

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,)
)
) Petitioner,)
)
) v.) No. 16-498
RYAN ZINKE, SECRETARY OF THE)
)
) INTERIOR, ET AL.,)
)
) Respondents.)

Pages: 1 through 75

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7 INTERIOR, ET AL.,)

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11 Washington, D.C.

12 Tuesday, November 7, 2017

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

16

17 APPEARANCES:

18 SCOTT E. GANT, Washington, D.C.; on

19 behalf of the Petitioner

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21 Department of Justice, Washington, D.C.; on

22 behalf of the Federal Respondents

23 PRATIK A. SHAH, Washington, D.C.; on

24 behalf of the Match-E-Be-Nash-She-Wish Band

25 of Pottawatomi Indians Respondent

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SCOTT E. GANT	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ANN O'CONNELL	
7	On behalf of the Federal Respondents	34
8	ORAL ARGUMENT OF:	
9	PRATIK A. SHAH	57
10	On behalf of the Match-E-Be-Nash-	
11	She-Wish Band of Pottawatomis Indians	
12	Respondent	
13	REBUTTAL ARGUMENT OF:	
14	SCOTT E. GANT	
15	On behalf of the Petitioner	71
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 16-498, Patchak versus Zinke.

Mr. Gant.

ORAL ARGUMENT OF SCOTT E. GANT

ON BEHALF OF THE PETITIONER

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

Section 2(b) of the Gun Lake Act is unconstitutional because it is incompatible with several well-established strands of this Court's separation-of-powers jurisprudence as well as with Article III itself. With Section 2(b), Congress directed the federal courts to dismiss a pending case otherwise properly before the courts.

As a consequence of that directive to dismiss with respect to Mr. Patchak's case, the courts were prevented from performing their constitutionally assigned responsibilities to decide cases before them and to say what the law is in the context of deciding those cases.

Section 2(b) is precisely the kind of

1 legislative review of judicial decisions that
2 the framers rejected when they designed the
3 Constitution. And all of --

4 JUSTICE KAGAN: Mr. Gant, when -- when
5 you say "directed that a case shall be
6 dismissed," are you referring only to the last
7 few words of this statute or are you referring
8 more broadly?

9 MR. GANT: I'm referring to the -- to
10 the last -- the words that refer to dismissal
11 itself.

12 JUSTICE KAGAN: Right. "And shall be
13 promptly dismissed."

14 MR. GANT: Yes. And then --

15 JUSTICE KAGAN: Are you suggesting
16 that if those five words were not in the
17 statute, that the case would come out
18 differently?

19 MR. GANT: I -- I am not suggesting
20 that. I think it would still have come out
21 differently; for example, if you dropped the
22 reference to dismissal but left "maintain," the
23 result would be the same. The same would be
24 true if there had been a removal of judicial
25 review.

1 JUSTICE KENNEDY: In other words, if
2 two -- if the -- if the statute had contained
3 just 2(a) but not 2(b), same result?

4 MR. GANT: No. That -- I understand
5 that to be a different question from Justice
6 Kagan's. If 2(a) were -- were the only part of
7 the statute, we had no 2(b) -- 2(c) is not at
8 issue here. So, if we had 2(a) only, we
9 wouldn't be here arguing that there was a
10 separation-of-powers violation.

11 Part of the problem here --

12 JUSTICE KAGAN: But -- but if you had
13 2(b), finished, just "shall not be filed or
14 maintained in a Federal court," full stop,
15 you're saying that would be the same statute as
16 the one we actually have?

17 MR. GANT: It -- it would still be
18 unconstitutional.

19 JUSTICE KAGAN: Yeah.

20 MR. GANT: Now, the -- the omission of
21 the "shall be dismissed" language is not
22 without significance. And if I may, I'd like
23 to explain.

24 The direction to dismiss is a
25 quintessential judicial function. It's not

1 surprising that Black's Dictionary, in defining
2 dismissal, refers to it as especially a judge's
3 decision to stop the case.

4 That's --

5 JUSTICE GINSBURG: Well, what do you
6 do with the McCardle case?

7 MR. GANT: McCardle was -- the fact
8 that a statute strips jurisdiction from a court
9 doesn't mean that it's immunized from review
10 under separation of powers. So the -- the
11 touchstone has to be and the relevant strands
12 of the separation-of-powers jurisprudence at
13 issue here are -- are really two parts.

14 One is, has Congress exercised the
15 judicial power and/or has Congress prevented
16 the courts from fulfilling its constitutionally
17 assigned responsibilities? I submit that both
18 have occurred here as a result of what is in
19 the actual 2(b), but the same result would
20 arise if you omitted just the words "shall be
21 dismissed."

22 JUSTICE GORSUCH: But, Mr. --

23 JUSTICE ALITO: If this is a -- just a
24 jurisdiction-stripping statute, could you just
25 say as succinctly as possible what the rule is

1 that you would like us to adopt? What is the
2 -- the separation-of-powers rule that you would
3 like us to adopt with respect to a purely
4 jurisdiction-stripping statute?

5 MR. GANT: Well, I -- I want to be
6 directly responsive to your question, but I
7 also want to say, and I've -- I've made this
8 observation in the briefs, I think the better
9 view is that it is not jurisdictional, and I'm
10 happy to elaborate on that later. But if we
11 assume that it's a jurisdiction-stripping
12 statute --

13 JUSTICE ALITO: Well, on that,
14 suppose, following up on the initial questions,
15 if all that 2(b) said was that an action
16 relating to this land shall not be maintained
17 in a federal court, would you say that is not a
18 jurisdiction-stripping statute?

19 MR. GANT: That --- that certainly
20 looks more like a jurisdiction-stripping
21 statute. The reason I say that it's -- the
22 better view is it's not jurisdictional is -- is
23 at least twofold.

24 One is -- and I -- I have been accused
25 by some colleagues of taking Arbaugh too

1 seriously, but this Court went out of its way
2 in Arbaugh to announce to the world and to
3 Congress in particular that it wanted a new
4 rule, that if a court wanted a statute to be
5 viewed as jurisdictional, you needed to clearly
6 say so.

7 This statute doesn't say anywhere in
8 its text, in its headings, that it's
9 jurisdictional. In fact, 2(b), the section
10 we're discussing that -- that arguably strips
11 jurisdiction from the courts, uses the phrase
12 "no claims."

13 My research may have been faulty, but
14 I couldn't find a single case using that
15 language in framing a jurisdictional statute.

16 JUSTICE ALITO: Well, if one of the
17 things that 2(b) does is to strip jurisdiction,
18 and if "shall not" -- "shall not be maintained"
19 is a jurisdiction-stripping provision, then I
20 don't see how you can win unless you have a
21 rule that applies to a jurisdiction-stripping
22 statute. Maybe there are other things in this
23 statute that are vulnerable, so they could be
24 severed.

25 So, to go back to the question I

1 asked, if this is a statute that takes away
2 federal court jurisdiction, what is your
3 separation-of-powers rule?

4 MR. GANT: The rule -- the rule, I
5 submit, the Court should adopt is if a statute
6 is properly -- deemed as properly -- is
7 properly construed as a jurisdiction-stripping
8 statute, it is still subject to
9 separation-of-powers analysis. That -- that
10 much is clear from Klein. However, whatever
11 else about the case might be puzzling, Klein
12 clearly establishes that the mere fact that
13 Congress affixes the label "jurisdiction" to a
14 statute doesn't immunize it.

15 So then we return to our touchstone
16 principles here. Has, through this
17 jurisdiction statute, Congress exercised the
18 judicial power and/or has it prevented the
19 courts from fulfilling their constitutionally
20 assigned responsibilities?

21 JUSTICE ALITO: Yeah, but when -- as
22 succinctly as you can, Congress violates the
23 separation of powers when it deprives the
24 federal courts of jurisdiction in this
25 circumstance. And what is the circumstance?

1 MR. GANT: The circumstance is when it
2 is directly, overtly deciding a case or
3 effectively deciding a case, rather than making
4 new law and leaving it to the courts to apply
5 the new law --

6 JUSTICE GINSBURG: Well, let's --
7 let's take -- which is not fictional, suppose
8 Congress enacts a statute that says a federal
9 court shall not have jurisdiction over cases
10 involving prayer in school. It's
11 constitutional?

12 MR. GANT: I think that raises serious
13 but -- but somewhat different questions. Part
14 of what's offensive here to the
15 separation-of-powers principles is that
16 Congress is directing the outcome in a case.
17 It could be a set of cases.

18 And I submit, by the way, look --
19 looking to Bank Markazi, if there had been
20 1,000 cases just like Patchak's, I think the
21 outcome would be the same. So the fact that it
22 was one case is, I think, probative of
23 assessing whether or not the Congress is
24 actually deciding a case, rather than actually
25 making the law to be applied by the courts.

1 JUSTICE KAGAN: Well, if that's so, I
2 mean, I thought that you were suggesting a rule
3 that said, well, when you direct one case,
4 that's unconstitutional, but now you've just
5 said you're not saying that.

6 So, again, coming back to Justice
7 Alito's question, I mean, we know that Congress
8 can alter the jurisdiction of the federal
9 courts. And we know that Congress can alter
10 that jurisdiction and apply it to pending
11 cases. We've said that over and over again.

12 So what makes -- what would make this
13 unconstitutional if we assumed that this is a
14 jurisdiction-stripping statute?

15 MR. GANT: Because what Congress has
16 done is affect directly here, but it could be
17 indirectly -- dictated the outcome of the case
18 without changing the law.

19 JUSTICE GORSUCH: So, Mr. Gant, it's
20 that last clause --

21 JUSTICE KAGAN: Well, the law is the
22 jurisdictional law. That's what Congress is
23 changing. Congress is changing jurisdiction.
24 In so doing, Congress is changing the law. We
25 haven't said Congress has to change, you know,

1 substantive law.

2 Here Congress is changing
3 jurisdictional law. It's saying, you know,
4 yesterday you had jurisdiction over a certain
5 category of cases. Today you don't.

6 Now, why is that unconstitutional or
7 when is that unconstitutional?

8 MR. GANT: That is unconstitutional
9 when in the -- under the guise of -- of
10 changing the rules with respect to
11 jurisdiction, the court is effectively deciding
12 the case and then not letting the courts apply
13 the new law either.

14 So both things have occurred here.
15 So, in Bank Markazi and in Robertson, the
16 reason why those survive separation-of-powers
17 scrutiny was because they changed the law and
18 they left it to the courts to apply to new
19 cases. You have the exact opposite here.

20 JUSTICE GORSUCH: So, Mr. Gant, if I
21 understand it, the answer to the question, I
22 think, is that last clause, the dismiss --
23 ordering the courts to dismiss the claim, that
24 up to that point, "shall not be filed or
25 maintained," if that's jurisdictional, as I

1 understand, you and your amici are okay with
2 that. It's the directing the dismissal.

3 But if that -- if that's the only beef
4 we have, is that really a beef at all because
5 that's a natural consequence of a
6 jurisdiction-stripping statute as McCardle
7 itself, as Justice Ginsburg pointed out, right,
8 so there's nothing left. I think it's almost a
9 virtual quote from McCardle, right, there's
10 nothing left to be done but dismiss. So where
11 is the real beef here?

12 MR. GANT: Justice Gorsuch, I think
13 what the -- collectively, what the Court's
14 cases instruct us is that we shouldn't stop the
15 inquiry at the label.

16 We know that from Klein. We know that
17 from other cases. So this case isn't framed as
18 jurisdictional, but if -- if we assume that the
19 --

20 JUSTICE GORSUCH: Assume -- assuming
21 it's jurisdictional and all you're left with is
22 this complaint about the last clause, why
23 should we care?

24 MR. GANT: We should care because then
25 what Congress is doing is it's -- it's giving

1 carte blanche to dictate the outcome of cases
2 just by affixing the label jurisdictional.

3 JUSTICE GINSBURG: I -- I thought you,
4 in your response to Justice Kagan, you said it
5 wouldn't make any difference if those last
6 words were omitted, "shall be dismissed."

7 MR. GANT: Right.

8 JUSTICE GINSBURG: You -- would have
9 the same objection.

10 MR. GANT: I would have the same
11 objection -- let me be clear there. With
12 respect to pending cases, so there -- the two
13 words that are operative here with respect to
14 pending cases are "shall not be maintained" and
15 "shall be dismissed." I'm not talking about
16 the "filed."

17 So, with respect to prospective cases,
18 we're not arguing that Section 2(b) would be
19 unconstitutional because it wouldn't implicate
20 the -- the strands of the separation-of-powers
21 jurisprudence that I was discussing.

22 So it's with respect to pending cases
23 where both the shall not be -- may not be
24 maintained and shall be dismissed are both
25 operative --

1 JUSTICE KAGAN: I don't think that's
2 the question, Mr. Gant. I think the question
3 is, and this was what I started with, would you
4 be making the same constitutional argument if
5 the last five words were not there? And I took
6 you to say, yes, you would be making the same
7 constitutional argument, and in so doing, you
8 separated yourself from your amici because I
9 understand your amici, as Justice Gorsuch does,
10 as saying that everything hangs on that last
11 five words.

12 And you're suggesting that not
13 everything hangs on that last five words, that
14 you would have the exact same constitutional
15 objections if those five words weren't in the
16 picture. Do I have you right?

17 MR. GANT: Yes. I think the fact that
18 it includes the dismissal term is -- makes it
19 particularly pernicious, so I would say that's
20 additional, pushing it even further beyond.

21 JUSTICE KAGAN: It's like bad
22 atmospherics?

23 MR. GANT: Well, it -- but it -- but
24 it's not just atmospherics. As I -- as I
25 suggested earlier, I think there's an argument

1 to be made that a direction from Congress to
2 the courts to dismiss a case is telling the
3 courts how to perform their duties in an
4 impermissible way. And I also --

5 JUSTICE SOTOMAYOR: Counselor --

6 JUSTICE KAGAN: But then you do get,
7 again, and I think that this is the underlying
8 premise of Justice Gorsuch's question, so take
9 out the last five words, and you were trying to
10 explain why what then just seems a
11 jurisdiction-stripping statute is
12 unconstitutional, in that -- against the
13 backdrop of very consistent precedent that we
14 have that says that Congress can take away the
15 jurisdiction of the federal courts and can do
16 so in a way that affects pending cases.

17 And -- and so why and when is that
18 unconstitutional?

19 MR. GANT: Because you have to pierce
20 the label of jurisdiction and return to the
21 basic principles, which are: is Congress
22 exercising judicial functions or is it
23 preventing the judiciary from carrying out its
24 actions?

25 CHIEF JUSTICE ROBERTS: It seems that

1 we -- we've been replicating what, among
2 lawyers anyway, is a famous dialogue between
3 Professors Wechsler and Hart about whether
4 Congress can achieve unconstitutional
5 objectives by preventing federal courts from
6 adjudicating claims that those provisions are
7 unconstitutional.

8 You know, during the civil rights era,
9 there were a lot of proposals in Congress that
10 said the federal courts have no jurisdiction
11 over any case in which busing is sought as a
12 remedy. And those types of proposals are
13 consistently submitted whenever Congress
14 attempts to achieve an unconstitutional result
15 by depriving the federal courts of
16 jurisdiction.

17 So I would have thought your answer is
18 -- is -- I would have thought you would have
19 taken the position that I understand to be
20 ascribed to Professor Hart in the dialogue,
21 which is that that is an indirect way of
22 achieving an unconstitutional result and is
23 subject to the same objection.

24 MR. GANT: That -- that is my
25 position. And I --

1 JUSTICE SOTOMAYOR: Counselor, can I
2 -- I want to switch from personal jurisdiction
3 to sovereign immunity, in part for the reasons
4 that the Chief is -- Chief Justice is talking
5 about. Okay?

6 MR. GANT: Yes.

7 JUSTICE SOTOMAYOR: In Patchak I, I
8 took the position that the Court got sovereign
9 immunity wrong, and basically I argued -- the
10 majority disagreed -- that -- that the Quiet
11 Title Act really granted immunity. And the
12 majority disagreed and said this had to do with
13 APA waiver of immunity.

14 I look at statutory history and this
15 new act, the Reaffirmation Act, was in the
16 context of that dispute in that case. And what
17 Congress did was settle the question, which I
18 believe it's entitled to do and is not
19 unconstitutional, it ratified the acts of the
20 Secretary's taking of this land, and by that
21 act, implicated the Quiet Title Act.

22 And so, if it did that, I see this --
23 and I don't understand why it's not, that
24 waiver of sovereign immunity that the Court did
25 not recognize in Patchak I.

1 And I raise this for two reasons:
2 One, I do think there's a difference between
3 the Congress coming in between two private
4 parties and directing a result in favor of one
5 private party. I think that's a quintessential
6 separation-of-powers question and a very, very
7 serious one.

8 But I think there is something
9 fundamentally different about suits involving
10 the government because sovereign immunity -- or
11 any suit against the government is a matter
12 only of largesse and -- and the government's
13 voluntary choice.

14 We have repeatedly through the
15 centuries said the government can at any moment
16 take away its sovereign immunity. It can take
17 away that niceness of giving you the immunity.

18 So I see the potential of less of a
19 problem with separation of powers if -- if the
20 government has withdrawn sovereign immunity
21 than it directing the outcome between private
22 parties. I would be really frightened if we
23 let the government do that.

24 MR. GANT: Well, I --

25 JUSTICE SOTOMAYOR: But -- so, given

1 that statutory history, the only issue that was
2 left alive or was at issue in Patchak I, given
3 that the waiver of sovereign immunity that was
4 taken away tracks the APA language, the APA's
5 language says that a suit can be maintained
6 against the government, why isn't this a
7 sovereign immunity case?

8 Why am I dealing with personal
9 jurisdiction at all or separation-of-powers
10 questions at all?

11 MR. GANT: Because, with respect to
12 both the text of the Gun Lake Act, as well as
13 the statutory history, I submit that sovereign
14 immunity, the restoration of sovereign immunity
15 did not exist. The text nowhere mentions
16 sovereign immunity. If you look at --

17 JUSTICE SOTOMAYOR: We've never said
18 it had to.

19 MR. GANT: Well, it doesn't have to,
20 but there -- there are no other indicia, I
21 submit, that suggest --

22 JUSTICE SOTOMAYOR: All of the
23 statutory history indicia.

24 MR. GANT: Well --

25 JUSTICE SOTOMAYOR: The whole fight in

1 Patchak I was over the existence or
2 non-existence of sovereign immunity.

3 MR. GANT: But given that, and of
4 course the statutory history is to some extent
5 in the eye of the beholder, I look at it and I
6 see, given the history that you've just
7 outlined, that if what Congress had intended to
8 do was to restore sovereign immunity, there
9 would have been more evidence of that.

10 It wasn't mentioned anywhere in any of
11 the -- the hearings. It wasn't mentioned in
12 the House or Senate reports. It wasn't
13 mentioned --

14 JUSTICE GINSBURG: Well, why wouldn't
15 -- wouldn't -- Patchak turned on this Court's
16 holding sovereign immunity had been waived.
17 And now Congress -- using the APA words, and
18 the APA itself doesn't say sovereign immunity,
19 so the APA withdrew the immunity, and this,
20 using the same kind of language, restores it.

21 Why isn't that the appropriate way to
22 look at this case? What did Congress want it
23 to do? They -- we said sovereign immunity is
24 waived. They said sovereign immunity is not
25 waived.

1 MR. GANT: I take Congress at its word
2 in what it intended to do, and the D.C. Circuit
3 said the same, which is to void the case, to
4 make it go away, to direct dismissal against
5 Patchak and for Zinke. That's what -- that's
6 what the statute says. That's how the D.C.
7 Circuit, I think, properly understood it.

8 JUSTICE KENNEDY: If this suit had
9 proceeded to a conclusion, would -- and Patchak
10 prevailed, would he be entitled to costs?

11 MR. GANT: He might be. And that's
12 certainly one of the things that would have --
13 there are a number of things that would be
14 addressed on remand. And for the -- the
15 statute, (a) and (b) are not severable. And --

16 JUSTICE KENNEDY: Well, I'm -- I'm
17 wondering if it helps your position to say that
18 the Congress is stripping him of certain rights
19 that he had because of the litigation.

20 MR. GANT: Well, there -- there's no
21 question. I mean, we'd have to go back on
22 remand in addressing the question of
23 entitlement to costs and others, the
24 entitlement to a declaratory judgment, the
25 meaning of 2(a). What Congress --

1 JUSTICE BREYER: When -- when you say

2 2(a) --

3 MR. GANT: Yeah.

4 JUSTICE BREYER: -- imagine that was
5 the only statute. I thought your claim -- and
6 imagine, as well, that 2(a) is, in fact,
7 constitutional and Congress can say in 2017
8 that when we took this into federal trust
9 territory, Indian trust territory, that was
10 constitutional. That's what it does. All
11 right.

12 If that's constitutional to do that,
13 do you have any case left?

14 MR. GANT: We do. We do have a case.

15 JUSTICE BREYER: What's the case?

16 MR. GANT: Leaving aside the -- am I
17 assuming that it's separable?

18 JUSTICE BREYER: You forget -- suppose
19 (b) and (c) were never there. They just passed
20 (a).

21 MR. GANT: If they just passed (a), as
22 I -- I think I mentioned this earlier in
23 response to another question, we would not be
24 arguing --

25 JUSTICE BREYER: I realize that, but

1 my question is: Would your client have a
2 lawsuit? What would be the basis for it?
3 Because I thought his basis was that the taking
4 of the land into trust was not lawful under a
5 particular act because that just referred to
6 tribes that were tribes in the '30s. Right?

7 MR. GANT: Yeah.

8 JUSTICE BREYER: Now, this act says we
9 don't give a -- we don't care about that; we
10 say that the government had the power to take
11 it into trust anyway. And it had that power to
12 take it into trust when it did. All right?

13 So, if that's the law, what is your
14 client suing about?

15 MR. GANT: Well --

16 JUSTICE BREYER: How can he win?

17 MR. GANT: For purposes of your
18 question, I'm presupposing that that's the law.

19 JUSTICE BREYER: Yeah.

20 MR. GANT: But one thing that happened
21 here is we -- no court could make that
22 determination.

23 JUSTICE BREYER: No, no, but what's
24 your argument?

25 MR. GANT: The argument -- the

1 argument is that -- well, we would argue that
2 it's not retroactive. We would argue --

3 JUSTICE BREYER: It says -- it says
4 ratified.

5 MR. GANT: I -- I understand. But I
6 -- I -- we haven't briefed this, but I submit
7 that there is an argument, a colorable
8 argument, to be made that ratification is in a
9 sense an endorsement -- if you look at -- on
10 page 2 of the --

11 JUSTICE BREYER: All right. So your
12 argument is that (a) applies only to taking
13 into trust after the passage of the act -- the
14 (a), after the passage of (a)?

15 MR. GANT: Yes.

16 JUSTICE BREYER: In other words, it
17 doesn't ratify the prior taking into trust of
18 Indian land?

19 MR. GANT: That is an argument. There
20 was an argument made below about the meaning of
21 (a) before the district court when this was --

22 JUSTICE BREYER: Okay. That's your
23 best argument?

24 MR. GANT: No, no, it's not. It is
25 not. There was an argument made below that the

1 -- the ratification talks about taking the land
2 into trust. But that doesn't mean that it
3 authorizes all uses of the property. So
4 there's a distinction between the land being
5 into trust and --

6 JUSTICE BREYER: Okay. Okay. Okay.
7 Okay, I've got it.

8 MR. GANT: -- there are --

9 JUSTICE BREYER: Got it, got it.

10 MR. GANT: -- there are --- there are
11 others.

12 JUSTICE KAGAN: Mr. Gant, could I --
13 I'm sorry to drag you around like this, but the
14 Chief Justice asked you a question and you
15 indicated that you agreed with his
16 understanding of when a jurisdictional statute
17 violated the Constitution, and -- and then you
18 were interrupted.

19 I just want to hear a little bit more
20 about what you think of his question.

21 MR. GANT: Sure. I hope I have it
22 firmly in mind. And at the same time, I want
23 to try and answer your -- some of your prior
24 questions and the question --

25 JUSTICE BREYER: There's also the

1 parties' side.

2 JUSTICE KAGAN: Well, I'm interested
3 in that question, the Chief Justice's question,
4 because he gave you a theory; you said yes.

5 MR. GANT: Okay.

6 JUSTICE KAGAN: But what does that
7 mean, "yes"? Yes why?

8 MR. GANT: What Congress cannot do is
9 direct the outcomes of a case even under the
10 guise of jurisdiction. Let's go back to the
11 "Smith wins" hypothetical from Bank Markazi.
12 If -- if --

13 JUSTICE ALITO: But I -- I thought the
14 Chief Justice's examples were instances in
15 which a hypothetical statute deprived the
16 federal court of the opportunity to rule on
17 violations of -- on constitutional -- alleged
18 constitutional violations, the same as the
19 question that Justice Ginsburg gave to you,
20 taking away jurisdiction over cases involving
21 prayer in the schools or jurisdiction over
22 equal protection violations, but this is a
23 statutory case.

24 MR. GANT: It is, although it has --
25 because there were -- the Court in Patchak I

1 addressed standing and sovereign immunity,
2 which at least have constitutional dimensions,
3 but there's no doubt about the fact that the
4 underlying claims at issue in the pending
5 complaint that's still operative are statutory
6 in nature. The only thing I think --

7 JUSTICE BREYER: So why don't you
8 bring your case in state court? It doesn't say
9 the state court doesn't have a -- I mean, yeah,
10 bring it in state court.

11 MR. GANT: I would have to think about
12 whether we could do that.

13 JUSTICE BREYER: Why?

14 CHIEF JUSTICE ROBERTS: Well, can the
15 tribe be sued in state court?

16 JUSTICE BREYER: Yeah, general
17 jurisdiction.

18 CHIEF JUSTICE ROBERTS: Can the
19 federal government be sued in state court?

20 JUSTICE BREYER: You can. Yeah.

21 CHIEF JUSTICE ROBERTS: I'm asking
22 you.

23 (Laughter.)

24 MR. GANT: I don't want to get in the
25 way of a good discussion.

1 (Laughter.)

2 MR. GANT: I honestly don't know the

3 --

4 CHIEF JUSTICE ROBERTS: But I suppose

5 --

6 MR. GANT: -- I don't know the answer.

7 CHIEF JUSTICE ROBERTS: -- I suppose
8 the question is, I mean, just as in a case of
9 -- the antibusing cases, there's a
10 constitutional violation that Congress is
11 trying to insulate from review, and that's the
12 separation-of-powers claim.

13 MR. GANT: And I took your question to
14 be that these were -- not that these were
15 identical situations, this case and -- and the
16 situations that Mr. Chief Justice posited, but
17 that they were close cousins.

18 And to go back to a question to try
19 and more directly answer your question, Justice
20 Gorsuch -- and I want to do save a few moments
21 for rebuttal -- if a statute said we think
22 Smith should win and, therefore, we -- we
23 determine that the courts shall not have
24 jurisdiction, that can't -- the fact that it
25 says it's jurisdictional cannot possibly save

1 it from a separation-of-powers scrutiny and
2 analysis.

3 And this is substantially similar to
4 that situation.

5 JUSTICE KAGAN: So why -- why is it
6 substantially similar to that situation? That
7 makes it sound like it's because it's about a
8 single case, but you said that that wasn't your
9 theory. So what is your theory?

10 MR. GANT: Right. We could change it
11 to -- to 10 Smiths win or in every case of
12 Smith v. Jones. It's not the number. It's the
13 fact that Congress is directing the outcome and
14 it's saying that you win not because we've
15 changed the law, and notwithstanding old law
16 because we know two things about the old law --

17 JUSTICE KAGAN: But doesn't Congress
18 always do that when it strips the federal
19 courts of jurisdiction over a category of
20 cases?

21 MR. GANT: No.

22 JUSTICE KAGAN: Because we have said
23 that that applies to pending suits. So I guess
24 the question is: Why aren't you saying that
25 every time we said that, we were wrong; that

1 any time Congress changes the jurisdiction of
2 the federal court and then applies to pending
3 cases, that that's a separation-of-powers
4 issue?

5 MR. GANT: Because Shore and the other
6 separation-of-powers cases of this Court
7 counsel that we should take a functional,
8 practical look at the particulars of the case.
9 And in this case, unlike these hypothetical
10 statutes, you have Congress clearly directing
11 the outcome of the case where, under old law,
12 this Court held that this case may proceed.
13 The House report at page 2 said, under existing
14 law, the -- putting the land into trust was
15 likely unlawful.

16 And the only thing that changed was
17 Congress said this case goes away, period.

18 JUSTICE ALITO: I mean, it sounds like
19 this is just based on your -- your analysis of
20 Congress's intent.

21 MR. GANT: No, I -- it's not.

22 JUSTICE ALITO: Let's take a case that
23 we -- we had earlier this term under the Alien
24 Tort Statute. I don't know whether you're
25 familiar with it. But it provides jurisdiction

1 in the federal courts for a suit by an alien
2 concerning certain torts. And we have the
3 question whether a -- a corporation can be
4 sued.

5 Suppose Congress were to pass a
6 statute that says that no federal court shall
7 have jurisdiction of an Alien Tort Statute suit
8 where the defendant is a corporation. There
9 are a limited number of cases involving that,
10 pending cases. Would that be unconstitutional?

11 MR. GANT: We'd have to look at the
12 particulars of the case and make a judgment
13 based on the case whether Congress was
14 directing the outcome of particular cases or
15 was it functioning more in a legislative role.

16 JUSTICE KAGAN: Well, it's certain --
17 I'm sorry. Your light's on. Fine.

18 MR. GANT: Well, I'm here for you, but
19 I would like to reserve --

20 (Laughter.)

21 MR. GANT: I would like to reserve a
22 few moments for rebuttal, but I -- but --

23 CHIEF JUSTICE ROBERTS: Well, why
24 don't you answer the -- ask and then answer the
25 question, and we'll afford you time for

1 rebuttal.

2 MR. GANT: Thank you, Mr. Chief
3 Justice.

4 JUSTICE KAGAN: I was just following
5 up on Justice Alito's because you -- you say
6 directing the outcome of these cases, but any
7 time Congress jurisdiction strips, and that
8 applies to pending cases, it does direct the
9 outcome of those cases. Once upon a time those
10 cases could proceed. Now they can't.

11 So Congress is directing the outcome
12 of those cases in some sense that we've
13 consistently held to be perfectly fine. We
14 might have been wrong in saying that's
15 perfectly fine, but we've said it a lot of
16 times.

17 MR. GANT: Right. And this may be an
18 example of what the Court has talked about in
19 other contexts where line-drawing can be hard.
20 Again, I'd step back and look at -- ask the
21 fundamental questions.

22 Is -- has the legislature overstepped
23 its bounds, traversed the boundary between the
24 legislative function and the judicial function
25 in deciding how cases should be determined?

1 Congress is entitled to try and affect the
2 outcomes, but the process of how it does it
3 very much matters.

4 And this is about as an egregious
5 circumstance as I can imagine of Congress
6 actually dictating the outcome of a case by
7 saying you shall -- must dismiss without
8 changing the underlying law and leaving it to
9 the courts to apply in future circumstances.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Ms. O'Connell.

14 ORAL ARGUMENT OF ANN O'CONNELL

15 ON BEHALF OF THE FEDERAL RESPONDENTS

16 MS. O'CONNELL: Mr. Chief Justice, and
17 may it please the Court:

18 The United States took title to the
19 Bradley Property in 2009, but the tribe's
20 operations on that land have been subject to
21 great uncertainty ever since then nevertheless.

22 Part of that uncertainty stems from
23 this Court's decision in Patchak I, which
24 interpreted the laws enacted by Congress up to
25 that point and concluded that the Quiet Title

1 Act did not bar Petitioner's challenge to the
2 trust status of this land.

3 The Court acknowledged in Patchak I
4 that barring claims like Petitioner's is within
5 Congress's legislative power. Through the Gun
6 Lake Act, Congress did a couple of things. It
7 eliminated any doubt about the trust status of
8 this land by ratifying and confirming the
9 Secretary's action in 2005.

10 And Congress also eliminated federal
11 court jurisdiction over challenges to the trust
12 status of this property, thereby revoking the
13 waiver of sovereign immunity in the APA.

14 JUSTICE KENNEDY: Suppose that Patchak
15 had relied on his interpretation of the law and
16 had built a facility on a neighboring property
17 that was just completely inconsistent with a
18 casino, so that he's -- has some -- some
19 serious reliance interests.

20 Would -- would this case be any
21 different?

22 MS. O'CONNELL: Well, there -- there
23 could be other constitutional concerns that may
24 be implicated by Congress -- by an act of
25 Congress that takes away vested property rights

1 or something like that, but they're -- they're
2 not Article III interests.

3 I don't think that it would violate
4 the separation of powers for Congress to enact
5 a law that --

6 JUSTICE KENNEDY: Well, they're taking
7 away his expectations when he built on the
8 property.

9 MS. O'CONNELL: Well, then maybe --

10 JUSTICE KENNEDY: In the hypothetical
11 case, hypothetical.

12 MS. O'CONNELL: He may be able to
13 bring some other sort of a challenge like a
14 takings challenge or something like that. I
15 mean, this Court in Bank Markazi --

16 JUSTICE KENNEDY: But Congress could
17 still pass this statute?

18 MS. O'CONNELL: Yes. And, you know,
19 the Court explained in Bank Markazi there are
20 other limits imposed in the Constitution on
21 retroactive application of laws. And so
22 perhaps if there was some kind of a takings
23 claim, then regardless of Section 2(b), the --
24 the Petitioner could bring some sort of a suit
25 to --

1 JUSTICE BREYER: Maybe he has -- this
2 might be his best argument, that this
3 ratification business is not, in certain
4 respects, retroactive.

5 Can he bring this case in state court
6 against the Secretary?

7 MS. O'CONNELL: No. The Secretary --

8 JUSTICE BREYER: No. Okay. The
9 answer is no.

10 MS. O'CONNELL: Well, he could bring
11 it, but the Secretary would still have immunity
12 in state court as for the trial.

13 JUSTICE BREYER: Okay. Has immunity
14 in state court, so you can't bring it. So he
15 has, let's imagine, under state law a right to
16 the peaceful enjoyment of his property. That's
17 what he's worried about.

18 Now, this (b) means -- his best claim,
19 he thinks, is not a constitutional claim that
20 they've taken it away, but he sees that in the
21 background.

22 His best claim, he thinks, is to say
23 that this law is not retroactive, and that in
24 the 1930s this tribe did not get -- was not one
25 of the ones that that Act protected.

1 That's his argument. With (b), he
2 cannot bring his claim in a state court. He
3 cannot bring his claim in federal court. And
4 there's no other person anywhere who even is
5 dreaming of such a claim.

6 And, therefore, what (b), he says,
7 does, as I understand it, is whatever general
8 language they dress it up in, it is taking the
9 only case that is likely to be brought,
10 challenging the taking of this land into trust
11 and challenging this later statute as well as
12 being interpreted, you know, such and such, and
13 throwing it out of court.

14 So there we have, though they have
15 excellent language and have tried to make it
16 general, in reality an act of Congress that
17 does nothing other than take his case and throw
18 it out of court. And that, he says, is for the
19 Congress, the legislative branch, to enter into
20 the judicial process and say: Mr. Plaintiff,
21 in this case you lose.

22 Now, what is your answer to that?

23 MS. O'CONNELL: I've got a couple of
24 answers to -- specifically to the second part.
25 On the first part, I don't know if in this case

1 you're talking about some sort of a
2 hypothetical relief that he's asking for.
3 Regardless of whether this is a -- a statute
4 that's retroactive or not in terms of taking
5 the land into trust --

6 JUSTICE BREYER: It's not retroactive.
7 That's why I asked him the question.

8 MS. O'CONNELL: He -- he's --

9 JUSTICE BREYER: I take -- I take his
10 answer to my question was he retains certain
11 arguments that (a) is not sufficient to deprive
12 him of the right to use his property because
13 (a) does not move this tribe's land into trust
14 as of -- prior to its enactment.

15 MS. O'CONNELL: His --

16 JUSTICE BREYER: I think it's
17 something like that.

18 MS. O'CONNELL: The -- just to
19 clarify, the -- he's filed an APA claim. So
20 the relief he is asking for is prospective
21 injunctive relief. There doesn't -- it doesn't
22 actually matter if the statute is retroactive
23 or not.

24 But to answer the question about
25 whether the Congress is targeting one

1 particular lawsuit in this case, a couple of
2 responses: First is that this statute,
3 although that seems to the Petitioner, and it
4 may be the practical effect, that because his
5 is the only case that's pending, it's the only
6 one that is dismissed, this is not a statute
7 that is directed toward just Smith v. Jones,
8 Smith wins. This is a case that applies to any
9 suit related to --

10 JUSTICE KAGAN: Well, what if it were?
11 What -- what if they -- the Congress had said
12 the Secretary's decision to make the Bradley
13 Property is confirmed, and David Patchak's suit
14 shall not be maintained and shall be dismissed.

15 MS. O'CONNELL: I -- I don't think
16 there is an Article III problem with a case
17 that takes away jurisdiction over even just one
18 case. It may have other constitutional
19 concerns. Footnote 27 of Bank Markazi said
20 maybe you could look to the equal protection
21 clause, if it's just a statute that targets one
22 person and it's irrational, there's no rational
23 basis for it, but we don't see any
24 separation-of-powers problem with taking
25 jurisdiction over --

1 CHIEF JUSTICE ROBERTS: Well --

2 MS. O'CONNELL: -- away over only just
3 one case.

4 JUSTICE SOTOMAYOR: I'm sorry.

5 CHIEF JUSTICE ROBERTS: -- in that --
6 in that case, is -- does the government
7 recognize any limit on Congress's power to
8 decide the result in a pending case?

9 MS. O'CONNELL: To decide the result
10 in a pending case, yes. If the --

11 CHIEF JUSTICE ROBERTS: What is it?
12 If saying Smith wins, isn't that -- what would
13 an unconstitutional statute under the
14 separation of powers look like from your
15 viewpoint?

16 MS. O'CONNELL: Well, certainly Smith
17 wins would be an unconstitutional statute
18 because in that case Congress is just directing
19 the results of a case without changing the
20 underlying law. And I think --

21 JUSTICE KAGAN: Well, what's the
22 difference between --

23 CHIEF JUSTICE ROBERTS: And -- and so
24 we should -- so we should look at this and
25 decide whether we think this is in substance

1 different from Smith wins?

2 MS. O'CONNELL: I think that would be
3 a perfectly fine way to do it. And I think
4 this case is different from Smith wins in a
5 variety of different ways.

6 JUSTICE KAGAN: Is there a difference
7 between Smith wins and there's no jurisdiction
8 over Jones's suit?

9 MS. O'CONNELL: Yes.

10 JUSTICE KAGAN: And, therefore, Smith
11 wins?

12 MS. O'CONNELL: Yes. I think that
13 that is one of the differences between Smith
14 wins and the -- and the statute that's going on
15 here, even if you think -- even if you imagine
16 a hypothetical statute that's just limited to
17 Smith v. Jones, and, again, this Court is --
18 this statute is broader than that.

19 CHIEF JUSTICE ROBERTS: So Congress
20 has plenary authority to insulate itself from
21 separation-of-powers arguments. They -- a
22 statute that says in any case in which a
23 statute is alleged to violate the separation of
24 powers, federal courts have no jurisdiction.
25 You think that's okay?

1 MS. O'CONNELL: No. I --

2 CHIEF JUSTICE ROBERTS: Why not?

3 MS. O'CONNELL: And we haven't
4 contested in this case that the Court can
5 analyze 2(b) to determine whether it violates
6 the separation of powers. That's what the
7 whole case is about. Congress has -- has not
8 insulated 2(b) from that review and they're --
9 Petitioner is bringing a constitutional
10 challenge to Section 2(b).

11 I think one of the -- another one of
12 the key --

13 JUSTICE GORSUCH: Well, Ms. O'Connell,
14 it seems to me like a lot hinges on whether
15 this is jurisdictional or not in response to
16 all of these questions.

17 And this Court in recent years has
18 instructed that we're not going to lightly
19 assume Congress is stripping jurisdiction. We
20 need a clear statement, Arbaugh, Sebelius, and
21 whatever might have been permissible before,
22 Congress is now on notice that it needs to
23 provide a clear rule. And this statute comes
24 after those warnings from this Court.

25 And help me understand why this

1 statute is, in fact, jurisdiction-stripping
2 without reference to old past laws but after
3 Sebelius, after Arbaugh?

4 MS. O'CONNELL: Well, I think --
5 there's two cases we've cited that show that
6 this is jurisdictional language. One of them I
7 won't use to answer your question --

8 JUSTICE GORSUCH: Right. You can't.
9 Right.

10 MS. O'CONNELL: -- because it's
11 older. Keene.

12 JUSTICE GORSUCH: Keene. Right.

13 MS. O'CONNELL: But I think Gonzalez
14 versus Thaler is another -- another opinion
15 where this Court took some language that's
16 similar. We think it's like the appellate
17 court equivalent.

18 JUSTICE GORSUCH: But you've also got
19 Reed Elsevier, which has similar language to
20 this. No -- basically, no claim shall be
21 maintained, or something like that, that we
22 held wasn't jurisdictional, in the copyright
23 statute.

24 MS. O'CONNELL: In this statute, we
25 think there's -- there's a lot of different

1 things at play that make it a jurisdictional
2 statute, one being that it says a case can't be
3 filed or maintained in federal court. If it
4 just says it can't be maintained, maybe that
5 could be something different, but if it's -- it
6 can't be filed even in the first place, that
7 speaks to jurisdictional terms.

8 JUSTICE GORSUCH: Parties file things.
9 That could be a claims processing rule too.
10 Right? You don't file it.

11 MS. O'CONNELL: Well, although this --
12 I mean, so those are the two cases that
13 Petitioner cites in his opening brief. One is
14 Sebelius, which is the claims processing rule,
15 and then Arbaugh, which is the -- the elements
16 of a cause of action.

17 JUSTICE GORSUCH: Let's say -- let's
18 say it isn't jurisdictional. Let's say --
19 let's say we're going to stick with our clear
20 statement rule and that we find this
21 non-jurisdictional. Don't we then have a real
22 problem because a dismissal would be not
23 12(b)(1) but 12(b)(6), it would be on the
24 merits and have collateral consequences?

25 And wouldn't that be a real problem

1 for Article III?

2 MS. O'CONNELL: A -- a couple of
3 responses. I think the -- requiring the
4 jurisdictional clear statement rule in this
5 case flips the constitutional --

6 JUSTICE GORSUCH: I'm asking -- I'm
7 asking you to put that aside in this question.

8 MS. O'CONNELL: Well, I think the
9 Court would -- would want to invoke the
10 constitutional avoidance principle to --

11 JUSTICE GORSUCH: I'm asking you to --
12 again, assuming this isn't jurisdictional, for
13 purposes of this question, wouldn't we have a
14 real problem because you are directing
15 dismissal and dismissal wouldn't be 12(b)(1),
16 it would be 12(b)(6), and that has collateral
17 consequences potentially.

18 MS. O'CONNELL: If -- if the Court
19 concluded that -- that Congress was just
20 telling the Court that it had to dismiss this
21 case on the merits, then -- then, yes, I think
22 that may be a problem, but even if the Court
23 doesn't think that -- I mean, even if you don't
24 use jurisdictional language or you think that
25 the statute may not be taking away jurisdiction

1 over a category of cases, which we think it is,
2 I'd like to come back to the sovereign immunity
3 point, which is that, you know, the APA
4 provides the waiver of sovereign immunity, and
5 that's the statute that the Petitioner has sued
6 under.

7 The APA doesn't apply if another
8 statute precludes judicial review.

9 CHIEF JUSTICE ROBERTS: Sovereign
10 immunity is --

11 JUSTICE GINSBURG: Can I ask you a
12 question about the -- the APA? The argument
13 that has been raised on the other side is it
14 doesn't -- you don't need sovereign immunity
15 waiver because sovereign immunity doesn't
16 protect a federal employee from a suit alleging
17 that that employee acted in excess of statutory
18 authority.

19 So, I mean, what -- what I suggested
20 in the first part of this argument was we held
21 there is sovereign -- there -- sovereign
22 immunity is not a bar. Congress says sovereign
23 immunity is a bar. But the answer to that is,
24 so what? We can sue a federal officer and
25 sovereign immunity wouldn't bar that.

1 MS. O'CONNELL: Justice Ginsburg, I
2 think this Court's decision in Block versus
3 North Dakota goes a long way to answering that
4 question. In Block, the state was suing --
5 bringing an officer suit because it was outside
6 of the statute of limitations in the Quiet
7 Title Act. What the Court said was you can't
8 just use an officer suit to get around the
9 Quiet Title Act; now that we have Congress's
10 waiver of sovereign immunity in the Quiet Title
11 Act, you have to comply with those statutory
12 provisions. The same should be true of the
13 APA.

14 So if -- if Petitioner could -- could
15 just bring an officer suit against Secretary
16 Zinke for prospective injunctive relief, that
17 would vitiate the final agency action
18 requirement of the APA, the statute of
19 limitations of the APA. Congress has given us
20 its waiver of sovereign immunity in the APA,
21 and when it enacts a statute like this, it has
22 revoked it.

23 CHIEF JUSTICE ROBERTS: It --

24 JUSTICE SOTOMAYOR: Can you tell me
25 what other actions in your judgment, besides

1 this one, could be or would be filed relating
2 to the land? Would a slip-and-fall no longer
3 be permissible?

4 MS. O'CONNELL: So I think there are
5 some questions about just how broad this
6 statute is. We think it -- it at least covers
7 suits that relate to the trust status of the
8 Bradley Property or the -- the Secretary's
9 decision and Congress's decision to take it
10 into trust. But --

11 JUSTICE SOTOMAYOR: But any suit like
12 that would be way past the statute of
13 limitations. Who -- who could even bring it?

14 MS. O'CONNELL: Well, I -- it may be
15 outside the statute of limitations now. I
16 believe there was a -- a regulation passed
17 later in time that made the -- the land a part
18 of the tribe's reservation, which I guess
19 there's questions about whether that could
20 restart the statute of limitations, but, you
21 know, now -- and also Congress has enacted 2(a)
22 now.

23 And so, if somebody wanted to bring a
24 challenge to that, then that would also be
25 barred by 2(b) and it would --

1 JUSTICE ALITO: Well, the literal --

2 CHIEF JUSTICE ROBERTS: Yeah, but
3 there wouldn't be any challenge to that. It
4 does seem -- I mean, you say, well, "relating
5 to" could mean different things. And it could,
6 but that would be for a court to decide.

7 And it's not clear how they get to
8 decide what "relating" means in light of 2(b),
9 which says if it does relate, it's dismissed
10 automatically. And I guess I just don't
11 understand how -- well, you're saying it's an
12 open issue how broad Congress's determination
13 that these cases shouldn't be in federal court
14 is?

15 MS. O'CONNELL: That's -- it's -- it's
16 an open issue how broad 2(a) is. The -- that
17 any action -- well, yes, that any action
18 relating to the Bradley Property can't be filed
19 or maintained in federal court.

20 JUSTICE BREYER: On 2(a) --

21 CHIEF JUSTICE ROBERTS: On the
22 sovereign immunity question, you know, that is
23 the federal government sort of going nuclear.
24 You know, they're -- they're -- I'm like the
25 king; you can't sue me because I can do no

1 wrong. And it seems to me there's a real
2 political accountability problem there because
3 this statute doesn't say anything about
4 sovereign immunity.

5 MS. O'CONNELL: Even if the statute --

6 CHIEF JUSTICE ROBERTS: And you didn't
7 argue it even in the -- the brief in
8 opposition, if I'm remembering right.

9 MS. O'CONNELL: Well, this is an
10 argument that we -- we presented to the court
11 of appeals. The court of appeals said they
12 didn't need to reach it because they decided
13 that this was a jurisdiction-stripping statute.

14 But -- but even so, it's -- it's
15 really just another way of getting you to the
16 point that the court lacks jurisdiction over
17 the case, that Congress has changed the law,
18 and it takes you outside the scope of Klein,
19 but --

20 JUSTICE ALITO: Can you point to any
21 case in which we've held there was sovereign
22 immunity where the statute said nothing --
23 never mentioned either immunity or the United
24 States as a party?

25 MS. O'CONNELL: Well, I -- again, I

1 think that in this context it doesn't matter if
2 the statute is broader than just precluding
3 claims against the United States because under
4 the APA, what you're looking for in order to
5 say that the APA doesn't apply is a statute
6 that precludes judicial review.

7 JUSTICE ALITO: Well, how much broader
8 is it? It's somewhat difficult to decide this
9 case without having some idea what "relating
10 to" here means.

11 MS. O'CONNELL: Well --

12 JUSTICE ALITO: It's hard to believe
13 that this statute means what it literally says
14 --

15 MS. O'CONNELL: I --

16 JUSTICE ALITO: -- that no -- no
17 action relating to the land -- suppose that --
18 that the tribe said anybody who has toxic waste
19 any place in the country can bring it here and
20 just dump it in a big pit. Would you say,
21 well, the federal government couldn't bring a
22 lawsuit about that?

23 MS. O'CONNELL: No. I think we would
24 --

25 JUSTICE ALITO: Okay. So what does

1 "relating to" mean?

2 MS. O'CONNELL: In -- we -- it at
3 least means that you can't -- that nobody can
4 bring a statute that challenges the trust
5 status of the land and the Secretary's decision
6 to take the land into trust. So I think --

7 JUSTICE BREYER: Here in the trust --
8 I'm on my own track here, but I -- I know this
9 question is fascinating, what we've been
10 discussing, and it's right there in (b), but
11 I'm still stuck on (a) and why we really have
12 to get to (b).

13 You said that all they've asked for is
14 prospective relief.

15 MS. O'CONNELL: Correct.

16 JUSTICE BREYER: And as far as
17 prospective relief, when this was passed in
18 2014, it certainly, in (a), took the Indian
19 land into trust.

20 MS. O'CONNELL: Yes.

21 JUSTICE BREYER: All right. That's
22 what they're challenging, prospectively.
23 What's the argument?

24 MS. O'CONNELL: Well, I don't --
25 Petitioner hasn't brought challenges to Section

1 2(a). It certainly hasn't brought any
2 constitutional challenges to what Congress has
3 done in Section 2(a).

4 JUSTICE BREYER: So we should get into
5 the most fascinating and difficult questions in
6 what one of my -- I heard once described as the
7 course federal courts call "darkness at noon,"
8 and -- and the -- the -- but perhaps we don't
9 have to in this case, fascinating though it is,
10 because there is no claim under (a) that
11 prospectively this land is not Indian trust
12 land.

13 MS. O'CONNELL: That's -- I think
14 that's correct.

15 JUSTICE BREYER: Is that your view?

16 MS. O'CONNELL: Yes.

17 JUSTICE BREYER: You think that's
18 correct?

19 MS. O'CONNELL: I think under 2(a),
20 Congress has really --

21 JUSTICE BREYER: Well, then maybe
22 we'll get a minute on the other side.

23 MS. O'CONNELL: -- exercised its own
24 --

25 JUSTICE KENNEDY: Suppose -- suppose

1 in this case that about 80 percent of the
2 litigation had -- had been completed, no
3 judgment yet, and suppose, assume, that had
4 Patchak prevailed, he would be entitled to
5 costs.

6 Could the case be ordered dismissed so
7 that he could no longer get those costs?

8 MS. O'CONNELL: If there's no -- it
9 depends on what basis the Congress is
10 ordering --

11 JUSTICE KENNEDY: Under this statute.

12 MS. O'CONNELL: Under -- if Congress
13 is -- is taking away --

14 JUSTICE KENNEDY: Under (a) -- under
15 both (a) and (b) of this statute.

16 MS. O'CONNELL: If Congress is taking
17 away jurisdiction, then, no, I don't think the
18 court would have the authority to order costs.
19 And he also wouldn't be a prevailing party if
20 no judgment had been entered.

21 JUSTICE KENNEDY: Well, I'm -- I'm
22 assuming -- I'm assuming that he would have
23 been a prevailing party, there was a
24 substantial chance of it, and he would have
25 been entitled to costs. But even though

1 80 percent of the costs had been expended, he
2 -- the Congress could suddenly say he can't get
3 them?

4 MS. O'CONNELL: The -- the rule that
5 this Court has laid out is that once a final
6 judgment has been entered, that Congress can't
7 undo that.

8 And so I -- any time up to -- I mean,
9 the Court's cases have said again and again
10 that the Congress can enact jurisdictional
11 rules and apply them to pending cases, so, no,
12 I don't think there is any separation-of-powers
13 problem with such a -- with such a rule.

14 One other final point I'd like to
15 make, the -- the Petitioner argues that by
16 enacting Section 2(b), that Congress is taking
17 away the Court's ability to interpret the law,
18 but when it's a jurisdictional statute that
19 Congress is enacting, a jurisdiction-stripping
20 statute, there's not going to be much left for
21 the Court to do.

22 There's cases from this Court that
23 talk about whether there is something left for
24 the Court to do and whether that's enough to --
25 to give the Court a role in -- in exercising

1 its judicial role. Those cases are all trying
2 to decide whether Congress has changed the law
3 such that the case is taken outside the scope
4 of Klein.

5 When you have a statute like this one
6 that takes away subject matter jurisdiction of
7 the federal courts and gets a category of cases
8 off of the judicial agenda, the Court just has
9 to determine whether this case falls within
10 that category and then it -- it should dismiss.

11 If there are no further questions, we
12 ask that the Court affirm.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Shah.

16 ORAL ARGUMENT OF PRATIK A. SHAH ON BEHALF OF
17 THE MATCH-E-BE-NASH-SHE-WISH BAND OF
18 POTTAWATOMI INDIANS RESPONDENT

19 MR. SHAH: Mr. Chief Justice, and may
20 it please the Court:

21 I guess I'd like to start with Justice
22 Alito's question because I think it cuts to the
23 matter. What would be an administrable line in
24 a separation of powers case?

25 And the line that we would embrace is

1 the line that the other side has offered in the
2 Federal Court Scholars amicus brief supporting
3 the other side, and this is at page 15 of that
4 amicus brief. It says -- and this is relying
5 on Professor Hart, it says, "It is one thing to
6 exclude completely the federal courts from
7 adjudication; it is quite another to vest the
8 federal courts with jurisdiction to adjudicate
9 but simultaneously restrict the power of those
10 courts to perform the adjudicatory function in
11 the manner they deem appropriate."

12 Now, the scholars then explain why
13 that first category, which this case clearly
14 falls within when you're taking federal courts
15 out of the business, entirely raises no
16 separation-of-powers problems.

17 They say, "by wholly excluding the
18 federal court, Congress loses its ability to
19 draw upon the integrity possessed by the
20 Article III judiciary in the public's eyes."

21 And so we think that gets to the core
22 separation-of-powers concerns that are
23 underlying the lines that this Court has drawn.
24 It avoids any puppeteering concern that
25 Congress is using the Article III, the judicial

1 imprimatur to give a merits judgment. It
2 avoids any public misperception concern that
3 this is an Article III resolution on the merits
4 of the controversy.

5 CHIEF JUSTICE ROBERTS: I don't see --

6 JUSTICE KAGAN: I guess I don't
7 understand, Mr. Shah, how that helps you. I
8 mean, doesn't this just exclude the power of
9 the federal courts?

10 MR. SHAH: Yes. And so that -- that's
11 the permissible side of the line, that the
12 professors lay out. They say if you are
13 excluding completely the federal courts from
14 adjudication, that does not raise a
15 separation-of-powers problem.

16 JUSTICE KAGAN: I -- I see.

17 MR. SHAH: They rely on Professor
18 Hart's dialectic for that proposition. They
19 say the harder cases --

20 JUSTICE KAGAN: Got it.

21 MR. SHAH: -- are like -- oh, sorry.

22 JUSTICE KAGAN: Could I ask you to --
23 Ms. O'Connell said when you were looking at
24 that -- if you had a piece of legislation that
25 said in Jones v. Smith, Smith loses, that that

1 would be unconstitutional.

2 MR. SHAH: Right.

3 JUSTICE KAGAN: And she has to say
4 that because nine of us said it.

5 MR. SHAH: Yes.

6 (Laughter.)

7 JUSTICE KAGAN: So then the question
8 is why is it different --

9 MR. SHAH: Sure.

10 JUSTICE KAGAN: -- if Congress instead
11 says in Jones v. Smith, there shall be no
12 jurisdiction, and Smith loses. Why -- why is
13 that different?

14 MR. SHAH: So, Your Honor, if, in
15 fact, what they're doing is taking away
16 jurisdiction, they just say there is no -- so
17 in your hypothetical, there is no --

18 JUSTICE KAGAN: In Jones v. Smith,
19 there shall be no jurisdiction --

20 MR. SHAH: Right.

21 JUSTICE KAGAN: -- and ergo, Smith
22 loses.

23 MR. SHAH: Right. Well, the reason
24 why we think that statute is different is
25 because of the first part of it. It's saying

1 there is no jurisdiction.

2 So, when -- when it says Smith loses,
3 it's not in the same way that was in the
4 hypothetical in Bank Markazi where all nine
5 Justices said that that would be problematic.

6 And three reasons why it's different.
7 First, in the Bank Markazi hypothetical of
8 Smith wins in a civil suit between Smith and
9 Jones, that is a merits judgment that the Court
10 had in mind. Presumably, in Smith wins, there
11 is a merits judgment that the Court --

12 JUSTICE KENNEDY: Suppose -- suppose
13 the statute said, in order to ensure that Smith
14 wins, there shall be no jurisdiction.

15 MR. SHAH: Well, again, Your Honor, I
16 guess I still -- if what it's doing is -- is
17 asking the Court or taking away the --

18 JUSTICE KENNEDY: It's doing -- what
19 it's doing is clear to everybody.

20 MR. SHAH: It's taking away --

21 JUSTICE KENNEDY: In fact, it says
22 that it's clear. What's the result?

23 MR. SHAH: Sure. So I still think
24 that is distinguishable from the hypothetical
25 statute in Bank Markazi. And the reason is

1 because of the -- because it's taking away
2 jurisdiction. So the -- there are a couple
3 reasons why it's different.

4 One is a functional matter. The
5 judgment is quite different. It's not a merits
6 judgment. Smith is presumably not in the Bank
7 Markazi hypothetical.

8 JUSTICE KENNEDY: But you're taking
9 away jurisdiction --

10 MR. SHAH: Yes.

11 JUSTICE KENNEDY: -- in order to have
12 a particular result in litigation.

13 MR. SHAH: Right, Your Honor, but the
14 result that you're getting is different than in
15 Smith v. wins -- Smith wins, because --

16 JUSTICE KAGAN: I don't think Smith
17 much cares. Why would Smith care?

18 MR. SHAH: Well, Your Honor, in -- in
19 Bank Markazi, Smith was the plaintiff. He
20 cares a lot, because if he wins, he gets an
21 award of relief, and that relief has res
22 judicata effect.

23 That's very different from a dismissal
24 for lack of jurisdiction in which there's no
25 merits judgment, there's no award of relief,

1 and there's no res judicata effect.

2 CHIEF JUSTICE ROBERTS: It doesn't say
3 anything about jurisdiction. And you are
4 enlisting the courts. You're telling the court
5 you have to -- you take this stamp and you
6 stamp dismissed on it.

7 And it doesn't say dismissed for want
8 of jurisdiction. I suppose we'd have to figure
9 out what the collateral consequences are, since
10 the statute doesn't say.

11 MR. SHAH: Well, your --

12 CHIEF JUSTICE ROBERTS: You aren't
13 dragooning the court into doing something the
14 court doesn't want to do. You're making them
15 dismiss a case that's pending before them.

16 MR. SHAH: Well, Your Honor, it --
17 we're assuming -- if we're assuming this is a
18 jurisdiction-stripping statute; that is, it is
19 withdrawing jurisdiction, then the only thing
20 the court can do is dismiss for lack of
21 jurisdiction.

22 And if that, enlisting the courts in
23 that limited matter is a problem, then that's
24 true for 150 years of this Court's precedent.

25 CHIEF JUSTICE ROBERTS: Well, that

1 begs the answer -- that begs the answer to the
2 -- the -- the Hart and Wechsler dialogue that
3 when the court -- when Congress strips
4 jurisdiction to achieve an otherwise
5 unconstitutional result, that that's perfectly
6 fine.

7 MR. SHAH: Well, Your Honor --

8 CHIEF JUSTICE ROBERTS: And I think
9 that's a very difficult question.

10 MR. SHAH: Well, Your Honor, I think
11 that question implicates different interests.
12 It's not a separation-of-powers problem, I
13 don't think, for Congress to say a certain set
14 of cases can't be within the federal courts.

15 If they're talking about equal
16 protection cases and singling those out, that
17 runs afoul of the equal protection clause.

18 CHIEF JUSTICE ROBERTS: Well, is it --
19 I understand your answer, but is it a
20 separation-of-powers question if they say, if
21 the claim is separation of powers, the case --
22 there -- there is no jurisdiction?

23 MR. SHAH: Yes, Your Honor, there --
24 there I grant you we're not arguing that
25 Congress can take away the court's jurisdiction

1 to adjudicate whether there is a
2 separation-of-powers problem itself, the
3 constitutional vow itself, and that's why we're
4 here, on here.

5 We are not arguing that Congress has
6 done or could -- could do that. It can't
7 prevent the court from adjudicating whether the
8 statute it has passed is constitutional, but
9 that's not what's going on here, we're having a
10 full airing of the claim.

11 The question is: Can they withdraw
12 jurisdiction? And if, in fact, enlisting the
13 courts, as you say, in that limited manner
14 violates separation of powers, well, that's
15 true in the seminal withdrawal of jurisdiction
16 case in *McCardle* and 150 years of cases after
17 that. In fact, in *McCardle*, the Petitioner
18 made --

19 JUSTICE GINSBURG: What about the
20 answer to *McCardle* is it was just a question of
21 how you get habeas. There was another route.
22 Congress had closed off one route, but it left
23 open another.

24 MR. SHAH: Well, Your -- Your Honor, I
25 guess a couple responses.

1 One is the Petitioner in McCardle
2 actually made the very same argument that
3 Petitioner makes here, is that Congress was
4 targeting my suit when it passed that statute.
5 And the Court expressly addressed that argument
6 and said, no, we're not going to look behind
7 Congress's act.

8 It describes a category of suits. And
9 we're not going to ask whether Congress had
10 some illicit motive of targeting your suit.
11 That's my first response, Justice Ginsburg.

12 The second response is if, in fact,
13 there's a claim that there is no other forum to
14 bring this case, then maybe there is, as -- as
15 this Court said in Bank Markazi, there are
16 other constitutional limitations. Maybe that's
17 a due process problem.

18 In fact, Petitioner raised a due
19 process claim in the lower courts. And in its
20 cert petition, this Court denied cert on the
21 due process claim. So that is out of the case.

22 We're strictly on separation-of-powers
23 grounds, and there is no separation-of-powers
24 problem in this Court withdrawing jurisdiction,
25 including with respect to pending cases.

1 That's what it did in McCardle. That's what it
2 did in Assessors v. Osborne. That's what it
3 did in Hallowell. That's what --

4 JUSTICE KAGAN: I guess I'm -- I'm not
5 quite sure what you're reserving there, Mr.
6 Shah, so here is a hypothetical.

7 MR. SHAH: Okay.

8 JUSTICE KAGAN: There's a very large
9 corporation, commits a lot of employment
10 discrimination. Because it does, it has a lot
11 of employment discrimination suits filed
12 against it.

13 And so the CEO of this big corporation
14 goes to Congress and says: These suits are
15 getting to be a real hassle, and so I'd like a
16 piece of legislation. And Congress says: Good
17 enough, and it says there shall be no
18 jurisdiction over any employment discrimination
19 suits filed against that corporation.

20 MR. SHAH: Right.

21 JUSTICE KAGAN: All right? And -- and
22 -- and -- and -- and -- and in so doing, it
23 knocks out all these employment litigation --
24 all these employment discrimination suits that
25 have been filed against that corporation.

1 Is that constitutional?

2 MR. SHAH: It may be unconstitutional,
3 but not for failure of separation of powers,
4 not a separation-of-powers violation. Maybe
5 that is the type of class-of-one problem that
6 this Court noted in -- in the Court's opinion
7 in Bank Markazi.

8 In Footnote 27, it said: Look, if
9 you're singling out a particular litigant for
10 special disfavored or favored treatment, that's
11 the class -- maybe that's a class-of-one claim.
12 So it's not a separation --

13 JUSTICE KAGAN: So, if this had said
14 just David Patchak's suit, different case?

15 MR. SHAH: Well, Your Honor, if
16 Congress had singled out just Mr. Patchak's
17 suit in the text of the statute, maybe they
18 could have brought that sort of claim. I still
19 think based on this Court's decision in Bank
20 Markazi that talked about Congress is free to
21 legislate with -- in a particularized manner
22 even with respect to particular cases, it's
23 probably okay, but it would raise at least a
24 harder question. But make no mistake, the
25 statute here is about a class of cases.

1 Now, I will grant you it is a
2 relatively narrow class of cases, suits that
3 were relating to the Bradley Property. And as
4 it turned out --

5 JUSTICE KENNEDY: I -- I don't know
6 why the hypothetical that Justice Kagan just
7 put doesn't severely compromise the integrity
8 of the courts. The courts are hearing cases
9 against one class or -- or against a large
10 class of defendants but not another class.

11 And this, it seems to me, severely --

12 MR. SHAH: Your Honor --

13 JUSTICE KENNEDY: -- calls into
14 question the integrity of the courts. And
15 that's a separation-of-powers problem.

16 MR. SHAH: Well, Your Honor, I agree
17 with you, everything up until that last part.
18 I agree if -- if the court was drawing lines
19 that you could only sue these type of
20 defendants and not other types of defendants or
21 singling out one company --

22 JUSTICE KENNEDY: Well, that's the
23 hypothetical.

24 MR. SHAH: Yes. Well, I think that's
25 an --

1 JUSTICE KENNEDY: And you said
2 separation of powers is not involved.

3 MR. SHAH: Right. I think that's an
4 equal --

5 JUSTICE KENNEDY: It seems to me that
6 this is intrinsically separation of powers.

7 MR. SHAH: Well, Your Honor, I think
8 that's an equal protection problem. And -- and
9 as this Court recognized in Footnote 27, there
10 are claims to deal with that.

11 CHIEF JUSTICE ROBERTS: You can take
12 an extra minute because we're going to give
13 your friend some rebuttal time.

14 MR. SHAH: Sure, Your Honor.

15 I guess what I was starting to finish
16 up on was on the -- on the class of claims, it
17 may be a narrow category, but just because it
18 turned out that the only suit happened to be
19 Patchak's, it would be an odd constitutional
20 rule if on the day before they -- if they've
21 passed the statute on the day before Patchak's
22 suit, it's fine. On the day after Patchak's
23 suit, it's not fine. And then, if three other
24 people happen to file suit, suddenly it's fine
25 again.

1 That -- that is not a right sort of --
2 that does not strike us as a sensible
3 constitutional rule. Instead, you should look
4 at the words that Congress enacted which was
5 trying to insulate a category of cases from --
6 from this Court exercise -- from any federal
7 court exercising jurisdiction. That's
8 precisely what Congress has done for over 150
9 years dating back to *McCardle* and in a line of
10 cases since then.

11 If there are no further questions.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. SHAH: Thank you.

15 CHIEF JUSTICE ROBERTS: Three minutes,
16 Mr. Gant.

17 REBUTTAL ARGUMENT OF SCOTT E. GANT

18 ON BEHALF OF THE PETITIONER

19 MR. GANT: Thank you, Mr. Chief
20 Justice. A few quick points. I'll try and run
21 through them quickly.

22 Justice Kennedy, I completely agree
23 with you that there is a separation of powers
24 problem posed by the circumstance -- the
25 hypotheticals that were posed. We shouldn't

1 lose sight of the fact that separation of
2 powers were designed in substantial part to
3 protect an individual's rights and to protect
4 an independent judiciary.

5 What we would have here is, if you
6 affirm and uphold the Gun Lake Act, you will
7 have judges looking over their shoulders
8 wondering if they're going to be next in a case
9 like this Court was in Patchak I, where
10 Congress says we don't like the results. We're
11 going to take the case away from the courts.
12 We can dress it up using the language of
13 jurisdiction, but it's still taking the case
14 away from the courts and directing the outcome.

15 Now, on the point, the distinction
16 that counsel for the Respondents were trying to
17 drive home, that somehow a direction to dismiss
18 in 2(b) is different because it's not merits.
19 I would refer to the Court to a unanimous
20 decision from last year, CRST versus EEOC,
21 where the Court found the -- the party that was
22 not prevailing in -- that -- that did not win
23 on the merits in the EEOC case was nevertheless
24 the prevailing party.

25 The Court, unanimous Court observed

1 the defendant, however, has fulfilled its
2 primary objective whenever plaintiff's
3 challenge is rebuffed, irrespective of the
4 precise reason.

5 As anyone who has ever been a
6 plaintiff or represented a plaintiff knows,
7 when the plaintiff's case is dismissed, the
8 plaintiff has lost and the defendant has won.
9 It could have different collateral
10 consequences, res judicata and so on, but
11 fundamentally, when the plaintiff gets kicked
12 out of court, they have lost.

13 Mr. Patchak had that result as -- from
14 2(b).

15 With respect to the relationship
16 between 2(a) and 2(b), 2(a) does one of two
17 things here. It's either meaningless because
18 all the work is done by 2(b). If the suit
19 relates to the Gun Lake -- to the Bradley
20 Property, it shall be dismissed.

21 Or, as the House of Representatives
22 argued on pages 3 and 20 of its brief, what
23 2(a) -- 2(b) does is it implements 2(a). This
24 was an extraordinary assertion by the House of
25 Representatives, which came and filed an amicus

1 brief, and they said what they were really
2 telling you is that what the Congress did in
3 2(b) was it decided what 2(a) means and then
4 kicked the case out of court based on its own
5 understanding while depriving this Court or any
6 other court of the opportunity to say what 2(a)
7 means.

8 Respondents -- Federal Respondents
9 said they didn't know quite what some of the
10 provisions in the Gun Lake Act means except
11 they do know that it prevents Mr. Patchak's
12 case from going forward.

13 This seems to me that their uncertain
14 about the meaning, except when it comes to its
15 application to Mr. Patchak, only highlights the
16 fact that Congress was trying to direct the
17 outcome in Mr. Patchak's case.

18 With respect to the hypotheticals that
19 were posed to Mr. Shah by Justices Kagan and
20 Kennedy, this case is no different, I think,
21 than the hypotheticals you were posing. This
22 is substantially like Smith wins. You can play
23 around with the words. You can say we want
24 Smith to win; therefore, there's no
25 jurisdiction.

1 I don't think anyone here believes
2 that Congress should be able to do that. So
3 this is effectively the same thing.

4 And finally, Justice Gorsuch, with
5 respect to the Gonzalez case that you were
6 discussing with counsel for the Federal
7 Respondents, in that case, both of the parties
8 acknowledged that there was no dispute about
9 jurisdiction.

10 Thank you for the extra time, Mr.
11 Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:06 a.m., the case
15 was submitted.)

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1	additional ^[1] 15:20 addressed ^[3] 22:14 28:1 66:5 addressing ^[1] 22:22 adjudicate ^[2] 58:8 65:1 adjudicating ^[2] 17:6 65:7 adjudication ^[2] 58:7 59:14 adjudicatory ^[1] 58:10 administrable ^[1] 57:23 adopt ^[3] 7:1,3 9:5 affect ^[2] 11:16 34:1 affects ^[1] 16:16 affirm ^[2] 57:12 72:6 affixes ^[1] 9:13 affixing ^[1] 14:2 afford ^[1] 32:25 afoul ^[1] 64:17 agency ^[1] 48:17 agenda ^[1] 57:8 agree ^[3] 69:16,18 71:22 agreed ^[1] 26:15 airing ^[1] 65:10 AL ^[1] 1:7 Alien ^[3] 31:23 32:1,7 ALITO ^[13] 6:23 7:13 8:16 9:21 27:13 31:18,22 50:1 51:20 52:7,12,16,25 Alito's ^[3] 11:7 33:5 57:22 alive ^[1] 20:2 alleged ^[2] 27:17 42:23 alleging ^[1] 47:16 almost ^[1] 13:8 alter ^[2] 11:8,9 although ^[3] 27:24 40:3 45:11 amici ^[3] 13:1 15:8,9 amicus ^[3] 58:2,4 73:25 among ^[1] 17:1 analysis ^[3] 9:9 30:2 31:19 analyze ^[1] 43:5 and/or ^[2] 6:15 9:18 ANN ^[3] 1:20 2:6 34:14 announce ^[1] 8:2 another ^[10] 23:23 43:11 44:14,14 47:7 51:15 58:7 65:21,23 69:10 answer ^[17] 12:21 17:17 26:23 29:6,19 32:24,24 37:9 38:22 39:10,24 44:7 47:23 64:1,1,19 65:20 answering ^[1] 48:3 answers ^[1] 38:24 antibusing ^[1] 29:9 anybody ^[1] 52:18 anyway ^[2] 17:2 24:11 APA ^[16] 18:13 20:4 21:17,18,19 35:13 39:19 47:3,7,12 48:13,18,19,20 52:4,5 APA's ^[1] 20:4 appeals ^[2] 51:11,11 APPEARANCES ^[1] 1:17 appellate ^[1] 44:16 application ^[2] 36:21 74:15 applied ^[1] 10:25 applies ^[6] 8:21 25:12 30:23 31:2 33:8 40:8 apply ^[8] 10:4 11:10 12:12,18 34:9 47:7 52:5 56:11	appropriate ^[2] 21:21 58:11 Arbaugh ^[5] 7:25 8:2 43:20 44:3 45:15 aren't ^[2] 30:24 63:12 arguably ^[1] 8:10 argue ^[3] 25:1,2 51:7 argued ^[2] 18:9 73:22 argues ^[1] 56:15 arguing ^[5] 5:9 14:18 23:24 64:24 65:5 argument ^[3] 1:14 2:2,5,8,13 3:4,7 15:4,7,25 24:24,25 25:1,7,8,12,19,20,23,25 34:14 37:2 38:1 47:12,20 51:10 53:23 57:16 66:2,5 71:17 arguments ^[2] 39:11 42:21 arise ^[1] 6:20 around ^[3] 26:13 48:8 74:23 Article ^[7] 3:15 36:2 40:16 46:1 58:20,25 59:3 ascribed ^[1] 17:20 aside ^[2] 23:16 46:7 assertion ^[1] 73:24 assessing ^[1] 10:23 Assessors ^[1] 67:2 assigned ^[3] 3:22 6:17 9:20 Assistant ^[1] 1:20 assume ^[5] 7:11 13:18,20 43:19 55:3 assumed ^[1] 11:13 assuming ^[7] 13:20 23:17 46:12 55:22,22 63:17,17 atmospherics ^[2] 15:22,24 attempts ^[1] 17:14 authority ^[3] 42:20 47:18 55:18 authorizes ^[1] 26:3 automatically ^[1] 50:10 avoidance ^[1] 46:10 avoids ^[2] 58:24 59:2 award ^[2] 62:21,25 away ^[26] 9:1 16:14 19:16,17 20:4 22:4 27:20 31:17 35:25 36:7 37:20 40:17 41:2 46:25 55:13,17 56:17 57:6 60:15 61:17,20 62:1,9 64:25 72:11,14	begs ^[2] 64:1,1 behalf ^[11] 1:19,22,24 2:4,7,10,15 3:8 34:15 57:16 71:18 behind ^[1] 66:6 beholder ^[1] 21:5 believe ^[3] 18:18 49:16 52:12 believes ^[1] 75:1 below ^[2] 25:20,25 besides ^[1] 48:25 best ^[4] 25:23 37:2,18,22 better ^[2] 7:8,22 between ^[11] 17:2 19:2,3,21 26:4 33:23 41:22 42:7,13 61:8 73:16 beyond ^[1] 15:20 big ^[2] 52:20 67:13 bit ^[1] 26:19 Black's ^[1] 6:1 blanche ^[1] 14:1 Block ^[2] 48:2,4 both ^[7] 6:17 12:14 14:23,24 20:12 55:15 75:7 boundary ^[1] 33:23 bounds ^[1] 33:23 Bradley ^[6] 34:19 40:12 49:8 50:18 69:3 73:19 branch ^[1] 38:19 BREYER ^[34] 23:1,4,15,18,25 24:8,16,19,23 25:3,11,16,22 26:6,9,25 28:7,13,16,20 37:1,8,13 39:6,9,16 50:20 53:7,16,21 54:4,15,17,21 brief ^[6] 45:13 51:7 58:2,4 73:22 74:1 briefed ^[1] 25:6 briefs ^[1] 7:8 bring ^[16] 28:8,10 36:13,24 37:5,10,14 38:2,3 48:15 49:13,23 52:19,21 53:4 66:14 bringing ^[2] 43:9 48:5 broad ^[3] 49:5 50:12,16 broadener ^[3] 42:18 52:2,7 broadly ^[1] 4:8 brought ^[4] 38:9 53:25 54:1 68:18 built ^[2] 35:16 36:7 business ^[2] 37:3 58:15 busing ^[1] 17:11
2	2 ^[2] 25:10 31:13 2(a) ^[18] 5:3,6,8 22:25 23:2,6 49:21 50:16,20 54:1,3,19 73:16,16,23,23 74:3,6 2(b) ^[24] 3:11,16,25 5:3,7,13 6:19 7:15 8:9,17 14:18 36:23 43:5,8,10 49:25 50:8 56:16 72:18 73:14,16,18,23 74:3 2(c) ^[1] 5:7 20 ^[1] 73:22 2005 ^[1] 35:9 2009 ^[1] 34:19 2014 ^[1] 53:18 2017 ^[2] 1:12 23:7 27 ^[3] 40:19 68:8 70:9	back ^[8] 8:25 11:6 22:21 27:10 29:18 33:20 47:2 71:9 backdrop ^[1] 16:13 background ^[1] 37:21 bad ^[1] 15:21 Band ^[3] 1:24 2:11 57:17 Bank ^[14] 10:19 12:15 27:11 36:15,19 40:19 61:4,7,25 62:6,19 66:15 68:7,19 bar ^[4] 35:1 47:22,23,25 barred ^[1] 49:25 barring ^[1] 35:4 based ^[4] 31:19 32:13 68:19 74:4 basic ^[1] 16:21 basically ^[2] 18:9 44:20 basis ^[4] 24:2,3 40:23 55:9 beef ^[3] 13:3,4,11	C
3	3 ^[2] 2:4 73:22 30s ^[1] 24:6 34 ^[1] 2:7		
5	57 ^[1] 2:9		
7	7 ^[1] 1:12 71 ^[1] 2:15		
8	80 ^[2] 55:1 56:1		
A	a.m ^[3] 1:15 3:2 75:14 ability ^[2] 56:17 58:18 able ^[2] 36:12 75:2 above-entitled ^[1] 1:13 accountability ^[1] 51:2 accused ^[1] 7:24 achieve ^[3] 17:4,14 64:4 achieving ^[1] 17:22 acknowledged ^[2] 35:3 75:8 Act ^[2] 3:11 18:11,15,15,21,21 20:12 24:5,8 25:13 35:1,6,24 37:25 38:16 48:7,9,11 66:7 72:6 74:10 acted ^[1] 47:17 action ^[7] 7:15 35:9 45:16 48:17 50:17,17 52:17 actions ^[2] 16:24 48:25 acts ^[1] 18:19 actual ^[1] 6:19 actually ^[6] 5:16 10:24,24 34:6 39:22 66:2		

Official

<p>55:1,6 57:3,9,24 58:13 63:15 64:21 65:16 66:14,21 68:14 72:8,11,13,23 73:7 74:4,12,17,20 75:5,7,13,14</p> <p>cases [50] 3:23,24 10:9,17,20 11:11 12:5,19 13:14,17 14:1,12,14,17,22 16:16 27:20 29:9 30:20 31:3,6 32:9,10,14 33:6,8,9,10,12,25 44:5 45:12 47:1 50:13 56:9,11,22 57:1,7 59:19 64:14,16 65:16 66:25 68:22,25 69:2,8 71:5,10</p> <p>casino [1] 35:18</p> <p>category [9] 12:5 30:19 47:1 57:7,10 58:13 66:8 70:17 71:5</p> <p>cause [1] 45:16</p> <p>centuries [1] 19:15</p> <p>CEO [1] 67:13</p> <p>cert [2] 66:20,20</p> <p>certain [7] 12:4 22:18 32:2,16 37:3 39:10 64:13</p> <p>certainly [5] 7:19 22:12 41:16 53:18 54:1</p> <p>challenge [7] 35:1 36:13,14 43:10 49:24 50:3 73:3</p> <p>challenges [4] 35:11 53:4,25 54:2</p> <p>challenging [3] 38:10,11 53:22</p> <p>chance [1] 55:24</p> <p>change [2] 11:25 30:10</p> <p>changed [5] 12:17 30:15 31:16 51:17 57:2</p> <p>changes [1] 31:1</p> <p>changing [8] 11:18,23,23,24 12:2,10 34:8 41:19</p> <p>CHIEF [44] 3:3,9 16:25 18:4,4 26:14 27:3,14 28:14,18,21 29:4,7,16 32:23 33:2 34:10,11,16 41:1,5,11,23 42:19 43:2 47:9 48:23 50:2,21 51:6 57:13,19 59:5 63:2,12,25 64:8,18 70:11 71:12,15,19 75:11,12</p> <p>choice [1] 19:13</p> <p>Circuit [2] 22:2,7</p> <p>circumstance [5] 9:25,25 10:1 34:5 71:24</p> <p>circumstances [1] 34:9</p> <p>cited [1] 44:5</p> <p>cites [1] 45:13</p> <p>civil [2] 17:8 61:8</p> <p>claim [20] 12:23 23:5 29:12 36:23 37:18,19,22 38:2,3,5 39:19 44:20 54:10 64:21 65:10 66:13,19,21 68:11,18</p> <p>claims [9] 8:12 17:6 28:4 35:4 45:9,14 52:3 70:10,16</p> <p>clarify [1] 39:19</p> <p>class [7] 68:11,25 69:2,9,10,10 70:16</p> <p>class-of-one [2] 68:5,11</p> <p>clause [5] 11:20 12:22 13:22 40:21 64:17</p> <p>clear [9] 9:10 14:11 43:20,23 45:19 46:4 50:7 61:19,22</p> <p>clearly [4] 8:5 9:12 31:10 58:13</p> <p>client [2] 24:1,14</p> <p>close [1] 29:17</p>	<p>closed [1] 65:22</p> <p>collateral [4] 45:24 46:16 63:9 73:9</p> <p>colleagues [1] 7:25</p> <p>collectively [1] 13:13</p> <p>colorable [1] 25:7</p> <p>come [3] 4:17,20 47:2</p> <p>comes [2] 43:23 74:14</p> <p>coming [2] 11:6 19:3</p> <p>commits [1] 67:9</p> <p>company [1] 69:21</p> <p>complaint [2] 13:22 28:5</p> <p>completed [1] 55:2</p> <p>completely [4] 35:17 58:6 59:13 71:22</p> <p>comply [1] 48:11</p> <p>compromise [1] 69:7</p> <p>concern [2] 58:24 59:2</p> <p>concerning [1] 32:2</p> <p>concerns [3] 35:23 40:19 58:22</p> <p>concluded [2] 34:25 46:19</p> <p>conclusion [1] 22:9</p> <p>confirmed [1] 40:13</p> <p>confirming [1] 35:8</p> <p>Congress [99] 3:16 6:14,15 8:3 9:13,17,22 10:8,16,23 11:7,9,15,22,23,24,25 12:2 13:25 16:1,14,21 17:4,9,13 18:17 19:3 21:7,17,22 22:1,18,25 23:7 27:8 29:10 30:13,17 31:1,10,17 32:5,13 33:7,11 34:1,5,24 35:6,10,24,25 36:4,16 38:16,19 39:25 40:11 41:18 42:19 43:7,19,22 46:19 47:22 48:19 49:21 51:17 54:2,20 55:9,12,16 56:2,6,10,16,19 57:2 58:18,25 60:10 64:3,13,25 65:5,22 66:3,9 67:14,16 68:16,20 71:4,8 72:10 74:2,16 75:2</p> <p>Congress's [7] 31:20 35:5 41:7 48:9 49:9 50:12 66:7</p> <p>consequence [2] 3:19 13:5</p> <p>consequences [4] 45:24 46:17 63:9 73:10</p> <p>consistent [1] 16:13</p> <p>consistently [2] 17:13 33:13</p> <p>Constitution [3] 4:3 26:17 36:20</p> <p>constitutional [24] 10:11 15:4,7,14 23:7,10,12 27:17,18 28:2 29:10 35:23 37:19 40:18 43:9 46:5,10 54:2 65:3,8 66:16 68:1 70:19 71:3</p> <p>constitutionally [3] 3:22 6:16 9:19</p> <p>construed [1] 9:7</p> <p>contained [1] 5:2</p> <p>contested [1] 43:4</p> <p>context [3] 3:24 18:16 52:1</p> <p>contexts [1] 33:19</p> <p>controversy [1] 59:4</p> <p>copyright [1] 44:22</p> <p>core [1] 58:21</p> <p>corporation [6] 32:3,8 67:9,13,19,25</p> <p>Correct [3] 53:15 54:14,18</p>	<p>costs [7] 22:10,23 55:5,7,18,25 56:1</p> <p>couldn't [2] 8:14 52:21</p> <p>counsel [7] 31:7 34:12 57:14 71:13 72:16 75:6,13</p> <p>Counselor [2] 16:5 18:1</p> <p>country [1] 52:19</p> <p>couple [6] 35:6 38:23 40:1 46:2 62:2 65:25</p> <p>course [2] 21:4 54:7</p> <p>COURT [97] 1:1,14 3:10 5:14 6:8 7:17 8:1,4 9:2,5 10:9 12:11 18:8,24 24:21 25:21 27:16,25 28:8,9,10,15,19 31:2,6,12 32:6 33:18 34:17 35:3,11 36:15,19 37:5,12,14 38:2,3,13,18 42:17 43:4,17,24 44:15,17 45:3 46:9,18,20,22 48:7 50:6,13,19 51:10,11,16 55:18 56:5,21,22,24,25 57:8,12,20 58:2,18,23 61:9,11,17 63:4,13,14,20 64:3 65:7 66:5,15,20,24 68:6 69:18 70:9 71:6,7 72:9,19,21,25,25 73:12 74:4,5,6</p> <p>Court's [11] 3:14 13:13 21:15 34:23 48:2 56:9,17 63:24 64:25 68:6,19</p> <p>courts [42] 3:16,18,21 6:16 8:11 9:19,24 10:4,25 11:9 12:12,18,23 16:2,3,15 17:5,10,15 29:23 30:19 32:1 34:9 42:24 54:7 57:7 58:6,8,10,14 59:9,13 63:4,22 64:14 65:13 66:19 69:8,8,14 72:11,14</p> <p>cousins [1] 29:17</p> <p>covers [1] 49:6</p> <p>CRST [1] 72:20</p> <p>cuts [1] 57:22</p>	<p>deprives [1] 9:23</p> <p>depriving [2] 17:15 74:5</p> <p>described [1] 54:6</p> <p>describes [1] 66:8</p> <p>designed [2] 4:2 72:2</p> <p>determination [2] 24:22 50:12</p> <p>determine [3] 29:23 43:5 57:9</p> <p>determined [1] 33:25</p> <p>dialectic [1] 59:18</p> <p>dialogue [3] 17:2,20 64:2</p> <p>dictate [1] 14:1</p> <p>dictated [1] 11:17</p> <p>dictating [1] 34:6</p> <p>Dictionary [1] 6:1</p> <p>difference [4] 14:5 19:2 41:22 42:6</p> <p>differences [1] 42:13</p> <p>different [23] 5:5 10:13 19:9 35:21 42:1,4,5 44:25 45:5 50:5 60:8,13,24 61:6 62:3,5,14,23 64:11 68:14 72:18 73:9 74:20</p> <p>differently [2] 4:18,21</p> <p>difficult [3] 52:8 54:5 64:9</p> <p>dimensions [1] 28:2</p> <p>direct [5] 11:3 22:4 27:9 33:8 74:16</p> <p>directed [3] 3:16 4:5 40:7</p> <p>directing [12] 10:16 13:2 19:4,21 30:13 31:10 32:14 33:6,11 41:18 46:14 72:14</p> <p>direction [3] 5:24 16:1 72:17</p> <p>directive [1] 3:19</p> <p>directly [4] 7:6 10:2 11:16 29:19</p> <p>disagreed [2] 18:10,12</p> <p>discrimination [4] 67:10,11,18,24</p> <p>discussing [4] 8:10 14:21 53:10 75:6</p> <p>discussion [1] 28:25</p> <p>disfavored [1] 68:10</p> <p>dismiss [13] 3:17,20 5:24 12:22,23 13:10 16:2 34:7 46:20 57:10 63:15,20 72:17</p> <p>dismissal [10] 4:10,22 6:2 13:2 15:18 22:4 45:22 46:15,15 62:23</p> <p>dismissed [15] 4:6,13 5:21 6:21 14:6,15,24 40:6,14 50:9 55:6 63:6,7 73:7,20</p> <p>dispute [2] 18:16 75:8</p> <p>distinction [2] 26:4 72:15</p> <p>distinguishable [1] 61:24</p> <p>district [1] 25:21</p> <p>doing [9] 11:24 13:25 15:7 60:15 61:16,18,19 63:13 67:22</p> <p>done [6] 11:16 13:10 54:3 65:6 71:8 73:18</p> <p>doubt [2] 28:3 35:7</p> <p>drag [1] 26:13</p> <p>dragooning [1] 63:13</p> <p>draw [1] 58:19</p> <p>drawing [1] 69:18</p> <p>drawn [1] 58:23</p> <p>dreaming [1] 38:5</p> <p>dress [2] 38:8 72:12</p> <p>drive [1] 72:17</p>
---	--	--	--

D

D.C [6] 1:11,18,21,23 22:2,6

Dakota [1] 48:3

darkness [1] 54:7

dating [1] 71:9

DAVID [3] 1:3 40:13 68:14

day [3] 70:20,21,22

deal [1] 70:10

dealing [1] 20:8

decide [8] 3:23 41:8,9,25 50:6,8

52:8 57:2

decided [2] 51:12 74:3

deciding [6] 3:24 10:2,3,24 12:11

33:25

decision [9] 6:3 34:23 40:12 48:2

49:9,9 53:5 68:19 72:20

decisions [1] 4:1

declaratory [1] 22:24

deem [1] 58:11

deemed [1] 9:6

defendant [3] 32:8 73:1,8

defendants [3] 69:10,20,20

defining [1] 6:1

denied [1] 66:20

Department [1] 1:21

depends [1] 55:9

deprive [1] 39:11

deprived [1] 27:15

Official

<p>dropped [1] 4:21 due [3] 66:17,18,21 dump [1] 52:20 during [1] 17:8 duties [1] 16:3</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier [3] 15:25 23:22 31:23 EEOC [2] 72:20,23 effect [3] 40:4 62:22 63:1 effectively [3] 10:3 12:11 75:3 egregious [1] 34:4 either [3] 12:13 51:23 73:17 elaborate [1] 7:10 elements [1] 45:15 eliminated [2] 35:7,10 Elsevier [1] 44:19 embrace [1] 57:25 employee [2] 47:16,17 employment [5] 67:9,11,18,23,24 enact [2] 36:4 56:10 enacted [3] 34:24 49:21 71:4 enacting [2] 56:16,19 enactment [1] 39:14 enacts [2] 10:8 48:21 endorsement [1] 25:9 enjoyment [1] 37:16 enlisting [3] 63:4,22 65:12 enough [2] 56:24 67:17 ensure [1] 61:13 enter [1] 38:19 entered [2] 55:20 56:6 entirely [1] 58:15 entitled [5] 18:18 22:10 34:1 55:4, 25 entitlement [2] 22:23,24 equal [6] 27:22 40:20 64:15,17 70: 4,8 equivalent [1] 44:17 era [1] 17:8 ergo [1] 60:21 especially [1] 6:2 establishes [1] 9:12 ET [1] 1:7 even [15] 15:20 27:9 38:4 40:17 42: 15,15 45:6 46:22,23 49:13 51:5,7, 14 55:25 68:22 everybody [1] 61:19 everything [3] 15:10,13 69:17 evidence [1] 21:9 exact [2] 12:19 15:14 example [2] 4:21 33:18 examples [1] 27:14 excellent [1] 38:15 except [2] 74:10,14 excess [1] 47:17 exclude [2] 58:6 59:8 excluding [2] 58:17 59:13 exercise [1] 71:6 exercised [3] 6:14 9:17 54:23 exercising [3] 16:22 56:25 71:7 exist [1] 20:15 existence [1] 21:1 existing [1] 31:13</p>	<p>expectations [1] 36:7 expended [1] 56:1 explain [3] 5:23 16:10 58:12 explained [1] 36:19 expressly [1] 66:5 extent [1] 21:4 extra [2] 70:12 75:10 extraordinary [1] 73:24 eye [1] 21:5 eyes [1] 58:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facility [1] 35:16 fact [18] 6:7 8:9 9:12 10:21 15:17 23:6 28:3 29:24 30:13 44:1 60:15 61:21 65:12,17 66:12,18 72:1 74: 16 failure [1] 68:3 falls [2] 57:9 58:14 familiar [1] 31:25 famous [1] 17:2 far [1] 53:16 fascinating [3] 53:9 54:5,9 faulty [1] 8:13 favor [1] 19:4 avored [1] 68:10 Federal [44] 1:22 2:7 3:16 5:14 7: 17 9:2,24 10:8 11:8 16:15 17:5,10, 15 23:8 27:16 28:19 30:18 31:2 32:1,6 34:15 35:10 38:3 42:24 45: 3 47:16,24 50:13,19,23 52:21 54: 7 57:7 58:2,6,8,14,18 59:9,13 64: 14 71:6 74:8 75:6 few [4] 4:7 29:20 32:22 71:20 fictional [1] 10:7 fight [1] 20:25 figure [1] 63:8 file [3] 45:8,10 70:24 filed [12] 5:13 12:24 14:16 39:19 45:3,6 49:1 50:18 67:11,19,25 73: 25 final [3] 48:17 56:5,14 finally [1] 75:4 find [2] 8:14 45:20 Fine [8] 32:17 33:13,15 42:3 64:6 70:22,23,24 finish [1] 70:15 finished [1] 5:13 firmly [1] 26:22 first [8] 38:25 40:2 45:6 47:20 58: 13 60:25 61:7 66:11 five [6] 4:16 15:5,11,13,15 16:9 flips [1] 46:5 following [2] 7:14 33:4 Footnote [3] 40:19 68:8 70:9 forget [1] 23:18 forum [1] 66:13 forward [1] 74:12 found [1] 72:21 framed [1] 13:17 framers [1] 4:2 framing [1] 8:15 free [1] 68:20 friend [1] 70:13</p>	<p>frightened [1] 19:22 fulfilled [1] 73:1 fulfilling [2] 6:16 9:19 full [2] 5:14 65:10 function [4] 5:25 33:24,24 58:10 functional [2] 31:7 62:4 functioning [1] 32:15 functions [1] 16:22 fundamental [1] 33:21 fundamentally [2] 19:9 73:11 further [3] 15:20 57:11 71:11 future [1] 34:9</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>GANT [78] 1:18 2:3,14 3:6,7,9 4:4, 9,14,19 5:4,17,20 6:7 7:5,19 9:4 10:1,12 11:15,19 12:8,20 13:12, 24 14:7,10 15:2,17,23 16:19 17: 24 18:6 19:24 20:11,19,24 21:3 22:1,11,20 23:3,14,16,21 24:7,15, 17,20,25 25:5,15,19,24 26:8,10,12, 21 27:5,8,24 28:11,24 29:2,6,13 30:10,21 31:5,21 32:11,18,21 33: 2,17 71:16,17,19 gave [2] 27:4,19 General [4] 1:20 28:16 38:7,16 gets [4] 57:7 58:21 62:20 73:11 getting [3] 51:15 62:14 67:15 GINSBURG [11] 6:5 10:6 13:7 14: 3,8 21:14 27:19 47:11 48:1 65:19 66:11 give [4] 24:9 56:25 59:1 70:12 given [5] 19:25 20:2 21:3,6 48:19 giving [2] 13:25 19:17 Gonzalez [2] 44:13 75:5 GORSUCH [16] 6:22 11:19 12:20 13:12,20 15:9 29:20 43:13 44:8, 12,18 45:8,17 46:6,11 75:4 Gorsuch's [1] 16:8 got [7] 18:8 26:7,9,9 38:23 44:18 59:20 government [11] 19:10,11,15,20, 23 20:6 24:10 28:19 41:6 50:23 52:21 government's [1] 19:12 grant [2] 64:24 69:1 granted [1] 18:11 great [1] 34:21 grounds [1] 66:23 guess [9] 30:23 49:18 50:10 57:21 59:6 61:16 65:25 67:4 70:15 guise [2] 12:9 27:10 Gun [6] 3:11 20:12 35:5 72:6 73: 19 74:10</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habeas [1] 65:21 Hallowell [1] 67:3 hangs [2] 15:10,13 happen [1] 70:24 happened [2] 24:20 70:18 happy [1] 7:10 hard [2] 33:19 52:12 harder [2] 59:19 68:24</p>	<p>Hart [4] 17:3,20 58:5 64:2 Hart's [1] 59:18 hassle [1] 67:15 headings [1] 8:8 hear [2] 3:3 26:19 heard [1] 54:6 hearing [1] 69:8 hearings [1] 21:11 held [5] 31:12 33:13 44:22 47:20 51:21 help [1] 43:25 helps [2] 22:17 59:7 highlights [1] 74:15 hinges [1] 43:14 history [6] 18:14 20:1,13,23 21:4,6 holding [1] 21:16 home [1] 72:17 honestly [1] 29:2 Honor [14] 60:14 61:15 62:13,18 63:16 64:7,10,23 65:24 68:15 69: 12,16 70:7,14 hope [1] 26:21 House [4] 21:12 31:13 73:21,24 However [2] 9:10 73:1 hypothetical [15] 27:11,15 31:9 36:10,11 39:2 42:16 60:17 61:4,7, 24 62:7 67:6 69:6,23 hypotheticals [3] 71:25 74:18,21</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [1] 52:9 identical [1] 29:15 Ill [7] 3:15 36:2 40:16 46:1 58:20, 25 59:3 illicit [1] 66:10 imagine [5] 23:4,6 34:5 37:15 42: 15 immunity [39] 18:3,9,11,13,24 19: 10,16,17,20 20:3,7,14,14,16 21:2, 8,16,18,19,23,24 28:1 35:13 37:11, 13 47:2,4,10,14,15,22,23,25 48:10, 20 50:22 51:4,22,23 immunize [1] 9:14 immunized [1] 6:9 impermissible [1] 16:4 implements [1] 73:23 implicate [1] 14:19 implicated [2] 18:21 35:24 implicates [1] 64:11 imposed [1] 36:20 imprimatur [1] 59:1 includes [1] 15:18 including [1] 66:25 incompatible [1] 3:12 inconsistent [1] 35:17 independent [1] 72:4 Indian [4] 23:9 25:18 53:18 54:11 Indians [3] 1:25 2:11 57:18 indicated [1] 26:15 indicia [2] 20:20,23 indirect [1] 17:21 indirectly [1] 11:17 individual's [1] 72:3 initial [1] 7:14</p>
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<p>injunctive [2] 39:21 48:16 inquiry [1] 13:15 instances [1] 27:14 instead [2] 60:10 71:3 instruct [1] 13:14 instructed [1] 43:18 insulate [3] 29:11 42:20 71:5 insulated [1] 43:8 integrity [3] 58:19 69:7,14 intended [2] 21:7 22:2 intent [1] 31:20 interested [1] 27:2 interests [3] 35:19 36:2 64:11 INTERIOR [1] 1:7 interpret [1] 56:17 interpretation [1] 35:15 interpreted [2] 34:24 38:12 interrupted [1] 26:18 intrinsically [1] 70:6 invoke [1] 46:9 involved [1] 70:2 involving [4] 10:10 19:9 27:20 32:9 irrational [1] 40:22 irrespective [1] 73:3 isn't [6] 13:17 20:6 21:21 41:12 45:18 46:12 issue [8] 5:8 6:13 20:1,2 28:4 31:4 50:12,16 itself [7] 3:15 4:11 13:7 21:18 42:20 65:2,3</p>	<p>21 Justice [191] 1:21 3:3,9 4:4,12,15 5:1,5,12,19 6:5,22,23 7:13 8:16 9:21 10:6 11:1,6,19,21 12:20 13:7,12,20 14:3,4,8 15:1,9,21 16:5,6,8,25 18:1,4,7 19:25 20:17,22,25 21:14 22:8,16 23:1,4,15,18,25 24:8,16,19,23 25:3,11,16,22 26:6,9,12,14,25 27:2,6,13,19 28:7,13,14,16,18,20,21 29:4,7,16,19 30:5,17,22 31:18,22 32:16,23 33:3,4,5 34:10,11,16 35:14 36:6,10,16 37:1,8,13 39:6,9,16 40:10 41:4,4,5,11,21,23 42:6,10,19 43:2,13 44:8,12,18 45:8,17 46:6,11 47:9,11 48:1,23,24 49:11 50:1,2,20,21 51:6,20 52:7,12,16,25 53:7,16,21 54:4,15,17,21,25 55:11,14,21 57:13,19,21 59:5,6,16,20,22 60:3,7,10,18,21 61:12,18,21 62:8,11,16 63:2,12,25 64:8,18 65:19 66:11 67:4,8,21 68:13 69:5,6,13,22 70:1,5,11 71:12,15,20,22 75:4,11,12 Justice's [2] 27:3,14 Justices [2] 61:5 74:19</p>	<p>14:5 15:5,10,13 16:9 69:17 72:20 later [3] 7:10 38:11 49:17 Laughter [4] 28:23 29:1 32:20 60:6 law [28] 3:24 10:4,5,25 11:18,21,22,24 12:1,3,13,17 24:13,18 30:15,15,16 31:11,14 34:8 35:15 36:5 37:15,23 41:20 51:17 56:17 57:2 lawful [1] 24:4 laws [3] 34:24 36:21 44:2 lawsuit [3] 24:2 40:1 52:22 lawyers [1] 17:2 lay [1] 59:12 least [5] 7:23 28:2 49:6 53:3 68:23 leaving [3] 10:4 23:16 34:8 left [10] 4:22 12:18 13:8,10,21 20:2 23:13 56:20,23 65:22 legislate [1] 68:21 legislation [2] 59:24 67:16 legislative [5] 4:1 32:15 33:24 35:5 38:19 legislature [1] 33:22 less [1] 19:18 letting [1] 12:12 light [1] 50:8 light's [1] 32:17 lightly [1] 43:18 likely [2] 31:15 38:9 limit [1] 41:7 limitations [6] 48:6,19 49:13,15,20 66:16 limited [4] 32:9 42:16 63:23 65:13 limits [1] 36:20 line [5] 57:23,25 58:1 59:11 71:9 line-drawing [1] 33:19 lines [2] 58:23 69:18 literal [1] 50:1 literally [1] 52:13 litigant [1] 68:9 litigation [4] 22:19 55:2 62:12 67:23 little [1] 26:19 long [1] 48:3 longer [2] 49:2 55:7 look [15] 10:18 18:14 20:16 21:5,22 25:9 31:8 32:11 33:20 40:20 41:14,24 66:6 68:8 71:3 looking [4] 10:19 52:4 59:23 72:7 looks [1] 7:20 lose [2] 38:21 72:1 loses [5] 58:18 59:25 60:12,22 61:2 lost [2] 73:8,12 lot [7] 17:9 33:15 43:14 44:25 62:20 67:9,10 lower [1] 66:19</p>	<p>majority [2] 18:10,12 manner [3] 58:11 65:13 68:21 Markazi [14] 10:19 12:15 27:11 36:15,19 40:19 61:4,7,25 62:7,19 66:15 68:7,20 Match-E-Be-Nash [1] 2:10 Match-E-Be-Nash-She-Wish [2] 1:24 57:17 matter [8] 1:13 19:11 39:22 52:1 57:6,23 62:4 63:23 matters [1] 34:3 McCardle [10] 6:6,7 13:6,9 65:16,17,20 66:1 67:1 71:9 mean [18] 6:9 11:2,7 22:21 26:2 27:7 28:9 29:8 31:18 36:15 45:12 46:23 47:19 50:4,5 53:1 56:8 59:8 meaning [3] 22:25 25:20 74:14 meaningless [1] 73:17 means [8] 37:18 50:8 52:10,13 53:3 74:3,7,10 mentioned [5] 21:10,11,13 23:22 51:23 mentions [1] 20:15 mere [1] 9:12 merits [10] 45:24 46:21 59:1,3 61:9,11 62:5,25 72:18,23 might [5] 9:11 22:11 33:14 37:2 43:21 mind [2] 26:22 61:10 minute [2] 54:22 70:12 minutes [1] 71:15 misperception [1] 59:2 mistake [1] 68:24 moment [1] 19:15 moments [2] 29:20 32:22 morning [1] 3:4 most [1] 54:5 motive [1] 66:10 move [1] 39:13 Ms [53] 34:13,16 35:22 36:9,12,18 37:7,10 38:23 39:8,15,18 40:15 41:2,9,16 42:2,9,12 43:1,3,13 44:4,10,13,24 45:11 46:2,8,18 48:1 49:4,14 50:15 51:5,9,25 52:11,15,23 53:2,15,20,24 54:13,16,19,23 55:8,12,16 56:4 59:23 much [5] 9:10 34:3 52:7 56:20 62:17 must [1] 34:7</p>
<p style="text-align: center;">J</p> <p>Jones [7] 30:12 40:7 42:17 59:25 60:11,18 61:9 Jones's [1] 42:8 judge's [1] 6:2 judges [1] 72:7 judgment [12] 22:24 32:12 48:25 55:3,20 56:6 59:1 61:9,11 62:5,6,25 judicata [3] 62:22 63:1 73:10 judicial [13] 4:1,24 5:25 6:15 9:18 16:22 33:24 38:20 47:8 52:6 57:1,8 58:25 judiciary [3] 16:23 58:20 72:4 jurisdiction [63] 6:8 8:11,17 9:2,13,17,24 10:9 11:8,10,23 12:4,11 16:15,20 17:10,16 18:2 20:9 27:10,20,21 28:17 29:24 30:19 31:1,25 32:7 33:7 35:11 40:17,25 42:7,24 43:19 46:25 51:16 55:17 57:6 58:8 60:12,16,19 61:1,14 62:2,9,24 63:3,8,19,21 64:4,22,25 65:12,15 66:24 67:18 71:7 72:13 74:25 75:9 jurisdiction-stripping [15] 6:24 7:4,11,18,20 8:19,21 9:7 11:14 13:6 16:11 44:1 51:13 56:19 63:18 jurisdictional [24] 7:9,22 8:5,9,15 11:22 12:3,25 13:18,21 14:2 26:16 29:25 43:15 44:6,22 45:1,7,18 46:4,12,24 56:10,18 jurisprudence [3] 3:14 6:12 14:</p>	<p style="text-align: center;">K</p> <p>KAGAN [39] 4:4,12,15 5:12,19 11:1,21 14:4 15:1,21 16:6 26:12 27:2,6 30:5,17,22 32:16 33:4 40:10 41:21 42:6,10 59:6,16,20,22 60:3,7,10,18,21 62:16 67:4,8,21 68:13 69:6 74:19 Kagan's [1] 5:6 Keene [2] 44:11,12 KENNEDY [23] 5:1 22:8,16 35:14 36:6,10,16 54:25 55:11,14,21 61:12,18,21 62:8,11 69:5,13,22 70:1,5 71:22 74:20 key [1] 43:12 kicked [2] 73:11 74:4 kind [3] 3:25 21:20 36:22 king [1] 50:25 Klein [5] 9:10,11 13:16 51:18 57:4 knocks [1] 67:23 knows [1] 73:6</p> <p style="text-align: center;">L</p> <p>label [4] 9:13 13:15 14:2 16:20 lack [2] 62:24 63:20 lacks [1] 51:16 laid [1] 56:5 Lake [6] 3:11 20:12 35:6 72:6 73:19 74:10 land [21] 7:16 18:20 24:4 25:18 26:1,4 31:14 34:20 35:2,8 38:10 39:5,13 49:2,17 52:17 53:5,6,19 54:11,12 language [12] 5:21 8:15 20:4,5 21:20 38:8,15 44:6,15,19 46:24 72:12 large [2] 67:8 69:9 largesse [1] 19:12 last [12] 4:6,10 11:20 12:22 13:22</p>	<p style="text-align: center;">M</p> <p>made [8] 7:7 16:1 25:8,20,25 49:17 65:18 66:2 maintain [1] 4:22 maintained [12] 5:14 7:16 8:18 12:25 14:14,24 20:5 40:14 44:21 45:3,4 50:19</p>	<p style="text-align: center;">N</p> <p>narrow [2] 69:2 70:17 natural [1] 13:5 nature [1] 28:6 need [3] 43:20 47:14 51:12 needed [1] 8:5 needs [1] 43:22 neighboring [1] 35:16 never [3] 20:17 23:19 51:23 nevertheless [2] 34:21 72:23 new [6] 8:3 10:4,5 12:13,18 18:15 next [1] 72:8 niceness [1] 19:17 nine [2] 60:4 61:4</p>

<p>nobody ^[1] 53:3 non-existence ^[1] 21:2 non-jurisdictional ^[1] 45:21 noon ^[1] 54:7 North ^[1] 48:3 noted ^[1] 68:6 nothing ^[4] 13:8,10 38:17 51:22 notice ^[1] 43:22 notwithstanding ^[1] 30:15 November ^[1] 1:12 nowhere ^[1] 20:15 nuclear ^[1] 50:23 number ^[3] 22:13 30:12 32:9</p>	<p>ordering ^[2] 12:23 55:10 Osborne ^[1] 67:2 other ^[24] 5:1 8:22 13:17 20:20 25:16 31:5 33:19 35:23 36:13,20 38:4,17 40:18 47:13 48:25 54:22 56:14 58:1,3 66:13,16 69:20 70:23 74:6 others ^[2] 22:23 26:11 otherwise ^[2] 3:17 64:4 out ^[22] 4:17,20 8:1 13:7 16:9,23 38:13,18 56:5 58:15 59:12 63:9 64:16 66:21 67:23 68:9,16 69:4,21 70:18 73:12 74:4 outcome ^[14] 10:16,21 11:17 14:1 19:21 30:13 31:11 32:14 33:6,9,11 34:6 72:14 74:17 outcomes ^[2] 27:9 34:2 outlined ^[1] 21:7 outside ^[4] 48:5 49:15 51:18 57:3 over ^[19] 10:9 11:11,11 12:4 17:11 21:1 27:20,21 30:19 35:11 40:17,25 41:2 42:8 47:1 51:16 67:18 71:8 72:7 overstepped ^[1] 33:22 overtly ^[1] 10:2 own ^[3] 53:8 54:23 74:4</p>	<p>period ^[1] 31:17 permissible ^[3] 43:21 49:3 59:11 pernicious ^[1] 15:19 person ^[2] 38:4 40:22 personal ^[2] 18:2 20:8 petition ^[1] 66:20 Petitioner ^[18] 1:4,19 2:4,15 3:8 36:24 40:3 43:9 45:13 47:5 48:14 53:25 56:15 65:17 66:1,3,18 71:18 Petitioner's ^[2] 35:1,4 phrase ^[1] 8:11 picture ^[1] 15:16 piece ^[2] 59:24 67:16 pierce ^[1] 16:19 pit ^[1] 52:20 place ^[2] 45:6 52:19 Plaintiff ^[6] 38:20 62:19 73:6,6,8,11 plaintiff's ^[2] 73:2,7 play ^[2] 45:1 74:22 please ^[3] 3:10 34:17 57:20 plenary ^[1] 42:20 point ^[7] 12:24 34:25 47:3 51:16,20 56:14 72:15 pointed ^[1] 13:7 points ^[1] 71:20 political ^[1] 51:2 posed ^[3] 71:24,25 74:19 posing ^[1] 74:21 posited ^[1] 29:16 position ^[4] 17:19,25 18:8 22:17 possessed ^[1] 58:19 possible ^[1] 6:25 possibly ^[1] 29:25 potential ^[1] 19:18 potentially ^[1] 46:17 Pottawatomi ^[3] 1:25 2:11 57:18 power ^[8] 6:15 9:18 24:10,11 35:5 41:7 58:9 59:8 powers ^[15] 6:10 9:23 19:19 36:4 41:14 42:24 43:6 57:24 64:21 65:14 68:3 70:2,6 71:23 72:2 practical ^[2] 31:8 40:4 PRATIK ^[3] 1:23 2:9 57:16 prayer ^[2] 10:10 27:21 precedent ^[2] 16:13 63:24 precise ^[1] 73:4 precisely ^[2] 3:25 71:8 precludes ^[2] 47:8 52:6 precluding ^[1] 52:2 premise ^[1] 16:8 presented ^[1] 51:10 Presumably ^[2] 61:10 62:6 presupposing ^[1] 24:18 prevailed ^[2] 22:10 55:4 prevailing ^[4] 55:19,23 72:22,24 prevent ^[1] 65:7 prevented ^[3] 3:21 6:15 9:18 preventing ^[2] 16:23 17:5 prevents ^[1] 74:11 primary ^[1] 73:2 principle ^[1] 46:10 principles ^[3] 9:16 10:15 16:21</p>	<p>prior ^[3] 25:17 26:23 39:14 private ^[3] 19:3,5,21 probably ^[1] 68:23 probative ^[1] 10:22 problem ^[20] 5:11 19:19 40:16,24 45:22,25 46:14,22 51:2 56:13 59:15 63:23 64:12 65:2 66:17,24 68:5 69:15 70:8 71:24 problematic ^[1] 61:5 problems ^[1] 58:16 proceed ^[2] 31:12 33:10 proceeded ^[1] 22:9 process ^[5] 34:2 38:20 66:17,19,21 processing ^[2] 45:9,14 Professor ^[3] 17:20 58:5 59:17 Professors ^[2] 17:3 59:12 promptly ^[1] 4:13 properly ^[5] 3:17 9:6,6,7 22:7 property ^[13] 26:3 34:19 35:12,16,25 36:8 37:16 39:12 40:13 49:8 50:18 69:3 73:20 proposals ^[2] 17:9,12 proposition ^[1] 59:18 prospective ^[5] 14:17 39:20 48:16 53:14,17 prospectively ^[2] 53:22 54:11 protect ^[3] 47:16 72:3,3 protected ^[1] 37:25 protection ^[5] 27:22 40:20 64:16,17 70:8 provide ^[1] 43:23 provides ^[2] 31:25 47:4 provision ^[1] 8:19 provisions ^[3] 17:6 48:12 74:10 public ^[1] 59:2 public's ^[1] 58:20 puppeteering ^[1] 58:24 purely ^[1] 7:3 purposes ^[2] 24:17 46:13 pushing ^[1] 15:20 put ^[2] 46:7 69:7 putting ^[1] 31:14 puzzling ^[1] 9:11</p>
O			
<p>O'CONNELL ^[56] 1:20 2:6 34:13,14,16 35:22 36:9,12,18 37:7,10 38:23 39:8,15,18 40:15 41:2,9,16 42:2,9,12 43:1,3,13 44:4,10,13,24 45:11 46:2,8,18 48:1 49:4,14 50:15 51:5,9,25 52:11,15,23 53:2,15,20,24 54:13,16,19,23 55:8,12,16 56:4 59:23 objection ^[3] 14:9,11 17:23 objections ^[1] 15:15 objective ^[1] 73:2 objectives ^[1] 17:5 observation ^[1] 7:8 observed ^[1] 72:25 occurred ^[2] 6:18 12:14 odd ^[1] 70:19 offensive ^[1] 10:14 offered ^[1] 58:1 officer ^[4] 47:24 48:5,8,15 okay ^[14] 13:1 18:5 25:22 26:6,6,6,7 27:5 37:8,13 42:25 52:25 67:7 68:23 old ^[4] 30:15,16 31:11 44:2 older ^[1] 44:11 omission ^[1] 5:20 omitted ^[2] 6:20 14:6 Once ^[3] 33:9 54:6 56:5 one ^[34] 5:16 6:14 7:24 8:16 10:22 11:3 19:2,4,7 22:12 24:20 37:24 39:25 40:6,17,21 41:3 42:13 43:11,11 44:6 45:2,13 49:1 54:6 56:14 57:5 58:5 62:4 65:22 66:1 69:9,21 73:16 ones ^[1] 37:25 only ^[18] 4:6 5:6,8 13:3 19:12 20:1 23:5 25:12 28:6 31:16 38:9 40:5,5 41:2 63:19 69:19 70:18 74:15 open ^[3] 50:12,16 65:23 opening ^[1] 45:13 operations ^[1] 34:20 operative ^[3] 14:13,25 28:5 opinion ^[2] 44:14 68:6 opportunity ^[2] 27:16 74:6 opposite ^[1] 12:19 opposition ^[1] 51:8 oral ^[7] 1:13 2:2,5,8 3:7 34:14 57:16 order ^[4] 52:4 55:18 61:13 62:11 ordered ^[1] 55:6</p>	<p style="text-align: center;">P</p> <p>PAGE ^[4] 2:2 25:10 31:13 58:3 pages ^[1] 73:22 part ^[12] 5:6,11 10:13 18:3 34:22 38:24,25 47:20 49:17 60:25 69:17 72:2 particular ^[7] 8:3 24:5 32:14 40:1 62:12 68:9,22 particularized ^[1] 68:21 particularly ^[1] 15:19 particulars ^[2] 31:8 32:12 parties ^[4] 19:4,22 45:8 75:7 parties' ^[1] 27:1 parts ^[1] 6:13 party ^[6] 19:5 51:24 55:19,23 72:21,24 pass ^[2] 32:5 36:17 passage ^[2] 25:13,14 passed ^[7] 23:19,21 49:16 53:17 65:8 66:4 70:21 past ^[2] 44:2 49:12 PATCHAK ^[17] 1:3 3:4 18:7,25 20:2 21:1,15 22:5,9 27:25 34:23 35:3,14 55:4 72:9 73:13 74:15 Patchak's ^[10] 3:20 10:20 40:13 68:14,16 70:19,21,22 74:11,17 peaceful ^[1] 37:16 pending ^[17] 3:17 11:10 14:12,14,22 16:16 28:4 30:23 31:2 32:10 33:8 40:5 41:8,10 56:11 63:15 66:25 people ^[1] 70:24 percent ^[2] 55:1 56:1 perfectly ^[4] 33:13,15 42:3 64:5 perform ^[2] 16:3 58:10 performing ^[1] 3:21 perhaps ^[2] 36:22 54:8</p>	<p style="text-align: center;">Q</p> <p>question ^[47] 5:5 7:6 8:25 11:7 12:21 15:2,2 16:8 18:17 19:6 22:21,22 23:23 24:1,18 26:14,20,24 27:3,3,19 29:8,13,18,19 30:24 32:3,25 39:7,10,24 44:7 46:7,13 47:12 48:4 50:22 53:9 57:22 60:7 64:9,11,20 65:11,20 68:24 69:14 questions ^[11] 7:14 10:13 20:10 26:24 33:21 43:16 49:5,19 54:5 57:11 71:11 quick ^[1] 71:20 quickly ^[1] 71:21 Quiet ^[6] 18:10,21 34:25 48:6,9,10 quintessential ^[2] 5:25 19:5 quite ^[4] 58:7 62:5 67:5 74:9 quote ^[1] 13:9</p>	
R			

Official

<p>raise ^[3] 19:1 59:14 68:23 raised ^[2] 47:13 66:18 raises ^[2] 10:12 58:15 rather ^[2] 10:3,24 ratification ^[3] 25:8 26:1 37:3 ratified ^[2] 18:19 25:4 ratify ^[1] 25:17 ratifying ^[1] 35:8 rational ^[1] 40:22 reach ^[1] 51:12 Reaffirmation ^[1] 18:15 real ^[6] 13:11 45:21,25 46:14 51:1 67:15 reality ^[1] 38:16 realize ^[1] 23:25 really ^[8] 6:13 13:4 18:11 19:22 51:15 53:11 54:20 74:1 reason ^[5] 7:21 12:16 60:23 61:25 73:4 reasons ^[4] 18:3 19:1 61:6 62:3 rebuffed ^[1] 73:3 REBUTTAL ^[6] 2:13 29:21 32:22 33:1 70:13 71:17 recent ^[1] 43:17 recognize ^[2] 18:25 41:7 recognized ^[1] 70:9 Reed ^[1] 44:19 refer ^[2] 4:10 72:19 reference ^[2] 4:22 44:2 referred ^[1] 24:5 referring ^[3] 4:6,7,9 refers ^[1] 6:2 regardless ^[2] 36:23 39:3 regulation ^[1] 49:16 rejected ^[1] 4:2 relate ^[2] 49:7 50:9 related ^[1] 40:9 relates ^[1] 73:19 relating ^[9] 7:16 49:1 50:4,8,18 52:9,17 53:1 69:3 relationship ^[1] 73:15 relatively ^[1] 69:2 relevant ^[1] 6:11 reliance ^[1] 35:19 relied ^[1] 35:15 relief ^[9] 39:2,20,21 48:16 53:14,17 62:21,21,25 rely ^[1] 59:17 relying ^[1] 58:4 remand ^[2] 22:14,22 remedy ^[1] 17:12 remembering ^[1] 51:8 removal ^[1] 4:24 repeatedly ^[1] 19:14 replicating ^[1] 17:1 report ^[1] 31:13 reports ^[1] 21:12 Representatives ^[2] 73:21,25 represented ^[1] 73:6 requirement ^[1] 48:18 requiring ^[1] 46:3 res ^[3] 62:21 63:1 73:10 research ^[1] 8:13 reservation ^[1] 49:18</p>	<p>reserve ^[2] 32:19,21 reserving ^[1] 67:5 resolution ^[1] 59:3 respect ^[13] 3:20 7:3 12:10 14:12,13,17,22 20:11 66:25 68:22 73:15 74:18 75:5 respects ^[1] 37:4 Respondent ^[3] 1:25 2:12 57:18 Respondents ^[8] 1:8,22 2:7 34:15 72:16 74:8,8 75:7 response ^[5] 14:4 23:23 43:15 66:11,12 responses ^[3] 40:2 46:3 65:25 responsibilities ^[3] 3:22 6:17 9:20 responsive ^[1] 7:6 restart ^[1] 49:20 restoration ^[1] 20:14 restore ^[1] 21:8 restores ^[1] 21:20 restrict ^[1] 58:9 result ^[14] 4:23 5:3 6:18,19 17:14,22 19:4 41:8,9 61:22 62:12,14 64:5 73:13 results ^[2] 41:19 72:10 retains ^[1] 39:10 retroactive ^[7] 25:2 36:21 37:4,23 39:4,6,22 return ^[2] 9:15 16:20 review ^[7] 4:1,25 6:9 29:11 43:8 47:8 52:6 revoked ^[1] 48:22 revoking ^[1] 35:12 rights ^[4] 17:8 22:18 35:25 72:3 ROBERTS ^[31] 3:3 16:25 28:14,18,21 29:4,7 32:23 34:11 41:1,5,11,23 42:19 43:2 47:9 48:23 50:2,21 51:6 57:13 59:5 63:2,12,25 64:8,18 70:11 71:12,15 75:12 Robertson ^[1] 12:15 role ^[3] 32:15 56:25 57:1 route ^[2] 65:21,22 rule ^[18] 6:25 7:2 8:4,21 9:3,4,4 11:2 27:16 43:23 45:9,14,20 46:4 56:4,13 70:20 71:3 rules ^[2] 12:10 56:11 run ^[1] 71:20 runs ^[1] 64:17 RYAN ^[1] 1:6</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same ^[20] 4:23,23 5:3,15 6:19 10:21 14:9,10 15:4,6,14 17:23 21:20 22:3 26:22 27:18 48:12 61:3 66:2 75:3 save ^[2] 29:20,25 saying ^[11] 5:15 11:5 12:3 15:10 30:14,24 33:14 34:7 41:12 50:11 60:25 says ^[26] 10:8 16:14 20:5 22:6 24:8 25:3,3 29:25 32:6 38:6,18 42:22 45:2,4 47:22 50:9 52:13 58:4,5 60:11 61:2,21 67:14,16,17 72:10 Scholars ^[2] 58:2,12</p>	<p>school ^[1] 10:10 schools ^[1] 27:21 scope ^[2] 51:18 57:3 SCOTT ^[5] 1:18 2:3,14 3:7 71:17 scrutiny ^[2] 12:17 30:1 Sebelius ^[3] 43:20 44:3 45:14 second ^[2] 38:24 66:12 SECRETARY ^[5] 1:6 37:6,7,11 48:15 Secretary's ^[5] 18:20 35:9 40:12 49:8 53:5 Section ^[10] 3:11,15,25 8:9 14:18 36:23 43:10 53:25 54:3 56:16 see ^[7] 8:20 18:22 19:18 21:6 40:23 59:5,16 seem ^[1] 50:4 seems ^[8] 16:10,25 40:3 43:14 51:1 69:11 70:5 74:13 sees ^[1] 37:20 seminal ^[1] 65:15 Senate ^[1] 21:12 sense ^[2] 25:9 33:12 sensible ^[1] 71:2 separable ^[1] 23:17 separated ^[1] 15:8 separation ^[16] 6:10 9:23 19:19 36:4 41:14 42:23 43:6 57:24 64:21 65:14 68:3,12 70:2,6 71:23 72:1 separation-of-powers ^[28] 3:14 5:10 6:12 7:2 9:3,9 10:15 12:16 14:20 19:6 20:9 29:12 30:1 31:3,6 40:24 42:21 56:12 58:16,22 59:15 64:12,20 65:2 66:22,23 68:4 69:15 serious ^[3] 10:12 19:7 35:19 seriously ^[1] 8:1 set ^[2] 10:17 64:13 settle ^[1] 18:17 severable ^[1] 22:15 several ^[1] 3:13 severed ^[1] 8:24 severely ^[2] 69:7,11 SHAH ^[40] 1:23 2:9 57:15,16,19 59:7,10,17,21 60:2,5,9,14,20,23 61:15,20,23 62:10,13,18 63:11,16 64:7,10,23 65:24 67:6,7,20 68:2,15 69:12,16,24 70:3,7,14 71:14 74:19 shall ^[26] 4:5,12 5:13,21 6:20 7:16 8:18,18 10:9 12:24 14:6,14,15,23,24 29:23 32:6 34:7 40:14,14 44:20 60:11,19 61:14 67:17 73:20 She-Wish ^[1] 2:11 Shore ^[1] 31:5 shoulders ^[1] 72:7 shouldn't ^[3] 13:14 50:13 71:25 show ^[1] 44:5 side ^[6] 27:1 47:13 54:22 58:1,3 59:11 sight ^[1] 72:1 significance ^[1] 5:22 similar ^[4] 30:3,6 44:16,19 simultaneously ^[1] 58:9</p>	<p>since ^[3] 34:21 63:9 71:10 single ^[2] 8:14 30:8 singled ^[1] 68:16 singling ^[3] 64:16 68:9 69:21 situation ^[2] 30:4,6 situations ^[2] 29:15,16 slip-and-fall ^[1] 49:2 Smith ^[32] 27:11 29:22 30:12 40:7,8 41:12,16 42:1,4,7,10,13,17 59:25,25 60:11,12,18,21 61:2,8,8,10,13 62:6,15,15,16,17,19 74:22,24 Smiths ^[1] 30:11 Solicitor ^[1] 1:20 somebody ^[1] 49:23 somehow ^[1] 72:17 somewhat ^[2] 10:13 52:8 sorry ^[4] 26:13 32:17 41:4 59:21 sort ^[6] 36:13,24 39:1 50:23 68:18 71:1 SOTOMAYOR ^[10] 16:5 18:1,7 19:25 20:17,22,25 41:4 48:24 49:11 sought ^[1] 17:11 sound ^[1] 30:7 sounds ^[1] 31:18 sovereign ^[33] 18:3,8,24 19:10,16,20 20:3,7,13,14,16 21:2,8,16,18,23,24 28:1 35:13 47:2,4,9,14,15,21,21,22,25 48:10,20 50:22 51:4,21 speaks ^[1] 45:7 special ^[1] 68:10 specifically ^[1] 38:24 stamp ^[2] 63:5,6 standing ^[1] 28:1 start ^[1] 57:21 started ^[1] 15:3 starting ^[1] 70:15 state ^[11] 28:8,9,10,15,19 37:5,12,14,15 38:2 48:4 statement ^[3] 43:20 45:20 46:4 STATES ^[5] 1:1,14 34:18 51:24 52:3 status ^[5] 35:2,7,12 49:7 53:5 statute ^[86] 4:7,17 5:2,7,15 6:8,24 7:4,12,18,21 8:4,7,15,22,23 9:1,5,8,14,17 10:8 11:14 13:6 16:11 22:6,15 23:5 26:16 27:15 29:21 31:24 32:6,7 36:17 38:11 39:3,22 40:2,6,21 41:13,17 42:14,16,18,22,23 43:23 44:1,23,24 45:2 46:25 47:5,8 48:6,18,21 49:6,12,15,20 51:3,5,13,22 52:2,5,13 53:4 55:11,15 56:18,20 57:5 60:24 61:13,25 63:10,18 65:8 66:4 68:17,25 70:21 statutes ^[1] 31:10 statutory ^[9] 18:14 20:1,13,23 21:4 27:23 28:5 47:17 48:11 stems ^[1] 34:22 step ^[1] 33:20 stick ^[1] 45:19 still ^[11] 4:20 5:17 9:8 28:5 36:17 37:11 53:11 61:16,23 68:18 72:13 stop ^[3] 5:14 6:3 13:14 strands ^[3] 3:13 6:11 14:20</p>
---	---	--	--

Official

<p>strictly ^[1] 66:22 strike ^[1] 71:2 strip ^[1] 8:17 stripping ^[2] 22:18 43:19 strips ^[5] 6:8 8:10 30:18 33:7 64:3 stuck ^[1] 53:11 subject ^[4] 9:8 17:23 34:20 57:6 submit ^[6] 6:17 9:5 10:18 20:13, 21 25:6 submitted ^[3] 17:13 75:13,15 substance ^[1] 41:25 substantial ^[2] 55:24 72:2 substantially ^[3] 30:3,6 74:22 substantive ^[1] 12:1 succinctly ^[2] 6:25 9:22 suddenly ^[2] 56:2 70:24 sue ^[3] 47:24 50:25 69:19 sued ^[4] 28:15,19 32:4 47:5 sufficient ^[1] 39:11 suggest ^[1] 20:21 suggested ^[2] 15:25 47:19 suggesting ^[4] 4:15,19 11:2 15:12 suing ^[2] 24:14 48:4 suit ^[24] 19:11 20:5 22:8 32:1,7 36:24 40:9,13 42:8 47:16 48:5,8,15 49:11 61:8 66:4,10 68:14,17 70:18,22,23,24 73:18 suits ^[9] 19:9 30:23 49:7 66:8 67:11,14,19,24 69:2 supporting ^[1] 58:2 suppose ^[14] 7:14 10:7 23:18 29:4,7 32:5 35:14 52:17 54:25,25 55:3 61:12,12 63:8 SUPREME ^[2] 1:1,14 surprising ^[1] 6:1 survive ^[1] 12:16 switch ^[1] 18:2</p>	<p>throwing ^[1] 38:13 Title ^[7] 18:11,21 34:18,25 48:7,9,10 Today ^[1] 12:5 took ^[7] 15:5 18:8 23:8 29:13 34:18 44:15 53:18 Tort ^[2] 31:24 32:7 torts ^[1] 32:2 touchstone ^[2] 6:11 9:15 toward ^[1] 40:7 toxic ^[1] 52:18 track ^[1] 53:8 tracks ^[1] 20:4 traversed ^[1] 33:23 treatment ^[1] 68:10 trial ^[1] 37:12 tribe ^[3] 28:15 37:24 52:18 tribe's ^[3] 34:19 39:13 49:18 tribes ^[2] 24:6,6 tried ^[1] 38:15 true ^[4] 4:24 48:12 63:24 65:15 trust ^[23] 23:8,9 24:4,11,12 25:13,17 26:2,5 31:14 35:2,7,11 38:10 39:5,13 49:7,10 53:4,6,7,19 54:11 try ^[4] 26:23 29:18 34:1 71:20 trying ^[6] 16:9 29:11 57:1 71:5 72:16 74:16 Tuesday ^[1] 1:12 turned ^[3] 21:15 69:4 70:18 two ^[9] 5:2 6:13 14:12 19:1,3 30:16 44:5 45:12 73:16 twofold ^[1] 7:23 type ^[2] 68:5 69:19 types ^[2] 17:12 69:20</p>	<p>using ^[5] 8:14 21:17,20 58:25 72:12</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>variety ^[1] 42:5 versus ^[4] 3:5 44:14 48:2 72:20 vest ^[1] 58:7 vested ^[1] 35:25 view ^[3] 7:9,22 54:15 viewed ^[1] 8:5 viewpoint ^[1] 41:15 violate ^[2] 36:3 42:23 violated ^[1] 26:17 violates ^[3] 9:22 43:5 65:14 violation ^[3] 5:10 29:10 68:4 violations ^[3] 27:17,18,22 virtual ^[1] 13:9 vitiate ^[1] 48:17 void ^[1] 22:3 voluntary ^[1] 19:13 vow ^[1] 65:3 vulnerable ^[1] 8:23</p>	<p>16 71:4 74:23 work ^[1] 73:18 world ^[1] 8:2 worried ^[1] 37:17</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[1] 72:20 years ^[4] 43:17 63:24 65:16 71:9 yesterday ^[1] 12:4 yourself ^[1] 15:8</p>
<p style="text-align: center;">T</p> <hr/> <p>takings ^[2] 36:14,22 talked ^[2] 33:18 68:20 talks ^[1] 26:1 targeting ^[3] 39:25 66:4,10 targets ^[1] 40:21 term ^[2] 15:18 31:23 terms ^[2] 39:4 45:7 territory ^[2] 23:9,9 text ^[4] 8:8 20:12,15 68:17 Thaler ^[1] 44:14 theory ^[3] 27:4 30:9,9 there's ^[26] 13:8,9 15:25 19:2 22:20 26:4,25 28:3 29:9 38:4 40:22 42:7 44:5,25,25 49:19 51:1 55:8 56:20,22 62:24,25 63:1 66:13 67:8 74:24 thereby ^[1] 35:12 therefore ^[4] 29:22 38:6 42:10 74:24 they've ^[3] 37:20 53:13 70:20 thinks ^[2] 37:19,22 though ^[3] 38:14 54:9 55:25 three ^[3] 61:6 70:23 71:15 throw ^[1] 38:17</p>	<p style="text-align: center;">U</p> <hr/> <p>unanimous ^[2] 72:19,25 uncertain ^[1] 74:13 uncertainty ^[2] 34:21,22 unconstitutional ^[2] 3:12 5:18 11:4,13 12:6,7,8 14:19 16:12,18 17:4,7,14,22 18:19 32:10 41:13,17 60:1 64:5 68:2 under ^[17] 6:10 12:9 24:4 27:9 31:11,13,23 37:15 41:13 47:6 52:3 54:10,19 55:11,12,14,14 underlying ^[5] 16:7 28:4 34:8 41:20 58:23 understand ^[12] 5:4 12:21 13:1 15:9 17:19 18:23 25:5 38:7 43:25 50:11 59:7 64:19 understanding ^[2] 26:16 74:5 understood ^[1] 22:7 undo ^[1] 56:7 UNITED ^[5] 1:1,14 34:18 51:23 52:3 unlawful ^[1] 31:15 unless ^[1] 8:20 unlike ^[1] 31:9 until ^[1] 69:17 up ^[9] 7:14 12:24 33:5 34:24 38:8 56:8 69:17 70:16 72:12 uphold ^[1] 72:6 uses ^[2] 8:11 26:3</p>	<p style="text-align: center;">W</p> <hr/> <p>waived ^[3] 21:16,24,25 waiver ^[8] 18:13,24 20:3 35:13 47:4,15 48:10,20 wanted ^[3] 8:3,4 49:23 warnings ^[1] 43:24 Washington ^[4] 1:11,18,21,23 waste ^[1] 52:18 way ^[12] 8:1 10:18 16:4,16 17:21 21:21 28:25 42:3 48:3 49:12 51:15 61:3 ways ^[1] 42:5 Wechsler ^[2] 17:3 64:2 well-established ^[1] 3:13 whatever ^[3] 9:10 38:7 43:21 whenever ^[2] 17:13 73:2 Whereupon ^[1] 75:14 whether ^[19] 10:23 17:3 28:12 31:24 32:3,13 39:3,25 41:25 43:5,14 49:19 56:23,24 57:2,9 65:1,7 66:9 whole ^[2] 20:25 43:7 wholly ^[1] 58:17 will ^[2] 69:1 72:6 win ^[7] 8:20 24:16 29:22 30:11,14 72:22 74:24 wins ^[16] 27:11 40:8 41:12,17 42:1,4,7,11,14 61:8,10,14 62:15,15,20 74:22 withdraw ^[1] 65:11 withdrawal ^[1] 65:15 withdrawing ^[2] 63:19 66:24 withdrawn ^[1] 19:20 withdrew ^[1] 21:19 within ^[4] 35:4 57:9 58:14 64:14 without ^[6] 5:22 11:18 34:7 41:19 44:2 52:9 won ^[1] 73:8 wondering ^[2] 22:17 72:8 word ^[1] 22:1 words ^[16] 4:7,10,16 5:1 6:20 14:6,13 15:5,11,13,15 16:9 21:17 25:</p>	<p style="text-align: center;">Z</p> <hr/> <p>ZINKE ^[4] 1:6 3:5 22:5 48:16</p>