cummings. I think it would be
3 pursuit of competitive districts. I think
4 there are a range of circumstances where --

5 JUSTICE ALITO: Okay. What does a --
6 what is a balanced map? What does that mean?

7 MR. KIMBERLY: Well, I think balanced
8 map in the Gaffney sense, which is the sense
9 that I mean it, is -- is a proportional map.
10 So, in this case, it might be a six/two
11 delegation or a five/three delegation.

12 JUSTICE KAVANAUGH: But, if you -- if
13 you set out to draw a five/three here, say we
14 want to be proportional, we want to be fair, so
15 we're going to have five Democratic districts
16 and three Republican districts, the Democrats,
17 individual Democrats that you sort into the
18 Republican districts are going to be able to
19 say we're being deprived of our ability to be
20 treated without reference to our partisan
21 affiliation, our political affiliation, right?

22 MR. KIMBERLY: Well, I -- yes. And I
23 think that's how the --

24 JUSTICE KAVANAUGH: So doesn't that
25 show that your test -- but you said doing a

1 five/three would be okay.

2 MR. KIMBERLY: No, no, that's right.
3 So they would --

4 JUSTICE KAVANAUGH: Despite the fact
5 it would still treat individual voters, it
6 would penalize them because of their political
7 affiliation.

8 MR. KIMBERLY: But, Your Honor, that
9 is exactly the approach this Court takes in --
10 in its ballot access cases. As long as -- so
11 in the -- in the hypothetical that you've
12 described, I think Democratic voters may well
13 have stated a prima facie case under the first
14 two prongs, but, under the justification prong,
15 the state comes back and says, although true,
16 maybe they admit it, maybe they don't, but,
17 although true, we were --

18 JUSTICE KAVANAUGH: That --

19 MR. KIMBERLY: -- considering voting
20 --

21 JUSTICE KAVANAUGH: -- that shows --
22 I'm sorry to interrupt -- that shows what the
23 driver, I think, of your test, though, the
24 overwhelming driver is proportional
25 representation. And I guess I'll ask you the

1 question I've asked others.

2 Do you think the Constitution requires
3 proportional representation or something close
4 to proportional representation?

5 MR. KIMBERLY: I don't think it does
6 require it, Your Honor, and I do not think it
7 drives our request at all.

8 JUSTICE KAVANAUGH: Why don't you
9 think it requires it?

10 MR. KIMBERLY: Well, I -- I -- I don't
11 see a textual indication in -- in the
12 Constitution itself that suggests it.

13 JUSTICE KAVANAUGH: Equal Protection
14 Clause does not suggest to you something where
15 political groups are treated roughly equally?

16 MR. KIMBERLY: I -- Your Honor, if
17 that's the way that you're inclined to think
18 about it, I'm certainly --

19 JUSTICE KAVANAUGH: No, I'm just
20 asking --

21 MR. KIMBERLY: -- happy to have you --
22 have you rule that way.

23 JUSTICE KAVANAUGH: -- I'm asking why
24 --

25 (Laughter.)

1 JUSTICE KAVANAUGH: I'm asking --
2 everyone seems to be running away from --

3 MR. KIMBERLY: Well, I --

4 JUSTICE KAVANAUGH: -- challenging the
5 maps but running away from proportional
6 representation, even though, as you can tell
7 from the questions, there's a suggestion that
8 really it all comes back to proportional
9 representation in some respects.

10 MR. KIMBERLY: Your Honor, I guess
11 I'll -- I'll -- I'll answer the question this
12 way. One, I think -- I think the First
13 Amendment is probably the better approach for
14 explaining why it might favor proportional
15 representation. But, of course, there are a
16 range of factors having nothing to do with
17 discrimination against groups of voters on the
18 basis of their political views that might yield
19 a non-proportional map. And so I --

20 JUSTICE ALITO: You think the First
21 Amendment might require or even tolerate the
22 regulation of speech, and in this instance, the
23 speech is the votes, for the purpose of
24 providing a proportional representation of
25 viewpoints?

1 MR. KIMBERLY: So, as I was about to
2 say, I think not. I don't think it requires
3 it. I think --

4 JUSTICE ALITO: Does it tolerate it?

5 MR. KIMBERLY: I -- I think -- yes, I
6 think that's the inevitable conclusion of
7 Gaffney against Cummings.

8 JUSTICE ALITO: So if -- if there is a
9 -- a place in a public park, to get back to the
10 classic example where -- that is open to
11 speakers, the -- the -- the city that controls
12 that could say we want to make sure we have
13 equal speakers on both sides of this question,
14 so we're going to -- you know, we're going to
15 -- we're going to balance the speakers? They
16 can do that?

17 MR. KIMBERLY: Your Honor, I don't
18 think ruling in our favor requires the Court to
19 say that in the least. What we're saying is --

20 JUSTICE ALITO: Well, you're saying
21 this is -- this is a free speech case, right?
22 And you're saying it's okay to regulate speech
23 for the purpose of providing proportionality in
24 some sense?

25 MR. KIMBERLY: No, Your Honor, what

1 I'm suggesting is, after this Court's decision
2 in Gaffney against Cummings, we accept as given
3 that it is a legitimate state interest to
4 pursue proportional representation in
5 redistricting.

6 If you take that as a given, then the
7 sort of claim that Justice Kavanaugh was
8 describing would, in fact, be justified under
9 the third prong. But let me emphasize our
10 claim is not an ends-oriented claim. It is a
11 process-oriented claim.

12 Our view is, under -- under the facts
13 as we've proven them, we are entitled to a
14 neutrally-redrawn map in which the map -- in
15 which the legislature does not use this kind of
16 data with an intent to burden particular groups
17 of voters because of their political views.

18 JUSTICE GORSUCH: Counsel --

19 CHIEF JUSTICE ROBERTS: You would
20 think it would be -- you'd agree that if you
21 had a partisan-free map, you said is required,
22 that would be the first time in history, right?

23 MR. KIMBERLY: A neutrally-drawn map,
24 you mean?

25 CHIEF JUSTICE ROBERTS: Yes, neutrally

1 drawn, without -- without regard to partisan --
2 partisanship at all.

3 MR. KIMBERLY: I can't say for certain
4 whether as a matter of fact it would be the
5 first time in history. I would accept that
6 today the accepted approach does not require
7 neutrality, but I think that's precisely the
8 problem.

9 So just -- I think just to finish the
10 point, we don't -- our position is not, having
11 proved our claim, we're entitled to a redrawing
12 of the Sixth Congressional District so that it
13 favors Republicans.

14 Our point is that we are entitled to a
15 redrawing of the Sixth Congressional District
16 in a manner that does not select a map that
17 disfavors them because of their political
18 views. It may --

19 JUSTICE BREYER: Well, that's -- look,
20 there is a classical political science view.
21 It's very easy, draw state districts and
22 imagine populations such as the state's 42
23 percent -- 48 percent Republican, 52 percent
24 Democrat. All right?

25 Now, suddenly, 3 percent change,

1 2.1 percent change. Now, if there's no
2 politics involved whatsoever, I think you can
3 show that that means 100 percent change in the
4 legislature, depending. Now that cannot be a
5 recipe for American government.

6 I mean, if you believe it can, fine,
7 but you'd have to show that to me. And,
8 therefore, people resist to a degree your
9 statement that, well, no consideration, call it
10 a stability consideration, but it's still the
11 same consideration. So I think many people's
12 problems and what we're searching -- what I'm
13 searching for anyway, is for you to say, okay,
14 I see a stability interest there, but how much
15 is too much?

16 And now we've heard from one side that
17 said: Here is how you find out. You find out
18 by looking at the intent of the legislature
19 about what the effect is and about whether it's
20 durable.

21 MR. KIMBERLY: Right.

22 JUSTICE BREYER: Do you -- do you want
23 to just say that's it and it's the same
24 argument? That might work.

25 MR. KIMBERLY: I think it is

1 effectively the same argument, Your Honor. And
2 -- and just to draw a -- a counterdistinction,
3 the vote dilution in degree that took place in
4 the Eighth Congressional District was roughly
5 the same as the vote dilution in degree that
6 took place in the Sixth Congressional District.

7 The vote dilution in the Sixth
8 Congressional District resulted in a map drawn
9 such that Republicans were -- in the Sixth
10 Congressional District, were doomed to usual
11 electoral failure. Not so in the -- it's the
12 inverse. It's Democrats in the Eighth
13 Congressional District. Not so in the Eighth
14 Congressional District.

15 JUSTICE GORSUCH: What -- what do we
16 --

17 MR. KIMBERLY: So, yes, I think -- I
18 think, as a practical matter, this -- the
19 distinction that the district court below drew
20 between vote -- deliberate vote dilution that
21 makes a practical difference and doesn't is in
22 effect the same.

23 And we would be perfectly comfortable
24 with the Court saying that the way that we know
25 it's too much is if it results in a durable

1 partisan gerrymander that will resist changes
2 in politics over the coming decade. That is,
3 of course, exactly what is borne out in the
4 evidence in this case.

5 JUSTICE GORSUCH: What do we do about
6 the referendum? The whole of the people had a
7 chance to speak. Now I -- I understand that
8 there are questions about how good a referendum
9 that was.

10 But would your test require this Court
11 to declare unconstitutional gerrymanders that
12 have been approved by the people through
13 referendum themselves? And could this
14 referendum process be used otherwise too?

15 MR. KIMBERLY: I don't think so, Your
16 Honor. In -- in my view, the referendum is a
17 red-herring. This could not -- if this had
18 been a racial gerrymander and it had been put
19 to popular vote and that popular vote had
20 approved this map as drawn, it would still be a
21 racial gerrymander.

22 JUSTICE GORSUCH: I -- I completely
23 accept that answer, right? So -- so, in
24 effect, you are asking the Court, no matter how
25 good the referendum might be, no matter how

1 much the people themselves might approve these
2 lines, this Court has to tell them it -- it's
3 unconstitutional?

4 MR. KIMBERLY: On the facts of this
5 case, yes. I think that's correct.

6 I want to come back to the question --

7 JUSTICE SOTOMAYOR: I'm sorry.

8 MR. KIMBERLY: -- of justiciability --
9 I'm sorry.

10 JUSTICE SOTOMAYOR: What do you see as
11 -- on the facts of this case? What makes it so
12 here?

13 MR. KIMBERLY: Well, I -- for one, it
14 was -- the intent that led to the adoption of
15 this map in particular is undisputed. This is
16 not a circumstance where you have a -- you
17 know, a menu of maps put to the public vote and
18 the public are being asked to exercise their
19 independent discretion on which map to choose.

20 It isn't the public and the place of
21 the legislature. The legislature has acted.
22 It has done so in an unconstitutional way.
23 That --

24 JUSTICE SOTOMAYOR: Well --

25 MR. KIMBERLY: -- that Democrats and --

1 JUSTICE SOTOMAYOR: I -- I -- because
2 of the uniqueness of this. This is --

3 MR. KIMBERLY: Yes. No, that's right.
4 I'm just saying on the facts of this case.
5 That's right.

6 JUSTICE SOTOMAYOR: On the facts of
7 this case, whatever the public maps might have
8 been in an open situation were different than
9 what happened here?

10 MR. KIMBERLY: That's right. That
11 would be a --

12 JUSTICE SOTOMAYOR: That's what you're
13 saying?

14 MR. KIMBERLY: That would a very
15 different case, Your Honor.

16 JUSTICE GORSUCH: Well, but -- but
17 just to clarify, I -- and I just want to make
18 sure I understand your position, I'm supposing
19 that the people fully understood the -- the
20 gerrymander that took place and fully
21 understood that there was an alternative of
22 pure proportional representation, and it would
23 be great, all right. And they rejected it in
24 favor of gerrymander. Now, you may say that
25 that's outlandish and that isn't what happened

1 in Maryland, but let's just suppose it is.

2 You -- it would still be incumbent, on
3 your view, on a court to declare that -- the
4 gerrymander unconstitutional?

5 MR. KIMBERLY: I want to be clear that
6 I understand the hypothetical. The electorate
7 are being presented with an option, you -- you
8 get proportional representation or you get this
9 map; which do you choose?

10 JUSTICE GORSUCH: Yeah.

11 MR. KIMBERLY: And a majority of
12 Democrats who do better under this map choose
13 this map?

14 JUSTICE GORSUCH: Right.

15 MR. KIMBERLY: I think that's --

16 JUSTICE GORSUCH: Unconstitutional --

17 MR. KIMBERLY: -- unconstitutional.

18 JUSTICE GORSUCH: -- and we must say
19 so, yeah.

20 MR. KIMBERLY: And I don't think the
21 Court should -- should feel especially troubled
22 about that, for exactly the reason that the map
23 itself here --

24 JUSTICE GORSUCH: Sure.

25 MR. KIMBERLY: -- I think, is

1 unconstitutional.

2 I want to come back to the question of
3 justiciability. I think the question here is
4 not just whether there is a potential political
5 solution. That doesn't answer the question
6 whether this Court bears an obligation to
7 enforce the First Amendment in these
8 circumstances.

9 The question here is whether the
10 theory that we have put forward before the
11 Court as applied in these circumstances
12 entirely defies judicial judgment so that it
13 cannot be called a legal question at all.

14 And with respect to my friends on the
15 other side, I just don't think there's any
16 basis for saying that. We have this Court's
17 opinions in its racial gerrymandering cases, in
18 its racial vote dilution cases, in its ballot
19 access cases, its First Amendment retaliation
20 cases, and its political patronage cases. In
21 all of those contexts, this Court finds
22 consistently reliable, justiciable standards
23 for deciding exactly the kinds of burdens that
24 are being imposed here.

25 And if they are manageable in that

1 context, they are manageable in this context.

2 JUSTICE ALITO: Does your test --

3 JUSTICE KAGAN: Am I not --

4 JUSTICE ALITO: -- apply only to
5 districts that are drawn for a partisan to --
6 to favor one political party over another, or
7 could it apply to retaliation for some other
8 reason?

9 For example, suppose the objection of
10 the mapmakers -- mapmakers is not that a
11 particular -- that this district had voted
12 Republican, but it was that the particular
13 person in a district, the representative in
14 that district, was a pain in the rear and so
15 they wanted to get rid of that person.

16 Would -- would that be prohibited by
17 the First Amendment?

18 MR. KIMBERLY: Not under the theory
19 that -- that we've put forward. I --

20 JUSTICE ALITO: Well, how could you
21 square that with your retaliation theory?

22 MR. KIMBERLY: Well, I want to be
23 clear --

24 JUSTICE ALITO: So I vote for this
25 person because this guy is -- this is the

1 person that I want. And the mapmakers say we
2 want this person out of the House, so we're
3 going to draw the map so that person is
4 excluded. The -- they're --

5 MR. KIMBERLY: So that --

6 JUSTICE ALITO: -- diluting my -- my
7 -- I want to vote for this -- for my
8 representative and they're diluting my vote.
9 They're taking away my opportunity to elect the
10 person that I want.

11 MR. KIMBERLY: I -- so to begin with,
12 the First Amendment retaliation framework that
13 we've referenced in our briefing is just that;
14 it's a framework. We don't think there's any
15 particular magic in the word "retaliation"
16 itself.

17 The question presented in this context
18 by the First Amendment is whether the state
19 officials are deliberately burdening particular
20 groups of voters because of the way those
21 voters have expressed themselves. That does
22 not to me sound -- sound like the scenario that
23 you're describing where the -- the concern in
24 the cases, the behavior of a particular
25 individual -- and -- and I might add, in

1 addition, that drawing an individual out of a
2 district does not prevent that individual from
3 continuing to run as a candidate in that
4 district.

5 So I'm -- I'm just not sure that
6 the --

7 JUSTICE KAGAN: Mr. Kimberly --

8 JUSTICE KAVANAUGH: How much does --
9 go ahead.

10 JUSTICE KAGAN: -- Kimberly, I'm
11 wondering how easy it would be for plaintiffs
12 to prevail under your standard in the future?
13 Suppose we accepted your test and we made clear
14 that this kind of behavior was unconstitutional
15 so you didn't have all these people bragging
16 about how much partisan gerrymandering they
17 were doing, right?

18 What makes your case so easy is that
19 everybody was completely upfront about what
20 they were doing, as they were in the North
21 Carolina case as well, because they think it's
22 legal, so let's say what we're doing.

23 But if we say it's not legal and that
24 kind of intent evidence just disappears because
25 you don't find silver bullets like that very

1 often, then what kind of effects evidence would
2 you need to prove your claim?

3 MR. KIMBERLY: Well, the --

4 JUSTICE KAGAN: Now, you have all that
5 intent evidence; don't worry. This is not
6 affecting your case.

7 MR. KIMBERLY: Yeah.

8 (Laughter.)

9 JUSTICE KAGAN: But suppose people act
10 like normal people and they just stop saying
11 all these things, and the next case comes
12 along. What would you need to show intent and
13 effects and causation?

14 MR. KIMBERLY: Well, I think to show
15 intent, it would be the same sort of evidence
16 that you would need in racial gerrymandering
17 cases. This Court deals with that question all
18 the time. I think that -- that part of the
19 test would --

20 JUSTICE KAGAN: I mean, it would
21 really raise the bar, wouldn't it?

22 MR. KIMBERLY: It -- it would, Your
23 Honor. It would --

24 JUSTICE KAGAN: I mean, you would have
25 to show really dramatic effects to be able to

1 infer intent, wouldn't you?

2 MR. KIMBERLY: Yes, I think that's
3 right.

4 JUSTICE KAGAN: So, in fact, this
5 would be the outlier cases.

6 MR. KIMBERLY: I -- I think --

7 JUSTICE KAGAN: This is not --

8 MR. KIMBERLY: -- as a practical
9 matter --

10 JUSTICE KAGAN: -- in every case in
11 the universe, every district in the universe.

12 MR. KIMBERLY: Not -- not at all, Your
13 Honor, and --

14 CHIEF JUSTICE ROBERTS: Well, why just
15 -- why would you have to show dramatic evidence
16 of effects before you can infer intent?

17 MR. KIMBERLY: Well, I -- I think as a
18 general matter, showing intent when you're
19 talking about specific intent rather than
20 general intent, which is the standard that the
21 district court below applied and we think is
22 the correct standard, I think raises the bar
23 very high when you don't have direct evidence
24 of -- such as the admissions that we have on
25 our record here. You've got to show --

1 CHIEF JUSTICE ROBERTS: So you think
2 if you have the redistricting controlled by one
3 political party and it comes out that the
4 districts reflect a significant benefit for
5 that particular party, that's not enough to
6 infer an intent to draw the districts with an
7 eye to the partisan effect?

8 MR. KIMBERLY: Well, I think here,
9 Your Honor, that -- that may or may not be so.
10 I think here, though, the question of intent
11 dovetails with the question of justification.

12 If in any of those -- if in a
13 circumstance where you have a single-party
14 control of the government and you have a badly
15 imbalanced map that might suggest improper
16 intent, as long as the state can come forward
17 with some legitimate justification for the
18 imbalance as it's drawn, and as the Court has
19 said in its racial gerrymandering cases, the
20 sorts of political considerations in -- in map
21 drawing are myriad and malleable and they
22 involve a delicate balancing of all of these
23 factors, all the state has to come forward with
24 is some explanation for the map as it's drawn
25 and the burdens imposed identified by the

1 plaintiffs --

2 JUSTICE KAVANAUGH: So, if you have
3 the same -- if you have the record here with no
4 intent evidence, to pick up on Justice Kagan's
5 question, and it was five/three, any chance of
6 prevailing on that?

7 MR. KIMBERLY: We don't have evidence
8 of intent and it's a five/three map, I think
9 that's a very difficult case.

10 JUSTICE KAVANAUGH: How about six/two?

11 MR. KIMBERLY: I think that's also
12 very difficult.

13 JUSTICE KAVANAUGH: How about
14 seven/one?

15 MR. KIMBERLY: I think, seven/one, it
16 becomes easier to prove intent. There's no
17 question that the -- that the results of --

18 JUSTICE KAVANAUGH: And that's because
19 it deviates from proportional?

20 MR. KIMBERLY: It deviates for -- from
21 -- from proportional, but I -- I think the
22 question also, as I was saying about the third
23 prong, is whether there are neutral
24 justifications, and they might be things like
25 geography. Here, obviously, Maryland's

1 geography has a very --

2 JUSTICE KAVANAUGH: That's to justify
3 it, but it would be a problem? The seven/one
4 is a problem. The five/three almost certainly
5 not a problem. Which I think has got to be
6 right.

7 MR. KIMBERLY: Well, I think that's
8 right, but, to be clear, that isn't to say that
9 our test tends towards proportionality. It's
10 just to say what --

11 JUSTICE KAVANAUGH: Well, I -- I think
12 if Justice -- to play out Justice Kagan's
13 hypothetical, which I think is a good one,
14 there would be no intent to have evidence in
15 the future, or at least to be hidden. It would
16 be harder to discover.

17 So then it would be a lot on effects,
18 and five/three, it would be hard to prove.
19 Seven/one is easy to prove. Well, that sounds
20 like something where something that's balanced,
21 to use your words, which is the word you used,
22 five/three would be okay, because it's close to
23 the proportion of Democrats and Republicans in
24 the state.

25 MR. KIMBERLY: Yeah.

1 JUSTICE KAVANAUGH: Something that's
2 really extreme, to use Justice Kagan's words,
3 would not be okay, seven/one, because it
4 deviates so far from the proportion of --

5 MR. KIMBERLY: Right, it's just --

6 JUSTICE KAVANAUGH: -- Democrats and
7 Republicans.

8 MR. KIMBERLY: -- to say that where
9 there is smoke, you are probably going to find
10 fire. And if you don't see smoke, you're
11 probably not going --

12 JUSTICE GORSUCH: Is another way --

13 MR. KIMBERLY: -- to find fire.

14 JUSTICE GORSUCH: -- of putting the
15 test: I know it when I see it?

16 (Laughter.)

17 MR. KIMBERLY: Certainly not, Your
18 Honor.

19 CHIEF JUSTICE ROBERTS: So it sounds
20 like you might be comfortable with Justice
21 Breyer's two-thirds limit? Five/three is
22 probably okay. Seven/one is not. I mean, that
23 suggests some sort of, you know, rough
24 mathematical threshold.

25 MR. KIMBERLY: Your Honor, I don't

1 think a mathematical threshold is -- is
2 probably the way to go about it in large part
3 because every state is different and, you know,
4 how the geography plays out in every state is
5 different.

6 And what other sorts of justifications
7 there may be, I'm sure will vary. As I said,
8 the Court has recognized --

9 JUSTICE KAGAN: It just seems, Mr.
10 Kimberly, that what you are saying is that once
11 people stop putting these statements on the
12 record, which they will, that what your test
13 will deliver is a way of going after the worst
14 of the worst. And this happens to be one of
15 them.

16 MR. KIMBERLY: I -- I think that's
17 right, Your Honor. And if I may also come back
18 to -- to a -- to a point that you raised
19 earlier. I think we have to give legislators
20 due credit.

21 If this Court says that this kind of
22 discrimination against groups of voters is
23 unlawful, I have faith certainly that most
24 legislators will listen and abide this Court's
25 teachings.

1 And so the -- there is not enough time
2 in between now and the 2020 Census to litigate
3 any new cases. And so the next round of
4 litigation that this Court sees after adopting
5 a standard in this case or in North Carolina
6 will be after the 2020 redistricting.

7 And presuming that state legislators
8 abide this Court's teachings, there is every
9 reason to think that the incidents of extreme
10 partisan gerrymandering will be significantly
11 reduced.

12 The only reason we see it as often as
13 we do today in what is extreme, seems less
14 extreme, is only because this Court has not
15 identified a -- a standard to rein in the
16 practice.

17 JUSTICE KAVANAUGH: Can I isolate the
18 role of geography with this question?

19 MR. KIMBERLY: Certainly.

20 JUSTICE KAVANAUGH: Suppose you have
21 crazy line drawing, something similar to what
22 -- what is in Maryland, but it ends up in
23 five/three districts. Any problem there? No
24 partisan intent on the record but it's -- the
25 lines are really misshaped but it's five/three.

1 MR. KIMBERLY: Well, it wouldn't be a
2 First Amendment problem. It wouldn't be a
3 problem under our test. And, indeed, what the
4 evidence shows is there are a lot of reasons to
5 think you might still see that.

6 JUSTICE KAVANAUGH: Okay. And if it
7 ends up seven/one, I think the way -- I'm just
8 trying to understand your test -- if it ends up
9 seven/one, the state is in trouble, unless the
10 state could show actually this fits with county
11 boundaries and town boundaries and city
12 boundaries and actually the geography makes
13 sense and we don't want to divide the Bay and
14 all kinds of things like that, right?

15 MR. KIMBERLY: Yeah. I mean, I -- to
16 be clear, I don't think there are actually any
17 such justifications in this case.

18 JUSTICE KAVANAUGH: Right. I --

19 MR. KIMBERLY: Yeah.

20 JUSTICE KAVANAUGH: I take your point
21 on that. They also made a -- so that's helpful
22 on the geography. They made a point -- I just
23 wanted to give you a chance to respond -- on
24 the Sixth District not being durable because
25 Governor Hogan won. Can you respond to that?

1 MR. KIMBERLY: Yes. It's the
2 difference between what the experts call
3 endemic elections and exogenous elections.

4 What map drawers look at is the way
5 that voters vote in congressional elections
6 when they're looking to rig congressional
7 elections.

8 There -- on a number of occasions
9 there have been suggestions that legislatures
10 are going to act as legislatures. And the
11 framers of the constitution, having committed
12 the Elections Clause to legislatures, we have
13 to expect they will act that way.

14 That would be a reason to overturn
15 this Court's ballot access cases. In -- in
16 devising access to ballots and how ballots are
17 comprised, there is no reason to think that --
18 that those in power wouldn't be expected to use
19 that authority to regulate elections to their
20 own partisan ends. And yet we do not accept
21 that they may. That is the upshot of this
22 Court's valid access cases.

23 CHIEF JUSTICE ROBERTS: Well, I mean,
24 history has a little bit of, perhaps,
25 significance there. Gerrymandering has been

1 part of American history from the beginning, as
2 was pointed out in the previous case.

3 I'm not sure, maybe it has been, I
4 don't know that interference with ballot access
5 is on the same level of the air they breathe,
6 as -- as your friend on the other side put it.

7 MR. KIMBERLY: Your Honor, that may be
8 true, but since the beginning of the Republic,
9 gerrymandering has been recognized also as a
10 constitutional offense.

11 Indeed, the 1812 editorial coining the
12 term "gerrymander" called it a constitutional
13 offense.

14 I think everybody has understood that
15 it is a constitutional violation --

16 CHIEF JUSTICE ROBERTS: Well --

17 MR. KIMBERLY: -- from the beginning.

18 CHIEF JUSTICE ROBERTS: -- your best
19 authority is a newspaper editorial?

20 (Laughter.)

21 MR. KIMBERLY: Well, certainly --
22 certainly not, Your Honor. The -- the legal
23 tools for this Court to -- this Court and
24 Article III courts generally to address this
25 problem haven't emerged until modern times.

1 The incorporation of the First
2 Amendment of the states happened in the 1940s.
3 This Court's ballot access and political
4 patronage cases were decided in the '60s and
5 '70s.

6 I don't think it's any answer to those
7 --

8 JUSTICE ALITO: What does
9 incorporation have --

10 MR. KIMBERLY: -- cases to say that
11 they're ahistorical.

12 JUSTICE ALITO: -- to do with
13 congressional districts?

14 MR. KIMBERLY: I'm sorry?

15 JUSTICE ALITO: What does
16 incorporation have to do with congressional
17 districts?

18 MR. KIMBERLY: Well, congressional
19 districting is an act by state legislatures.
20 If state legislatures are cabined by the First
21 Amendment in how they exercise that authority,
22 the First Amendment has to be a limit on their
23 authority.

24 JUSTICE KAVANAUGH: You -- you --

25 MR. KIMBERLY: And that wasn't

1 recognized by this Court until the 1940s.

2 JUSTICE KAVANAUGH: You said
3 gerrymandering has been recognized as
4 unconstitutional.

5 But are you defining -- if -- if
6 gerrymandering is defined as deviation from
7 what you would otherwise get with proportional,
8 Justice O'Connor and Justice Kennedy have made
9 very clear in various opinions that the
10 constitution contains no such guarantee.

11 MR. KIMBERLY: Your Honor, what we
12 take to be partisan gerrymandering is the
13 singling out of groups of voters for disfavored
14 treatment in redistricting and using
15 redistricting in turn to make it -- to doom
16 those voters to usual electoral defeat.

17 That is the original understanding of
18 what a gerrymandering was in 1812 and in the
19 18th Century before that. And we think that is
20 a clear violation of the First Amendment.

21 I --I'll just say very briefly, the
22 other explanations that General Sullivan has
23 put before the Court explaining the -- the
24 shape of the Sixth District are all flatly
25 disproved by our alternative map, which is

1 reproduced at JA 787.

2 That map respects all of the political
3 considerations elsewhere throughout the state
4 and does not result in flipping the district to
5 democratic control.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Five minutes, Mr. Sullivan.

10 REBUTTAL ARGUMENT OF STEVEN M.

11 SULLIVAN ON BEHALF OF THE APPELLANTS

12 MR. SULLIVAN: Your Honor, I hope not
13 to take all of that time.

14 I think what we've heard, if nothing
15 else, confirms that the plaintiff's test and
16 the district court's test does not provide the
17 answer the Court is looking for, a test that
18 can tell us when the redistricting has gone too
19 far, and -- and --

20 JUSTICE GINSBURG: Why not? You have
21 intent, which on this case they -- all the
22 leaders said yeah, that's what we want to do,
23 reduce the Republican representation by one.

24 And then they tell the map makers to
25 achieve that result. The result is achieved.

1 And, as a result of the map, this will continue
2 into the future.

3 Why isn't that --

4 MR. SULLIVAN: Well, there is a number
5 of things wrong with that. The -- into the
6 future is not proven at all. The map that was
7 developed, the expert testimony agreed that it
8 was a competitive map. Independent sources
9 said it was a plus two Democratic.

10 And in 2010, the last election before
11 the redistricting, Democrats across the country
12 won 52 congressional seats in districts that
13 were more Democratic than the sixth District in
14 Maryland.

15 So what these legislators were looking
16 at was not a map that was a lock for a future
17 domination by Democrats in the Sixth District.
18 It was a very vulnerable map, if you look at
19 the results of the 2010 elections, where
20 Republicans swept to victory in district after
21 district with more Democratic components than
22 the Sixth District.

23 But the reason that this test doesn't
24 work, as counsel revealed, is that it abandons
25 what this Court or members of this Court,

1 including Justice Kagan in her Gill
2 concurrence, have identified as essential evil
3 of gerrymandering, which is the politicians
4 getting one over on the people and not letting
5 the people's will control what the map is going
6 to be.

7 In this case the people's will was --
8 was expressed in a referendum overwhelmingly
9 favoring the map. And counsel says this Court
10 needs to invalidate that result, which would be
11 directly contrary to what this Court has said
12 it's trying to get at in gerrymandering, which
13 is the polls deciding where their district
14 lines are going to be and not the people
15 deciding who they get to vote for.

16 JUSTICE ALITO: Do you mean if there's
17 a referendum on a map that is -- that heavily
18 favors one party, and the campaign -- and --
19 and this is a state in which that party is the
20 majority party -- and the campaign in favor of
21 the referendum has approved this map because
22 this will really favor the party that you like,
23 and the majority votes for that, that would not
24 be -- that would be different from the
25 legislature doing it?

1 MR. SULLIVAN: Well, in the rhetoric,
2 the discord as used in the gerrymandering area,
3 yes, it would, because it's the people's will
4 being expressed, which is the harm that
5 politicians who gerrymander are subordinating
6 the people's will. That didn't happen here.

7 JUSTICE ALITO: So when the
8 legislature does it, and the -- the members of
9 which are elected by the people, that's one
10 thing, but when people do it directly, it's a
11 different thing?

12 MR. SULLIVAN: It is a different
13 thing. Now, I'm not saying that the result can
14 always be constitutional. This Court has held
15 that, for example, the people could not approve
16 a map with unequal population. That -- that's
17 one of this Court's precedents.

18 But where the -- where the debate is
19 whose First Amendment rights are going to
20 prevail, these seven plaintiffs -- it's not a
21 class action -- or the 1.5 million Marylanders
22 who voted to approve this plan, I think that's
23 a much more difficult question that was even --
24 that even attempted to a -- for an answer to be
25 provided in this case.

1 There was no attempt by the Court
2 below to consider the referendum or its impact
3 whatsoever. And so this test cannot be the
4 answer to how do we protect the people and
5 their ability to ensure that politicians do not
6 draw the districts to serve the politicians
7 instead of the people.

8 Unless there are any further
9 questions, thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 12:24 p.m., the case
13 was submitted.)

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Official - Subject to Final Review

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| <p style="text-align: center;">1</p> <p>1 ^[1] 25:13 1.5 ^[2] 13:6 69:21 10,000 ^[1] 4:12 100 ^[1] 43:3 1012 ^[1] 10:10 11:25 ^[2] 1:15 3:2 12:24 ^[1] 70:12 18-726 ^[1] 3:4 1812 ^[2] 63:11 65:18 18th ^[1] 65:19 1940s ^[2] 64:2 65:1 1962 ^[1] 12:18</p> | <p>acceptable ^[1] 3:23 accepted ^[2] 42:6 52:13 access ^[7] 37:10 49:19 62:15,16, 22 63:4 64:3 accidental ^[1] 20:7 according ^[1] 8:4 account ^[3] 21:24 22:2 34:25 achieve ^[3] 25:15 35:19 66:25 achieved ^[2] 31:15 66:25 acknowledged ^[1] 20:9 across ^[3] 5:12 23:6 67:11 across-the-aisle ^[1] 23:6 act ^[4] 53:9 62:10,13 64:19 acted ^[1] 46:21 action ^[3] 20:16 22:9 69:21 actionable ^[1] 34:11 actors ^[1] 11:12 actual ^[1] 15:25 actually ^[5] 6:16 33:19 61:10,12, 16 add ^[1] 51:25 addition ^[1] 52:1 address ^[2] 3:13 63:24 admissions ^[1] 54:24 admit ^[1] 37:16 adopted ^[3] 3:17 12:20 17:24 adopting ^[1] 60:4 adoption ^[1] 46:14 affairs ^[1] 10:18 affect ^[2] 25:9 30:15 affecting ^[1] 53:6 affiliation ^[3] 36:21,21 37:7 affirmed ^[1] 19:5 agree ^[3] 14:8 17:15 41:20 agreed ^[2] 25:8 67:7 ahead ^[1] 52:9 ahistorical ^[1] 64:11 aim ^[1] 25:17 aims ^[1] 28:23 air ^[3] 25:4 26:7 63:5 AL ^[2] 1:3,6</p> | <p>another ^[3] 32:6 50:6 58:12 answer ^[9] 28:12,20 39:11 45:23 49:5 64:6 66:17 69:24 70:4 anyway ^[1] 43:13 APPEARANCES ^[1] 1:17 Appellants ^[6] 1:4,21 2:4,10 3:8 66:11 appellate ^[2] 13:20 14:9 Appellees ^[4] 1:7,23 2:7 31:5 Appendix ^[1] 14:19 applied ^[3] 16:9 49:11 54:21 apply ^[5] 18:10 21:20 26:14 50:4,7 applying ^[1] 24:19 approach ^[4] 34:21 37:9 39:13 42: 6 approaching ^[1] 21:18 approve ^[3] 46:1 69:15,22 approved ^[5] 13:6 14:25 45:12,20 68:21 area ^[2] 8:8 69:2 areas ^[2] 8:9 27:2 argue ^[1] 17:12 argument ^[17] 1:14 2:2,5,8 3:4,7, 14 12:3 16:12,22 20:14,22 29:19 31:4 43:24 44:1 66:10 arguments ^[2] 30:4,4 arise ^[1] 34:11 Arizona ^[1] 18:23 Arkansas ^[2] 10:6,20 Article ^[1] 63:24 associational ^[1] 30:14 assume ^[3] 5:4 10:24 11:2 assuming ^[1] 17:1 assumption ^[1] 9:22 attempt ^[1] 70:1 attempted ^[1] 69:24 authority ^[4] 62:19 63:19 64:21,23 away ^[8] 5:23 6:8,11 8:17 28:21 39: 2,5 51:9</p> | <p>5 66:11 behavior ^[5] 11:3,13 26:12 51:24 52:14 believe ^[2] 17:23 43:6 below ^[3] 44:19 54:21 70:2 benefit ^[2] 16:20 55:4 benign ^[1] 35:5 BENISEK ^[2] 1:6 3:5 best ^[1] 63:18 better ^[3] 16:14 39:13 48:12 between ^[9] 3:21 4:9 20:6 29:7 33: 20 34:2 44:20 60:2 62:2 beyond ^[2] 17:22 24:8 big ^[3] 9:18 14:24 26:12 bishops ^[2] 8:19,24 bit ^[2] 20:14 62:24 Board ^[1] 27:4 bodies ^[1] 29:4 borne ^[1] 45:3 both ^[11] 6:24 12:10,19 19:24 28:6, 9,11,12,13,13 40:13 boundaries ^[4] 15:5 61:11,11,12 bragging ^[2] 11:7 52:15 breathe ^[2] 25:5 63:5 BREYER ^[17] 8:13,16 9:12,25 10:2 15:2,10,17 23:20,24 24:14,18 26: 3,19 28:20 42:19 43:22 Breyer's ^[1] 58:21 brief ^[3] 12:2 17:15 20:24 briefed ^[1] 11:18 briefing ^[1] 51:13 briefly ^[1] 65:21 brought ^[1] 14:4 buildings ^[1] 5:6 bullets ^[1] 52:25 burden ^[5] 27:9 31:11 32:15 34:9 41:16 burdening ^[1] 51:19 burdens ^[5] 27:7 31:19 34:10 49: 23 55:25</p> |
| <p style="text-align: center;">2</p> <p>2.1 ^[1] 43:1 20 ^[1] 9:19 2010 ^[3] 23:3 67:10,19 2011 ^[1] 31:23 2019 ^[1] 1:11 2020 ^[3] 30:21 60:2,6 24,000 ^[1] 4:15 26 ^[1] 1:11</p> | <p>action ^[3] 20:16 22:9 69:21 actionable ^[1] 34:11 actors ^[1] 11:12 actual ^[1] 15:25 actually ^[5] 6:16 33:19 61:10,12, 16 add ^[1] 51:25 addition ^[1] 52:1 address ^[2] 3:13 63:24 admissions ^[1] 54:24 admit ^[1] 37:16 adopted ^[3] 3:17 12:20 17:24 adopting ^[1] 60:4 adoption ^[1] 46:14 affairs ^[1] 10:18 affect ^[2] 25:9 30:15 affecting ^[1] 53:6 affiliation ^[3] 36:21,21 37:7 affirmed ^[1] 19:5 agree ^[3] 14:8 17:15 41:20 agreed ^[2] 25:8 67:7 ahead ^[1] 52:9 ahistorical ^[1] 64:11 aim ^[1] 25:17 aims ^[1] 28:23 air ^[3] 25:4 26:7 63:5 AL ^[2] 1:3,6</p> | <p>back ^[8] 18:8 29:23 37:15 39:8 40: 9 46:6 49:2 59:17 badly ^[1] 55:14 Baker ^[1] 4:13 balance ^[1] 40:15 balanced ^[4] 36:1,6,7 57:20 balancing ^[2] 35:14 55:22 ballot ^[7] 13:10 14:23 37:10 49:18 62:15 63:4 64:3 ballots ^[2] 62:16,16 Baltimore ^[2] 1:20 6:4 Bandemer ^[2] 18:19 25:3 bar ^[2] 53:21 54:22 Bartlett ^[1] 22:24 based ^[2] 15:7 34:23 basis ^[4] 22:9 35:9 39:18 49:16 Bay ^[5] 5:13,24 6:5,14 61:13 bears ^[1] 49:6 become ^[1] 33:8 becomes ^[1] 56:16 begin ^[2] 31:8 51:11 beginning ^[4] 25:17 63:1,8,17 behalf ^[8] 1:21,23 2:4,7,10 3:8 31:</p> | <p style="text-align: center;">B</p> |
| <p style="text-align: center;">3</p> <p>3 ^[2] 2:4 42:25 31 ^[1] 2:7 34 ^[1] 4:19 35 ^[1] 4:22 36 ^[1] 4:17</p> | <p>AL ^[2] 1:3,6 Alabama ^[2] 10:7,21 ALITO ^[34] 11:21 18:2,14 27:20 28: 3,6,9,11,15,24 29:8,10,16,23 30: 19 34:22 35:3,8,23 36:5 39:20 40: 4,8,20 50:2,4,20,24 51:6 64:8,12, 15 68:16 69:7 alleged ^[1] 27:8 almost ^[1] 57:4 already ^[1] 26:15 alternative ^[2] 47:21 65:25 although ^[2] 37:15,17 Amendment ^[26] 3:17 19:3 20:14 21:16 27:2,23 28:4,16,17,25 29: 12 34:23 35:6 39:13,21 49:7,19 50:17 51:12,18 61:2 64:2,21,22 65:20 69:19 American ^[2] 43:5 63:1 amount ^[2] 11:7 26:18 analogous ^[1] 24:22 analysis ^[5] 16:21 18:18 20:25 21: 18 27:12 Anderson ^[1] 14:14 Anderson/Burdick ^[1] 35:14</p> | <p>area ^[2] 8:8 69:2 areas ^[2] 8:9 27:2 argue ^[1] 17:12 argument ^[17] 1:14 2:2,5,8 3:4,7, 14 12:3 16:12,22 20:14,22 29:19 31:4 43:24 44:1 66:10 arguments ^[2] 30:4,4 arise ^[1] 34:11 Arizona ^[1] 18:23 Arkansas ^[2] 10:6,20 Article ^[1] 63:24 associational ^[1] 30:14 assume ^[3] 5:4 10:24 11:2 assuming ^[1] 17:1 assumption ^[1] 9:22 attempt ^[1] 70:1 attempted ^[1] 69:24 authority ^[4] 62:19 63:19 64:21,23 away ^[8] 5:23 6:8,11 8:17 28:21 39: 2,5 51:9</p> | <p>5 66:11 behavior ^[5] 11:3,13 26:12 51:24 52:14 believe ^[2] 17:23 43:6 below ^[3] 44:19 54:21 70:2 benefit ^[2] 16:20 55:4 benign ^[1] 35:5 BENISEK ^[2] 1:6 3:5 best ^[1] 63:18 better ^[3] 16:14 39:13 48:12 between ^[9] 3:21 4:9 20:6 29:7 33: 20 34:2 44:20 60:2 62:2 beyond ^[2] 17:22 24:8 big ^[3] 9:18 14:24 26:12 bishops ^[2] 8:19,24 bit ^[2] 20:14 62:24 Board ^[1] 27:4 bodies ^[1] 29:4 borne ^[1] 45:3 both ^[11] 6:24 12:10,19 19:24 28:6, 9,11,12,13,13 40:13 boundaries ^[4] 15:5 61:11,11,12 bragging ^[2] 11:7 52:15 breathe ^[2] 25:5 63:5 BREYER ^[17] 8:13,16 9:12,25 10:2 15:2,10,17 23:20,24 24:14,18 26: 3,19 28:20 42:19 43:22 Breyer's ^[1] 58:21 brief ^[3] 12:2 17:15 20:24 briefed ^[1] 11:18 briefing ^[1] 51:13 briefly ^[1] 65:21 brought ^[1] 14:4 buildings ^[1] 5:6 bullets ^[1] 52:25 burden ^[5] 27:9 31:11 32:15 34:9 41:16 burdening ^[1] 51:19 burdens ^[5] 27:7 31:19 34:10 49: 23 55:25</p> |
| <p style="text-align: center;">4</p> <p>42 ^[3] 8:19,24 42:22 45 ^[1] 4:18 47 ^[1] 4:17 48 ^[1] 42:23</p> | <p style="text-align: center;">6</p> <p>60 ^[4] 4:4 10:8 24:5 26:15 60s ^[1] 64:4 66 ^[1] 2:10 66,000 ^[1] 4:14</p> | <p style="text-align: center;">B</p> | <p style="text-align: center;">C</p> |
| <p style="text-align: center;">5</p> <p>52 ^[2] 42:23 67:12</p> | <p style="text-align: center;">7</p> <p>7 ^[1] 25:13 70 ^[1] 14:18 70s ^[1] 64:5 787 ^[1] 66:1</p> | <p style="text-align: center;">B</p> | <p style="text-align: center;">C</p> |
| <p style="text-align: center;">6</p> <p>60 ^[4] 4:4 10:8 24:5 26:15 60s ^[1] 64:4 66 ^[1] 2:10 66,000 ^[1] 4:14</p> | <p style="text-align: center;">7</p> <p>7 ^[1] 25:13 70 ^[1] 14:18 70s ^[1] 64:5 787 ^[1] 66:1</p> | <p style="text-align: center;">B</p> | <p style="text-align: center;">C</p> |
| <p style="text-align: center;">7</p> <p>7 ^[1] 25:13 70 ^[1] 14:18 70s ^[1] 64:5 787 ^[1] 66:1</p> | <p style="text-align: center;">8</p> <p>871 ^[1] 10:10</p> | <p style="text-align: center;">B</p> | <p style="text-align: center;">C</p> |
| <p style="text-align: center;">A</p> <p>a.m ^[2] 1:15 3:2 abandons ^[1] 67:24 abide ^[2] 59:24 60:8 ability ^[2] 36:19 70:5 able ^[6] 6:16 12:6 16:20 26:3 36: 18 53:25 above-entitled ^[1] 1:13 absolute ^[1] 9:14 absolutely ^[2] 9:3,13 accept ^[4] 41:2 42:5 45:23 62:20</p> | <p style="text-align: center;">8</p> <p>871 ^[1] 10:10</p> | <p style="text-align: center;">B</p> | <p style="text-align: center;">C</p> |

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| <p>cases [20] 21:6 30:7 33:22 34:10, 18 37:10 49:17,18,19,20,20 51:24 53:17 54:5 55:19 60:3 62:15,22 64:4,10</p> <p>cast [1] 10:9</p> <p>category [1] 30:7</p> <p>causation [1] 53:13</p> <p>Cause [1] 33:18</p> <p>Census [4] 15:7 30:9,21 60:2</p> <p>central [1] 7:9</p> <p>Century [1] 65:19</p> <p>certain [1] 42:3</p> <p>certainly [10] 11:15 12:2,5 38:18 57:4 58:17 59:23 60:19 63:21,22</p> <p>challenging [1] 39:4</p> <p>chance [4] 16:17 45:7 56:5 61:23</p> <p>change [10] 6:13 11:2,12 21:12 27:19 30:14 32:25 42:25 43:1,3</p> <p>changed [1] 6:14</p> <p>changes [2] 7:11 45:1</p> <p>characterization [1] 22:19</p> <p>Chesapeake [1] 5:12</p> <p>CHIEF [20] 3:3,9 20:12 21:8 22:12 23:8 31:1,6,25 34:13 41:19,25 54:14 55:1 58:19 62:23 63:16,18 66:7 70:10</p> <p>choose [3] 46:19 48:9,12</p> <p>circumstance [5] 10:1,5,17 46:16 55:13</p> <p>circumstances [3] 36:4 49:8,11</p> <p>cited [3] 21:6 27:3 30:7</p> <p>citizens [1] 13:11</p> <p>city [2] 40:11 61:11</p> <p>claim [10] 31:9,21 32:13 34:23 41:7,10,10,11 42:11 53:2</p> <p>clarify [1] 47:17</p> <p>class [1] 69:21</p> <p>classic [1] 40:10</p> <p>classical [3] 26:9,10 42:20</p> <p>Clause [6] 27:23,24 28:1 29:13 38:14 62:12</p> <p>clear [8] 9:14 48:5 50:23 52:13 57:8 61:16 65:9,20</p> <p>Clement [1] 19:7</p> <p>close [5] 19:9,17 30:9 38:3 57:22</p> <p>coining [1] 63:11</p> <p>come [9] 17:8,24 20:11 31:18 46:6 49:2 55:16,23 59:17</p> <p>comes [4] 37:15 39:8 53:11 55:3</p> <p>comfortable [2] 44:23 58:20</p> <p>coming [1] 45:2</p> <p>committed [1] 62:11</p> <p>Common [1] 33:18</p> <p>community [1] 7:16</p> <p>compare [1] 30:12</p> <p>competent [1] 13:19</p> <p>competitive [3] 6:15 36:3 67:8</p> <p>complain [1] 30:13</p> <p>complaint [2] 8:4 13:16</p> <p>completely [3] 29:4 45:22 52:19</p> <p>complied [1] 25:25</p> <p>components [1] 67:21</p> <p>composition [1] 4:16</p> <p>comprised [1] 62:17</p> | <p>concern [1] 51:23</p> <p>concerned [1] 10:15</p> <p>concerns [1] 3:13</p> <p>conclude [1] 15:23</p> <p>conclusion [1] 40:6</p> <p>concurrence [1] 68:2</p> <p>confirms [1] 66:15</p> <p>confusion [2] 14:2 15:25</p> <p>congressional [17] 4:5 10:13 15:6 42:12,15 44:4,6,8,10,13,14 62:5,6 64:13,16,18 67:12</p> <p>consider [2] 26:22 70:2</p> <p>consideration [5] 3:25 35:17 43:9,10,11</p> <p>considerations [3] 3:21 55:20 66:3</p> <p>considering [1] 37:19</p> <p>considers [1] 26:6</p> <p>consistently [1] 49:22</p> <p>constitute [1] 11:24</p> <p>Constitution [10] 15:8 19:8,16 24:23 25:24 27:22 38:2,12 62:11 65:10</p> <p>constitutional [5] 11:4 63:10,12,15 69:14</p> <p>constitutionally [1] 3:22</p> <p>contains [1] 65:10</p> <p>context [5] 21:22 22:9 50:1,1 51:17</p> <p>contexts [2] 22:7 49:21</p> <p>continue [1] 67:1</p> <p>continuing [1] 52:3</p> <p>contrary [1] 68:11</p> <p>control [3] 55:14 66:5 68:5</p> <p>controlled [3] 12:10,19 55:2</p> <p>controls [2] 26:15 40:11</p> <p>Cook [1] 33:4</p> <p>correct [2] 46:5 54:22</p> <p>correctly [1] 9:21</p> <p>correspondence [1] 20:6</p> <p>corridor [3] 7:12,16,25</p> <p>counsel [7] 16:22 31:2 41:18 66:8 67:24 68:9 70:11</p> <p>count [3] 20:3,8 29:20</p> <p>counterdistinction [1] 44:2</p> <p>counties [1] 13:7</p> <p>country [2] 5:7 67:11</p> <p>counts [2] 34:7,9</p> <p>County [8] 6:3,3,3 7:10 22:22 23:1 27:4 61:10</p> <p>coupling [1] 32:15</p> <p>course [4] 26:8,23 39:15 45:3</p> <p>COURT [79] 1:1,14 3:10,12,15 4:2 9:9,23 10:25 11:3,11 12:5 13:18,19,20 14:1,9,12,15 15:13,23 16:9,19 17:6,11,17,24 18:9,18 19:1,4 20:9,10 21:7 25:1,3,23 27:6,14 28:21 29:5,24,25 30:2,6 31:7 32:11 33:12 36:1 37:9 40:18 44:19,24 45:10,24 46:2 48:3,21 49:6,11,21 53:17 54:21 55:18 59:8,21 60:4,14 63:23,23 65:1,23 66:17 67:25,25 68:9,11 69:14 70:1</p> <p>Court's [13] 10:16 14:15 19:4 28:2</p> | <p>41:1 49:16 59:24 60:8 62:15,22 64:3 66:16 69:17</p> <p>courts [3] 3:20 30:7 63:24</p> <p>Crawford [1] 27:4</p> <p>crazy [1] 60:21</p> <p>credit [1] 59:20</p> <p>crossing [4] 5:12,24 6:5,14</p> <p>Cummings [3] 36:2 40:7 41:2</p> <p>current [1] 10:17</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [2] 1:10,22</p> <p>data [1] 41:16</p> <p>Davis [2] 18:18 25:2</p> <p>daylight [1] 33:20</p> <p>de [2] 34:4,7</p> <p>deals [1] 53:17</p> <p>debate [1] 69:18</p> <p>decade [1] 45:2</p> <p>decided [1] 64:4</p> <p>deciding [3] 49:23 68:13,15</p> <p>decision [2] 5:10 41:1</p> <p>declare [2] 45:11 48:3</p> <p>deemed [1] 3:22</p> <p>defeat [2] 31:17 65:16</p> <p>defense [2] 4:8 23:25</p> <p>defies [1] 49:12</p> <p>defined [1] 65:6</p> <p>defining [1] 65:5</p> <p>degree [5] 29:16 32:6 43:8 44:3,5</p> <p>delay [2] 30:5,8</p> <p>delegation [3] 10:13 36:11,11</p> <p>deliberate [1] 44:20</p> <p>deliberately [1] 51:19</p> <p>delicate [1] 55:22</p> <p>deliver [1] 59:13</p> <p>democracy [1] 17:16</p> <p>Democrat [2] 26:1 42:24</p> <p>Democratic [12] 6:24 8:7 12:18 23:3 33:2,8 36:15 37:12 66:5 67:9,13,21</p> <p>Democrats [21] 4:15,18,18 6:15,17 8:7,21 9:15,17 12:20 13:8 23:18 36:16,17 44:12 46:25 48:12 57:23 58:6 67:11,17</p> <p>depending [1] 43:4</p> <p>deprived [1] 36:19</p> <p>described [1] 37:12</p> <p>describing [2] 41:8 51:23</p> <p>Despite [1] 37:4</p> <p>determined [2] 13:20 30:8</p> <p>developed [2] 29:5 67:7</p> <p>deviates [3] 56:19,20 58:4</p> <p>deviation [1] 65:6</p> <p>devising [1] 62:16</p> <p>dictate [2] 12:4 28:25</p> <p>differ [1] 33:16</p> <p>difference [11] 4:9 9:2 27:14,16,18 29:7 34:2,3,19 44:21 62:2</p> <p>different [14] 20:20 22:7 29:1,3,4 30:20,23 47:8,15 59:3,5 68:24 69:11,12</p> <p>difficult [7] 23:5 24:16 32:24 35:19 56:9,12 69:23</p> | <p>diluting [2] 51:6,8</p> <p>dilution [7] 34:3,4 44:3,5,7,20 49:18</p> <p>direct [1] 54:23</p> <p>direction [1] 8:12</p> <p>directly [2] 68:11 69:10</p> <p>disappears [1] 52:24</p> <p>discord [1] 69:2</p> <p>discount [1] 7:5</p> <p>discover [1] 57:16</p> <p>discretion [1] 46:19</p> <p>discriminate [1] 35:9</p> <p>discrimination [3] 35:6 39:17 59:22</p> <p>discuss [1] 20:13</p> <p>disfavored [1] 65:13</p> <p>disfavors [1] 42:17</p> <p>dismissal [1] 19:5</p> <p>disproved [1] 65:25</p> <p>dispute [1] 14:6</p> <p>disruption [1] 30:12</p> <p>distinction [1] 44:19</p> <p>distinctions [1] 23:4</p> <p>distinguish [1] 3:20</p> <p>district [56] 4:15,16,16 5:3,9 6:13,15,17 7:22 8:2,15 9:15,17 11:23 17:11 20:17,20 22:16 23:14,15,17 24:2 25:23 26:2 29:24,25 30:1 33:8,9,12 42:12,15 44:4,6,8,10,13,14,19 50:11,13,14 52:2,4 54:11,21 61:24 65:24 66:4,16 67:13,17,20,21,22 68:13</p> <p>distressing [1] 64:19</p> <p>districts [15] 15:7 25:18 36:3,15,16,18 42:21 50:5 55:4,6 60:23 64:13,17 67:12 70:6</p> <p>divide [1] 61:13</p> <p>doing [5] 36:25 52:17,20,22 68:25</p> <p>dominant [1] 25:1</p> <p>domination [1] 67:17</p> <p>done [7] 18:4,7 21:9,10,12 35:12 46:22</p> <p>doom [2] 34:14 65:15</p> <p>doomed [2] 31:16 44:10</p> <p>dooming [1] 32:12</p> <p>doubt [2] 25:16,19</p> <p>dovetails [1] 55:11</p> <p>down [1] 11:3</p> <p>dramatic [2] 53:25 54:15</p> <p>draw [7] 24:7 36:13 42:21 44:2 51:3 55:6 70:6</p> <p>drawers [4] 32:17 33:6 34:14 62:4</p> <p>drawing [5] 11:22 23:4 52:1 55:21 60:21</p> <p>drawn [9] 13:2 30:20 34:16 42:1 44:8 45:20 50:5 55:18,24</p> <p>drew [1] 44:19</p> <p>driver [2] 37:23,24</p> <p>drives [1] 38:7</p> <p>due [1] 59:20</p> <p>durability [5] 32:2,9 33:24 34:1,21</p> <p>durable [4] 9:4 43:20 44:25 61:24</p> <hr/> <p style="text-align: center;">E</p> <hr/> |
|--|---|---|--|

Official - Subject to Final Review

| | | | |
|---|--|---|---|
| <p>each [2] 13:23 15:15 earlier [1] 59:19 easier [2] 32:23 56:16 Easton [1] 6:2 easy [5] 25:3 42:21 52:11,18 57:19 editorial [2] 63:11,19 editorials [1] 14:20 effect [7] 9:16,18 32:7 43:19 44:22 45:24 55:7 effective [1] 20:18 effectively [2] 4:19 44:1 effects [7] 29:14,15 53:1,13,25 54:16 57:17 effectuated [1] 7:3 effort [1] 25:8 eight [1] 15:6 eighth [7] 6:24 7:22 8:2,14 44:4,12,13 either [1] 33:17 elect [1] 51:9 elected [2] 26:2 69:9 election [3] 13:23 22:25 67:10 elections [13] 4:5 8:23 24:4 27:5,24 31:14 62:3,3,5,7,12,19 67:19 electoral [8] 31:16 32:12,19,25 34:15 35:19 44:11 65:16 electorate [1] 48:6 eliminate [1] 14:2 elsewhere [2] 25:21 66:3 emerged [1] 63:25 emphasize [1] 41:9 employee [2] 21:15,23 employee's [1] 21:24 employment [2] 21:21 22:9 enacted [2] 22:5 33:6 enacting [1] 22:4 end [1] 10:12 endemic [2] 28:23 62:3 ends [4] 60:22 61:7,8 62:20 ends-oriented [1] 41:10 enforce [1] 49:7 enormously [1] 9:8 enough [3] 32:13 55:5 60:1 ensure [1] 70:5 ensuring [1] 4:19 entire [3] 5:8 8:9 25:20 entirely [2] 32:9 49:12 entitled [3] 41:13 42:11,14 equal [7] 18:19 27:23 28:1,25 29:13 38:13 40:13 equally [1] 38:15 equitable [1] 30:10 especially [2] 13:21 48:21 ESQ [5] 1:19,22 2:3,6,9 essence [1] 34:17 essential [1] 68:2 established [3] 7:18 10:10 21:18 establishes [1] 15:5 ET [2] 1:3,6 even [6] 13:15 24:4 39:6,21 69:23,24 everybody [2] 52:19 63:14 everyone [1] 39:2 everyone's [1] 6:6</p> | <p>everything [1] 10:24 evidence [16] 5:25 23:5 31:22 32:21 33:5 45:4 52:24 53:1,5,15 54:15,23 56:4,7 57:14 61:4 evil [1] 68:2 exact [1] 15:3 exactly [5] 32:21 37:9 45:3 48:22 49:23 exaggerated [1] 9:8 example [5] 11:22 27:3 40:10 50:9 69:15 except [3] 23:13 32:2 33:23 excessive [5] 3:21,25 4:9,11,24 excluded [1] 51:4 exercise [3] 21:16 46:18 64:21 exercising [1] 20:19 exogenous [1] 62:3 expect [1] 62:13 expected [1] 62:18 experience [1] 16:18 expert [2] 20:5 67:7 experts [2] 19:24 62:2 explain [1] 30:1 explained [1] 20:24 explaining [4] 13:24 34:12 39:14 65:23 explanation [1] 55:24 explanations [1] 65:22 express [2] 22:3 31:13 expressed [4] 9:25 51:21 68:8 69:4 extreme [8] 10:1,16,19 24:19 58:2 60:9,13,14 eye [1] 55:7</p> <hr/> <p style="text-align: center;">F</p> <p>facie [1] 37:13 fact [5] 9:1 37:4 41:8 42:4 54:4 factor [1] 25:1 factors [4] 6:12 33:12 39:16 55:23 facts [7] 8:17 18:11 41:12 46:4,11 47:4,6 fails [1] 3:18 failure [3] 32:13 34:16 44:11 fair [3] 22:19 26:17 36:14 faith [1] 59:23 famous [1] 5:5 far [3] 19:13 58:4 66:19 favor [6] 39:14 40:18 47:24 50:6 68:20,22 favoring [1] 68:9 favours [2] 42:13 68:18 feel [1] 48:21 fiddle [1] 32:18 figures [1] 15:7 find [7] 14:18 18:9 43:17,17 52:25 58:9,13 finds [1] 49:21 fine [1] 43:6 finish [1] 42:9 fire [3] 21:17 58:10,13 First [35] 3:16 6:13,24 13:14 19:2,2 20:13 21:16 22:25 27:2,22 28:4,16,17,24 29:12 30:3 34:23 35:6</p> | <p>37:13 39:12,20 41:22 42:5 49:7,19 50:17 51:12,18 61:2 64:1,20,22 65:20 69:19 fits [1] 61:10 five [2] 36:15 66:9 five/three [12] 6:20 36:11,13 37:156:5,8 57:4,18,22 58:21 60:23,25 fix [1] 32:19 flatly [1] 65:24 flipping [1] 66:4 flips [1] 4:16 focus [4] 32:8 34:1,7,8 force [1] 12:12 foreclosed [1] 19:3 foreseeable [2] 4:23 6:25 form [1] 19:2 formed [1] 5:7 forth [2] 24:21 26:7 forums [1] 15:15 forward [5] 31:18 49:10 50:19 55:16,23 found [2] 19:1 30:6 framers [1] 62:11 framework [2] 51:12,14 free [1] 40:21 friend [1] 63:6 friends [1] 49:14 full [1] 14:10 fully [2] 47:19,20 further [1] 70:8 future [7] 4:24 7:1 52:12 57:15 67:2,6,16</p> <hr/> <p style="text-align: center;">G</p> <p>Gaffney [4] 36:2,8 40:7 41:2 General [4] 1:19 54:18,20 65:22 generally [1] 63:24 generate [1] 24:22 genuine [1] 25:16 geography [6] 56:25 57:1 59:4 60:18 61:12,22 gerrymander [9] 32:17 45:1,18,21 47:20,24 48:4 63:12 69:5 gerrymanderers [1] 32:18 gerrymandering [19] 11:25 16:4 17:16 27:21 29:21 49:17 52:16 53:16 55:19 60:10 62:25 63:9 65:3,6,12,18 68:3,12 69:2 gerrymanders [1] 45:11 gets [1] 19:25 getters [1] 12:3 getting [2] 7:14 68:4 Gill [1] 68:1 Gingle [2] 33:11,14 Gingles [1] 33:15 GINSBURG [7] 12:7,24 13:9 14:6,11 25:11 66:20 give [3] 3:19 59:19 61:23 given [5] 5:25 7:8 30:5 41:2,6 giving [1] 9:17 go-around [1] 19:2 goal [6] 5:15,17 7:2,3 31:13,15 GORSUCH [12] 41:18 44:15 45:5,22 47:16 48:10,14,16,18,24 58:12,</p> | <p>14 got [4] 6:2 9:20 54:25 57:5 government [6] 23:23 25:12 35:21,24 43:5 55:14 governmental [1] 31:18 governor [11] 5:18,21 7:7 8:23 11:17 12:18 23:16 24:4 25:13,21 61:25 Grains [1] 13:25 great [2] 34:10 47:23 greatest [1] 9:4 group [3] 31:11,14,15 grouped [2] 6:2,3 groups [6] 38:15 39:17 41:16 51:20 59:22 65:13 growth [4] 7:8,10 8:8,10 guarantee [1] 65:10 guess [3] 21:13 37:25 39:10 guide [1] 24:25 guy [1] 50:25</p> <hr/> <p style="text-align: center;">H</p> <p>happen [5] 9:19 11:19 27:16 30:16 69:6 happened [6] 11:19 12:25 22:6 47:9,25 64:2 happens [2] 12:16 59:14 happy [2] 13:2 38:21 harbor [1] 32:17 hard [1] 57:18 harder [2] 31:13 57:16 harm [1] 69:4 hear [1] 3:3 heard [6] 3:13 8:19 15:1 16:12 43:16 66:14 heavily [4] 5:10 6:16 8:7 68:17 held [4] 15:16 18:19 22:25 69:14 help [1] 8:21 helpful [3] 32:14 34:6 61:21 hidden [1] 57:15 high [1] 54:23 higher [2] 20:1,8 history [5] 12:14 41:22 42:5 62:24 63:1 Hogan [2] 23:17 61:25 Honor [29] 4:2 5:1 11:14 13:14 16:6 17:5 24:24 30:25 32:15 35:2 37:8 38:6,16 39:10 40:17,25 44:1 45:16 47:15 53:23 54:13 55:9 58:18,25 59:17 63:7,22 65:11 66:12 hope [2] 26:1 66:12 House [2] 4:23 51:2 houses [2] 12:10,19 hypothetical [3] 37:11 48:6 57:13 hypothetically [1] 8:17</p> <hr/> <p style="text-align: center;">I</p> <p>I-270 [3] 7:12,15,25 idea [3] 7:24 24:12,14 identified [3] 55:25 60:15 68:2 identify [3] 18:10,17 27:8 Ill [1] 63:24 imagine [4] 9:7 29:2,6 42:22 imbalance [1] 55:18</p> |
|---|--|---|---|

Official - Subject to Final Review

| | | | |
|--|--|---|--|
| <p>imbalanced ^[1] 55:15 impact ^[2] 34:5 70:2 impermissible ^[2] 11:23,24 implicitly ^[1] 33:13 imposed ^[3] 31:19 49:24 55:25 impossible ^[2] 24:18,22 improper ^[1] 55:15 improve ^[1] 23:20 incidents ^[1] 60:9 inclined ^[1] 38:17 including ^[3] 13:7 25:21 68:1 incorporation ^[3] 64:1,9,16 increase ^[1] 24:8 incumbent ^[1] 48:2 indeed ^[2] 61:3 63:11 independent ^[3] 7:19 46:19 67:8 index ^[2] 33:3,4 indicated ^[2] 12:2 28:19 indication ^[1] 38:11 indisputable ^[1] 8:25 indisputed ^[2] 9:13,16 individual ^[6] 13:22 36:17 37:5 51:25 52:1,2 inevitable ^[1] 40:6 infer ^[3] 54:1,16 55:6 influenced ^[1] 5:10 informed ^[2] 14:16 16:21 inherent ^[1] 22:10 injure ^[1] 29:15 injury ^[2] 8:4,5 instance ^[1] 39:22 instead ^[3] 4:14,18 70:7 instituted ^[1] 5:13 intact ^[1] 23:1 intent ^[34] 9:14 23:12,12 24:25 25:1,4 27:6 29:14,15,17 32:15,16 35:18 41:16 43:18 46:14 52:24 53:5,12,15 54:1,16,18,19,20 55:6,10,16 56:4,8,16 57:14 60:24 66:21 intent-based ^[1] 28:21 intentionally ^[2] 24:6,7 interest ^[7] 7:16 30:11 31:19 35:21,24 41:3 43:14 interests ^[1] 30:14 interference ^[1] 63:4 intermediate ^[2] 13:20 14:9 interpreted ^[3] 19:8,17,23 interrupt ^[1] 37:22 intervene ^[3] 9:9,23 10:6 intervention ^[1] 10:16 introduced ^[1] 33:11 invalidate ^[1] 68:10 invalidating ^[1] 27:15 inverse ^[1] 44:12 involve ^[1] 55:22 involved ^[1] 43:2 iota ^[1] 34:25 isn't ^[6] 4:11 26:25 46:20 47:25 57:8 67:3 isolate ^[1] 60:17 issue ^[1] 14:24 itself ^[3] 38:12 48:23 51:16</p> | <p>JA ^[1] 66:1 JOHN ^[1] 1:6 Joint ^[1] 14:19 judgment ^[3] 7:6 13:17 49:12 judicial ^[1] 49:12 jurisdiction ^[1] 13:19 JUSTICE ^[174] 3:3,9,24 4:7 5:14,18,20,22 6:7,18,23 7:1,15,21,24 8:13,16 9:12,25 10:2,23 11:21 12:7,24 13:9 14:4,6,10 15:2,10,17 16:3,11,23 17:1,14,19,25 18:2,14 19:6,15,19,20 20:12 21:8 22:12 23:8,19,20,22,24 24:14,18 25:11 26:3,19 27:20 28:3,6,9,11,15,20,24 29:8,9,10,16,23 30:19 31:1,7,25 33:10,23 34:13,22 35:3,8,23 36:5,12,24 37:4,18,21 38:8,13,19,23 39:1,4,20 40:4,8,20 41:7,18,19,25 42:19 43:22 44:15 45:5,22 46:7,10,24 47:1,6,12,16 48:10,14,16,18,24 50:2,3,4,20,24 51:6 52:7,8,10 53:4,9,20,24 54:4,7,10,14 55:1 56:2,4,10,13,18 57:2,11,12,12 58:1,2,6,12,14,19,20 59:9 60:17,20 61:6,18,20 62:23 63:16,18 64:8,12,15,24 65:2,8,8 66:7,20 68:1,16 69:7 70:10 Justices ^[2] 18:22 25:8 justiciability ^[2] 46:8 49:3 justiciable ^[4] 18:20 20:10 27:21 49:22 justification ^[5] 27:10 35:13 37:14 55:11,17 justifications ^[3] 56:24 59:6 61:17 justified ^[1] 41:8 justify ^[2] 31:19 57:2</p> | <p>kind ^[8] 21:14 23:4 30:12 41:15 52:14,24 53:1 59:21 kinds ^[2] 49:23 61:14</p> <hr/> <p style="text-align: center;">L</p> <p>LAMONE ^[2] 1:3 3:4 language ^[1] 13:21 large ^[2] 15:18 59:2 largest ^[1] 7:10 Larry ^[1] 23:17 last ^[3] 30:6 34:2 67:10 Laughter ^[4] 38:25 53:8 58:16 63:20 law ^[4] 25:25 27:2 28:7 29:5 laws ^[1] 30:23 lead ^[1] 14:20 leaders ^[2] 25:13 66:22 League ^[2] 33:17 34:20 leaning ^[1] 6:16 least ^[6] 10:17 15:18 19:25 28:7 40:19 57:15 led ^[1] 46:14 left ^[1] 30:25 legal ^[7] 11:9,11,18 49:13 52:22,23 63:22 legislating ^[1] 22:1 legislation ^[2] 21:2 22:10 legislative ^[2] 21:1 25:12 legislators ^[9] 3:20 11:17 22:13,20 24:15 59:19,24 60:7 67:15 legislature ^[13] 12:10,19 18:23 22:4 25:12 26:11 41:15 43:4,18 46:21,21 68:25 69:8 legislatures ^[6] 26:13 62:9,10,12 64:19,20 legitimate ^[5] 31:18 35:20,24 41:3 55:17 less ^[1] 60:13 letting ^[1] 68:4 level ^[2] 16:21 63:5 light ^[2] 13:22 19:23 limit ^[3] 10:1 58:21 64:22 limiting ^[2] 10:15,19 LINDA ^[1] 1:3 line ^[3] 4:6 27:19 60:21 lines ^[4] 30:13 46:2 60:25 68:14 listen ^[1] 59:24 listening ^[1] 29:18 litigate ^[2] 16:18 60:2 litigated ^[3] 13:14,18 16:2 litigation ^[1] 60:4 little ^[2] 20:14 62:24 lock ^[1] 67:16 locked ^[1] 23:18 long ^[3] 35:16 37:10 55:16 longer ^[1] 30:10 look ^[9] 7:25 8:21 27:7,7 33:24,25 42:19 62:4 67:18 looking ^[5] 24:14 43:18 62:6 66:17 67:15 looks ^[1] 10:13 lose ^[1] 19:21 lost ^[1] 29:19 lot ^[5] 6:11 21:10 33:20 57:17 61:4</p> | <p style="text-align: center;">M</p> <p>made ^[5] 34:19 52:13 61:21,22 65:8 magic ^[1] 51:15 majorities ^[1] 24:21 majority ^[9] 12:4,8 18:21 20:1 24:8 25:7 48:11 68:20,23 makers ^[3] 4:14 25:15 66:24 makeup ^[1] 10:12 malleable ^[1] 55:21 manageable ^[4] 3:19 17:13 49:25 50:1 manner ^[1] 42:16 many ^[3] 9:2 27:9 43:11 map ^[59] 4:14 8:1,21,22 13:1,4 24:1,2,3 25:15 27:15 30:11,16,17,20,23 31:17,20 32:17 33:6,6 34:13,16 36:6,8,9 39:19 41:14,14,21,23 42:16 44:8 45:20 46:15,19 48:9,12,13,22 51:3 55:15,20,24 56:8 62:4 65:25 66:2,24 67:1,6,8,16,18 68:5,9,17,21 69:16 mapmakers ^[3] 50:10,10 51:1 Maps ^[7] 5:7 11:8 24:7 36:1 39:5 46:17 47:7 March ^[1] 1:11 margins ^[1] 32:19 Marion ^[1] 27:4 Maryland ^[17] 1:20 4:21 10:12,14 11:15,20 12:14,22 13:19 14:21 18:4 23:5 26:18 31:23 48:1 60:22 67:14 Maryland's ^[2] 3:12 56:25 Marylanders ^[1] 69:21 Massachusetts ^[2] 10:6,21 mathematical ^[2] 58:24 59:1 matter ^[7] 1:13 42:4 44:18 45:24,25 54:9,18 McDonald ^[1] 20:4 mean ^[22] 4:11 5:22,24 11:5 12:8 20:14 21:14 22:14 24:10 25:15 33:11 34:24 36:6,9 41:24 43:6 53:20,24 58:22 61:15 62:23 68:16 means ^[2] 3:20 43:3 measure ^[3] 4:10,13 27:8 measuring ^[1] 27:13 member ^[1] 4:23 members ^[2] 67:25 69:8 mention ^[1] 33:14 mentioned ^[3] 13:15 15:20 32:3 menu ^[1] 46:17 merely ^[1] 20:6 met ^[1] 32:1 metrics ^[1] 33:2 MICHAEL ^[3] 1:22 2:6 31:4 might ^[14] 35:13 36:10 39:14,18,21 43:24 45:25 46:1 47:7 51:25 55:15 56:24 58:20 61:5 million ^[2] 13:6 69:21 mind ^[1] 26:5 minds ^[1] 24:15 minimis ^[2] 34:5,8 minority ^[3] 12:3,8,12</p> |
| J | | | |

Official - Subject to Final Review

| | | | |
|---|--|---|--|
| <p>minutes ^[1] 66:9 mirror ^[1] 35:13 misshaped ^[1] 60:25 modern ^[1] 63:25 Montgomery ^[1] 7:9 most ^[7] 7:11 8:9 13:11 14:5,6 35:11 59:23 motion ^[1] 13:17 moved ^[2] 4:14 22:16 moving ^[1] 20:19 much ^[12] 21:25 26:25,25 27:5,8 43:14,15 44:25 46:1 52:8,16 69:23 must ^[1] 48:18 myriad ^[1] 55:21</p> <hr/> <p style="text-align: center;">N</p> <p>necessarily ^[1] 34:24 necessary ^[1] 22:11 need ^[6] 4:12 9:25 19:12 53:2,12,16 needs ^[2] 32:11 68:10 neutral ^[1] 56:23 neutrality ^[1] 42:7 neutrally ^[2] 31:20 41:25 neutrally-drawn ^[1] 41:23 neutrally-redrawn ^[1] 41:14 never ^[2] 4:20 20:25 New ^[4] 5:5,6 13:1 60:3 newspaper ^[1] 63:19 next ^[4] 3:4 9:19 53:11 60:3 non-excessive ^[1] 4:10 non-justiciable ^[1] 16:5 non-proportional ^[1] 39:19 norm ^[1] 4:3 normal ^[1] 53:10 north ^[4] 8:12,15 52:20 60:5 nothing ^[4] 5:11 7:19 39:16 66:14 notice ^[1] 15:16 notices ^[2] 13:22 14:1 number ^[7] 4:25 9:15,18,18 15:19 62:8 67:4 numbers ^[4] 24:10,11,20,22 nutshell ^[1] 31:21</p> <hr/> <p style="text-align: center;">O</p> <p>O'Brien ^[1] 21:7 O'Connor ^[1] 65:8 O'Malley ^[1] 25:21 O'Malley's ^[1] 7:7 objection ^[1] 50:9 obligation ^[2] 17:8 49:6 obvious ^[2] 5:23 6:9 obviously ^[1] 56:25 occasions ^[1] 62:8 offense ^[2] 63:10,13 officials ^[2] 31:10 51:19 often ^[2] 53:1 60:12 okay ^[13] 9:6,20 17:2 18:4 29:8 36:5 37:1 40:22 43:13 57:22 58:3,22 61:6 Oklahoma ^[2] 10:7,21 once ^[1] 59:10 one ^[30] 4:4,22 5:2,3,9 8:19 10:9</p> | <p>16:18 19:25 22:8 25:15,18 26:15 28:3 30:4 32:2,5 34:25 39:12 43:16 46:13 50:6 55:2 57:13 59:14 66:23 68:4,18 69:9,17 one's ^[1] 16:14 only ^[9] 4:11 15:12,18,19 16:17 28:3 50:4 60:12,14 open ^[2] 40:10 47:8 opinion ^[1] 11:25 opinions ^[2] 49:17 65:9 opponents ^[1] 32:24 opportunity ^[1] 51:9 opposed ^[1] 6:5 option ^[1] 48:7 oral ^[5] 1:14 2:2,5 3:7 31:4 order ^[2] 22:11 24:21 ordinarily ^[1] 31:16 original ^[1] 65:17 other ^[20] 6:12,19 7:5 8:24 9:12 11:20 15:15 18:9 21:4,14 22:13 24:11 27:1 30:4,4 49:15 50:7 59:6 63:6 65:22 others ^[3] 5:19 6:19 38:1 otherwise ^[3] 19:4 45:14 65:7 ought ^[1] 12:6 out ^[24] 4:15 7:11 20:20 22:16 24:10 25:3 29:21 32:17,18,19,22,25 34:14 36:13 43:17,17 45:3 51:2 52:1 55:3 57:12 59:4 63:2 65:13 outcomes ^[2] 32:20 33:1 outlandish ^[1] 47:25 outlier ^[1] 54:5 outline ^[1] 16:7 outnumbered ^[1] 13:8 over ^[3] 45:2 50:6 68:4 overcomes ^[1] 27:11 overlaps ^[1] 34:20 overturn ^[1] 62:14 overwhelming ^[1] 37:24 overwhelmingly ^[5] 13:6 14:25 22:24 23:16 68:8 own ^[2] 8:4 62:20</p> <hr/> <p style="text-align: center;">P</p> <p>p.m ^[1] 70:12 packing ^[2] 8:5,6 PAGE ^[2] 2:2 14:18 pain ^[1] 50:14 paper ^[2] 14:17 15:14 park ^[1] 40:9 part ^[5] 7:8,9 53:18 59:2 63:1 particular ^[11] 28:8 31:11 32:2 41:16 46:15 50:11,12 51:15,19,24 55:5 parties' ^[1] 21:4 partisan ^[18] 5:11 16:4 17:15 23:12 25:4,8 27:21 33:3 36:20 42:1 45:1 50:5 52:16 55:7 60:10,24 62:20 65:12 partisan-free ^[1] 41:21 partisanship ^[4] 11:8 32:4 34:24 42:2 parts ^[2] 5:8 9:20 party ^[15] 4:4 10:9 12:11 19:25 21:</p> | <p>3 24:1,5 26:15 50:6 55:3,5 68:18,19,20,22 past ^[3] 21:9,11 35:18 patronage ^[2] 49:20 64:4 penalize ^[1] 37:6 penalizing ^[1] 20:18 people ^[29] 11:2 12:15,21 13:2,5 14:15,16,21,25 22:2,5 27:9 35:17 43:8 45:6,12 46:1 47:19 52:15 53:9,10 59:11 68:4,14 69:9,10,15 70:4,7 people's ^[5] 43:11 68:5,7 69:3,6 percent ^[15] 4:4,17,17,18,19,22 10:8 24:5 26:15 42:23,23,23,25 43:1,3 percentage ^[1] 20:2 perfectly ^[2] 11:9 44:23 performance ^[1] 33:3 perhaps ^[1] 62:24 permissible ^[1] 35:22 person ^[7] 50:13,15,25 51:1,2,3,10 personal ^[1] 19:11 perspective ^[1] 5:3 persuasive ^[1] 5:25 petition ^[1] 15:5 pick ^[1] 56:4 picked ^[1] 24:10 pictured ^[1] 10:2 piecing ^[1] 5:7 place ^[5] 40:9 44:3,6 46:20 47:20 places ^[1] 25:22 Plaintiff ^[2] 17:9 18:17 plaintiff's ^[3] 17:7 20:4 66:15 plaintiffs ^[8] 13:16 14:14 25:22 27:3 30:12 52:11 56:1 69:20 Plaintiffs' ^[3] 8:4 16:10 30:5 plan ^[3] 12:20 14:22 69:22 play ^[2] 32:4 57:12 plays ^[1] 59:4 please ^[2] 3:10 31:7 plus ^[1] 67:9 point ^[5] 42:10,14 59:18 61:20,22 pointed ^[2] 25:3 63:2 policy-making ^[1] 21:23 political ^[24] 3:21,25 10:12 11:24 21:24 22:1,3 28:23 31:12 33:4 36:21 37:6 38:15 39:18 41:17 42:17,20 49:4,20 50:6 55:3,20 64:3 66:2 politician ^[1] 26:6 politicians ^[7] 11:7 25:5 26:22 68:3 69:5 70:5,6 politics ^[7] 5:11 26:6,23 28:22 34:15 43:2 45:2 polls ^[1] 68:13 popular ^[2] 45:19,19 population ^[3] 4:13 7:8 69:16 populations ^[1] 42:22 poses ^[1] 17:16 position ^[6] 16:15 17:5 18:3 21:5 42:10 47:18 possible ^[1] 18:6 Post ^[1] 14:20 potential ^[1] 49:4 potentially ^[2] 28:14 35:24</p> | <p>power ^[1] 62:18 practical ^[9] 27:13,16 34:3,9,10,18 44:18,21 54:8 practice ^[1] 60:16 precedent ^[3] 15:24 19:4 28:2 precedents ^[1] 69:17 precisely ^[1] 42:7 preponderance ^[1] 29:22 present ^[2] 25:10 28:5 presented ^[3] 33:21 48:7 51:17 presumably ^[3] 11:12 13:2 23:2 presume ^[1] 14:16 presumed ^[1] 14:13 presumes ^[1] 15:13 presuming ^[1] 60:7 pretty ^[2] 21:17,24 prevail ^[2] 52:12 69:20 prevailing ^[1] 56:6 prevent ^[1] 52:2 previous ^[1] 63:2 previously ^[1] 33:7 prima ^[1] 37:13 primarily ^[1] 7:10 prior ^[3] 12:2 16:22 29:19 probably ^[5] 39:13 58:9,11,22 59:2 problem ^[12] 15:24 24:24 26:20,24 42:8 57:3,4,5 60:23 61:2,3 63:25 problems ^[1] 43:12 process ^[1] 45:14 process-oriented ^[1] 41:11 produce ^[1] 26:10 prohibited ^[2] 22:8 50:16 prong ^[3] 37:14 41:9 56:23 prongs ^[1] 37:14 proof ^[2] 15:25 16:1 proportion ^[2] 57:23 58:4 proportional ^[17] 19:9,18 36:9,14 37:24 38:3,4 39:5,8,14,24 41:4 47:22 48:8 56:19,21 65:7 proportionality ^[4] 19:14,22 40:23 57:9 propose ^[1] 28:19 protect ^[1] 70:4 protection ^[6] 18:19 27:23 28:1,25 29:13 38:13 prove ^[7] 24:6 26:4,5 53:2 56:16 57:18,19 proved ^[1] 42:11 proven ^[2] 41:13 67:6 proves ^[1] 31:22 provide ^[2] 3:18 66:16 provided ^[1] 69:25 providing ^[2] 39:24 40:23 provision ^[1] 27:22 public ^[6] 30:10 40:9 46:17,18,20 47:7 pure ^[1] 47:22 purpose ^[2] 39:23 40:23 pursue ^[1] 41:4 pursuit ^[2] 36:1,3 put ^[9] 7:22 8:1 11:8 45:18 46:17 49:10 50:19 63:6 65:23 puts ^[1] 30:6</p> |
|---|--|---|--|

Official - Subject to Final Review

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|---|--|---|---|
| <p>putting [2] 58:14 59:11</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question [22] 6:8 13:24 19:7 22:20 38:1 39:11 40:13 46:6 49:2,3,5,9,13 51:17 53:17 55:10,11 56:5,17,22 60:18 69:23</p> <p>questions [3] 39:7 45:8 70:9</p> <p>quickly [1] 3:11</p> <p>quite [1] 16:14</p> <p>quoted [1] 25:22</p> | <p>regulate [2] 40:22 62:19</p> <p>regulation [1] 39:22</p> <p>rein [1] 60:15</p> <p>reiterated [1] 18:23</p> <p>reject [1] 14:21</p> <p>rejected [3] 12:22 21:6 47:23</p> <p>reliable [1] 49:22</p> <p>relied [1] 25:2</p> <p>rely [2] 14:14 33:12</p> <p>remediable [1] 8:6</p> <p>remedy [1] 12:6</p> <p>remove [1] 5:12</p> <p>reorient [1] 3:11</p> <p>repeatedly [1] 21:5</p> <p>reply [1] 21:19</p> <p>Report [1] 33:4</p> <p>representation [15] 19:10,18 25:14 30:15 37:25 38:3,4 39:6,9,15,24 41:4 47:22 48:8 66:23</p> <p>representative [2] 50:13 51:8</p> <p>reproduced [1] 66:1</p> <p>Republic [1] 63:8</p> <p>Republican [14] 4:23 6:17,25 22:23 23:14,16 25:14,17 33:7 36:16,18 42:23 50:12 66:23</p> <p>Republicans [16] 4:14,17,19,20,22 8:23 9:2 13:7 20:17 22:15 24:3 42:13 44:9 57:23 58:7 67:20</p> <p>request [1] 38:7</p> <p>require [7] 19:9,17 30:23 38:6 39:21 42:6 45:10</p> <p>required [2] 15:8 41:21</p> <p>requirements [1] 11:18</p> <p>requires [5] 4:13 38:2,9 40:2,18</p> <p>reserve [1] 30:24</p> <p>resist [2] 43:8 45:1</p> <p>respect [1] 49:14</p> <p>respectfully [1] 5:2</p> <p>respects [2] 39:9 66:2</p> <p>respond [2] 61:23,25</p> <p>response [2] 6:7 26:22</p> <p>rest [1] 5:6</p> <p>result [2] 22:11 34:4 66:4,25,25 67:1 68:10 69:13</p> <p>resulted [2] 6:14 44:8</p> <p>results [5] 12:4 21:2 44:25 56:17 67:19</p> <p>retaliate [1] 22:15</p> <p>retaliating [2] 21:4 22:21</p> <p>retaliation [7] 3:17 20:24 49:19 50:7,21 51:12,15</p> <p>retaliatory [1] 20:16</p> <p>revealed [1] 67:24</p> <p>reverse [1] 3:15</p> <p>rhetoric [1] 69:1</p> <p>rid [1] 50:15</p> <p>rig [1] 62:6</p> <p>rights [2] 21:16 69:19</p> <p>ROBERTS [17] 3:3 20:12 21:8 22:12 23:8 31:1,25 41:19,25 54:14 55:1 58:19 62:23 63:16,18 66:7 70:10</p> <p>role [2] 32:5 60:18</p> <p>rough [1] 58:23</p> | <p>roughly [2] 38:15 44:4</p> <p>round [1] 60:3</p> <p>Rucho [3] 16:12 17:3 33:17</p> <p>rule [2] 11:4 38:22</p> <p>ruling [1] 40:18</p> <p>run [3] 5:23 6:8 52:3</p> <p>running [3] 6:11 39:2,5</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safe [2] 33:7,8</p> <p>same [15] 10:25 12:11 21:19 23:1,2 28:25 30:11 43:11,23 44:1,5,22 53:15 56:3 63:5</p> <p>saying [21] 6:6 10:20 16:4,13 17:15 18:7,15 19:16 26:4,20 40:19,20,22 44:24 47:4,13 49:16 53:10 56:22 59:10 69:13</p> <p>says [5] 7:1 15:24 37:15 59:21 68:9</p> <p>scenario [1] 51:22</p> <p>science [1] 42:20</p> <p>searching [2] 43:12,13</p> <p>seat [2] 4:20 20:8</p> <p>seats [4] 20:2 24:9 26:16 67:12</p> <p>Second [1] 9:1</p> <p>secret [1] 14:23</p> <p>see [12] 4:6 5:5 7:11 33:10,20 38:11 43:14 46:10 58:10,15 60:12 61:5</p> <p>seem [1] 20:15</p> <p>seems [4] 32:8 39:2 59:9 60:13</p> <p>sees [1] 60:4</p> <p>select [1] 42:16</p> <p>send [1] 18:8</p> <p>sense [5] 32:16 36:8,8 40:24 61:13</p> <p>serve [1] 70:6</p> <p>service [1] 35:20</p> <p>set [7] 32:17,18,19,22,25 34:14 36:13</p> <p>sets [1] 11:3</p> <p>seven [1] 69:20</p> <p>seven/one [14] 5:15 6:1,6,20,21 7:2 56:14,15 57:3,19 58:3,22 61:7,9</p> <p>shape [1] 65:24</p> <p>shifts [2] 26:11,12</p> <p>show [11] 24:21 25:4 36:25 43:3,7 53:12,14,25 54:15,25 61:10</p> <p>showed [1] 8:22</p> <p>showing [1] 54:18</p> <p>shows [4] 32:22 37:21,22 61:4</p> <p>shrink [2] 25:14,17</p> <p>side [3] 43:16 49:15 63:6</p> <p>sides [1] 40:13</p> <p>significance [1] 62:25</p> <p>significant [2] 32:4 55:4</p> <p>significantly [1] 60:10</p> <p>silver [1] 52:25</p> <p>similar [3] 10:12,14 60:21</p> <p>simple [1] 8:1</p> <p>simply [1] 14:24</p> <p>since [2] 21:6 63:8</p> <p>single [2] 3:18 27:17</p> <p>single-party [1] 55:13</p> | <p>singling [1] 65:13</p> <p>situation [5] 11:22 12:5 20:15 34:12 47:8</p> <p>situations [1] 24:19</p> <p>six/two [4] 6:20,21 36:10 56:10</p> <p>Sixth [13] 5:9 6:24 23:15 42:12,15 44:6,7,9 61:24 65:24 67:13,17,22</p> <p>slightly [2] 32:23,24</p> <p>small [2] 26:11 35:10</p> <p>smoke [2] 58:9,10</p> <p>Solicitor [1] 1:19</p> <p>solution [2] 26:21 49:5</p> <p>Somebody [1] 27:17</p> <p>somewhere [1] 8:11</p> <p>sorry [4] 37:22 46:7,9 64:14</p> <p>sort [4] 36:17 41:7 53:15 58:23</p> <p>sorts [2] 55:20 59:6</p> <p>SOTOMAYOR [14] 7:21,24 16:3,11,23 17:1 33:10,23 46:7,10,24 47:1,6,12</p> <p>sound [2] 51:22,22</p> <p>sounds [2] 57:19 58:19</p> <p>sources [3] 7:19 28:14 67:8</p> <p>span [1] 30:18</p> <p>speaker [1] 5:21</p> <p>speakers [3] 40:11,13,15</p> <p>specific [3] 16:9 28:18 54:19</p> <p>speech [7] 22:8,10,13 39:22,23 40:21,22</p> <p>spoke [1] 18:22</p> <p>square [1] 50:21</p> <p>stability [5] 26:11,18,21 43:10,14</p> <p>stage [1] 35:13</p> <p>stake [1] 16:8</p> <p>standard [15] 3:19 17:8,9,13 18:20 19:3 20:11 28:14,22 29:1 52:12 54:20,22 60:5,15</p> <p>standards [2] 29:1 49:22</p> <p>start [2] 12:9 17:14</p> <p>started [1] 16:7</p> <p>starts [1] 5:2</p> <p>state [30] 5:8 7:9 8:9 10:17 13:19,25 14:24 18:23 20:16 21:15 22:5 31:10,17 32:13 37:15 41:3 42:21 51:18 55:16,23 57:24 59:3,4 60:7 61:9,10 64:19,20 66:3 68:19</p> <p>state's [3] 15:6 27:10 42:22</p> <p>state-wide [1] 8:23</p> <p>stated [3] 5:14 7:2 37:13</p> <p>statement [3] 7:7 31:9 43:9</p> <p>statements [2] 7:5 59:11</p> <p>STATES [11] 1:1,15 4:3,5 10:8,11,18 11:20 15:6,8 64:2</p> <p>statewide [3] 24:2,3,4</p> <p>staticians [1] 9:5</p> <p>statisticians [1] 9:5</p> <p>statutes [1] 25:24</p> <p>stay [1] 10:25</p> <p>STEVEN [5] 1:19 2:3,9 3:7 66:10</p> <p>still [7] 19:1 23:13 37:5 43:10 45:20 48:2 61:5</p> <p>stop [2] 53:10 59:11</p> <p>straight [1] 20:3</p> <p>strong [1] 23:7</p> |
|---|--|---|---|

Official - Subject to Final Review

| | | | |
|--|--|--|---|
| <p>submitted [2] 70:11,13 subordinating [1] 69:5 substantively [1] 34:20 success [1] 35:20 successful [2] 23:10,13 succinct [1] 31:9 suddenly [1] 42:25 sufficient [5] 13:21 15:11,21,22 27:15 suggest [2] 38:14 55:15 suggested [1] 13:10 suggesting [2] 23:9 41:1 suggestion [1] 39:7 suggestions [1] 62:9 suggests [2] 38:12 58:23 SULLIVAN [68] 1:19 2:3,9 3:6,7,9 4:1,25 5:16 6:10,22 7:4,17,23 8:3, 14 9:10,24 10:4,24 11:14 12:1,13 13:1,13 14:8 15:9,12,22 16:6,16, 25 17:4,17,21 18:12,16 19:11,19, 22 20:23 21:21 22:18 23:11 24:13, 17,24 25:19 26:17 27:1,25 28:4,7, 10,13,18 29:2,14,18 30:3,22 65:22 66:9,11,12 67:4 69:1,12 summary [2] 7:6 13:17 super [1] 19:25 suppose [6] 8:16 48:1 50:9 52:13 53:9 60:20 supposing [1] 47:18 SUPREME [2] 1:1,14 surrounding [1] 8:9 swear [1] 8:20 swept [1] 67:20 swore [1] 8:24</p> | <p>three [7] 3:16 9:18,19,20 13:13 14: 20 36:16 three-part [1] 8:18 threshold [2] 58:24 59:1 throughout [1] 66:3 today [2] 42:6 60:13 together [1] 5:7 tolerate [2] 39:21 40:4 took [3] 44:3,6 47:20 tools [1] 63:23 totally [1] 23:1 towards [2] 34:21 57:9 town [1] 61:11 treat [1] 37:5 treated [2] 36:20 38:15 treatment [1] 65:14 tried [1] 29:18 trigger [1] 27:15 trouble [1] 61:9 troubled [1] 48:21 true [4] 9:8 37:15,17 63:8 try [2] 3:11 30:1 trying [2] 61:8 68:12 Tuesday [1] 1:11 turn [1] 65:15 TV [1] 15:14 two [8] 9:16 20:6 22:7 24:3 29:6,7 37:14 67:9 two-thirds [3] 24:8,20 58:21 two-year [1] 30:18 typically [2] 17:6 20:7</p> | <p>usual [4] 31:16 34:15 44:10 65:16 Utah [1] 10:8</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacate [1] 3:16 valid [1] 62:22 various [1] 65:9 vary [1] 59:7 versus [4] 3:4 25:2 27:4 34:4 victory [1] 67:20 Vieth [4] 17:7 18:18,22 25:7 view [7] 19:10,12 35:16 41:12 42: 20 45:16 48:3 viewpoint [2] 35:5,9 viewpoints [1] 39:25 views [8] 21:4,24 22:1,3 31:12 39: 18 41:17 42:18 violated [1] 31:23 violation [2] 63:15 65:20 vote [22] 4:5 12:3 20:3,18,19 25:9 34:2,4 44:3,5,7,20,20 45:19,19 46: 17 49:18 50:24 51:7,8 62:5 68:15 voted [9] 15:4 22:17,23 23:2,3,15 35:18 50:11 69:22 voter [3] 13:23 14:2 33:4 voters [23] 13:6 14:6,13 15:13 22: 14 23:2 27:17 31:12,14,16 32:12 34:14 35:19 37:5,12 39:17 41:17 51:20,21 59:22 62:5 65:13,16 Voters' [1] 34:21 votes [7] 4:12 10:9 20:1 21:3 24:5 39:23 68:23 voting [6] 13:12 14:7 23:6,14 26: 12 37:19 vulnerable [1] 67:18</p> | <p>Women [2] 33:17 34:20 won [4] 8:24 24:3 61:25 67:12 wondering [1] 52:11 word [2] 51:15 57:21 words [5] 8:25 9:12 15:3 57:21 58: 2 work [3] 35:12 43:24 67:24 worry [1] 53:5 worst [2] 59:13,14 written [2] 19:25 20:5</p> |
| <hr/> <p style="text-align: center;">T</p> <hr/> <p>Talbot [1] 6:3 tally [1] 29:20 targeted [2] 32:12 34:14 teachings [2] 59:25 60:8 tend [1] 20:1 tends [1] 57:9 Tennessee [2] 10:7,22 term [2] 34:2 63:12 test [38] 3:17,18 8:18 16:9,19 17: 20 18:4,6,7,9 28:15,17,19 29:11, 12,13 32:1 33:11,16,17,20,24 36: 25 37:23 45:10 50:2 52:13 53:19 57:9 58:15 59:12 61:3,8 66:15,16, 17 67:23 70:3 testified [1] 19:24 testimony [2] 14:19 67:7 tests [5] 16:13 17:3,23 18:6 33:21 textual [1] 38:11 themselves [3] 45:13 46:1 51:21 theory [5] 31:10,24 49:10 50:18,21 There's [16] 4:25 11:16 12:14 21: 11,17 22:4 26:9,13 30:19 35:5 39: 7 43:1 49:15 51:14 56:16 68:16 therefore [1] 43:8 third [3] 9:3 41:9 56:22 though [3] 37:23 39:6 55:10 thread [1] 17:25 threat [2] 14:2 17:16</p> | <hr/> <p style="text-align: center;">U</p> <hr/> <p>unconstitutional [10] 11:1 45:11 46:3,22 48:4,16,17 49:1 52:14 65: 4 under [23] 4:10 10:17 18:4 27:21, 25 28:16,17 29:11,12,13 31:17 33: 4 34:16 35:6 37:13,14 41:8,12,12 48:12 50:18 52:12 61:3 understand [11] 9:11,21 12:11 13: 11 14:13 18:15 21:13 45:7 47:18 48:6 61:8 understanding [2] 16:3 65:17 understood [4] 33:7 47:19,21 63: 14 undisputed [1] 46:15 unequal [1] 69:16 unify [1] 7:25 uniqueness [1] 47:2 UNITED [5] 1:1,15 10:18 15:6,8 universe [4] 5:4 9:5 54:11,11 unlawful [1] 59:23 unless [3] 21:22 61:9 70:8 unrebutted [2] 10:11 14:19 until [2] 63:25 65:1 up [12] 4:6 10:13 14:5 17:8,9,24 20: 11 26:7 56:4 60:22 61:7,8 upfront [1] 52:19 upset [1] 12:15 upshot [1] 62:21 urging [2] 14:21 16:10 uses [1] 24:1 using [3] 24:25 33:2 65:14</p> | <hr/> <p style="text-align: center;">W</p> <hr/> <p>wanted [4] 17:10 25:24 50:15 61: 23 Washington [5] 1:10,22 13:25 14: 20 22:22 watch [1] 15:14 way [16] 6:19 8:22 12:15 35:17 38: 17,22 39:12 44:24 46:22 51:20 58: 12 59:2,13 61:7 62:4,13 west [1] 6:4 western [1] 7:8 whatever [2] 30:24 47:7 whatsoever [2] 43:2 70:3 whenever [1] 22:4 Whereupon [1] 70:12 Whether [9] 4:2 27:10 42:4 43:19 49:4,6,9 51:18 56:23 whole [4] 5:4 20:24 33:20 45:6 whom [1] 8:20 Wicomico [1] 6:3 will [23] 4:20 9:1,16,19 12:12 26:22 27:25 30:22 34:19 45:1 59:7,12, 13,24 60:6,10 62:13 67:1 68:5,7, 22 69:3,6 win [7] 4:20 6:16 29:25 30:2 31:14 32:23,25 within [1] 30:17 without [3] 36:20 42:1,1</p> | <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years [1] 9:19 yield [1] 39:18 York [1] 5:6 Yorker [1] 5:5</p> |