

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   NEVADA COMMISSION ON ETHICS,                   :

4                           Petitioner                           :   No. 10-568

5                   v.   :

6   MICHAEL A. CARRIGAN                                       :

7   - - - - - x

8   Washington, D.C.

9   Wednesday, April 27, 2011

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11                           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 10:09 a.m.

14   APPEARANCES:

15   JOHN P. ELWOOD, ESQ., Washington, D.C.; on behalf of  
16       Petitioner.

17   JOSHUA E. ROSENKRANZ, ESQ., New York, New York; on  
18       behalf of Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOHN P. ELWOOD, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOSHUA E. ROSENKRANZ, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	JOHN P. ELWOOD, ESQ.	
10	On behalf of the Petitioner	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: Our last argument of  
4 the term is in Case 10-568, Nevada Commission on Ethics  
5 v. Carrigan.

6 Mr. Elwood.

7 ORAL ARGUMENT OF JOHN P. ELWOOD

8 ON BEHALF OF THE PETITIONER

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

11 Neutral laws requiring official recusal for  
12 conflict of interest do not abridge free speech because  
13 a legislator's vote, however expressive, is not  
14 protected speech. It is, rather, a legally binding  
15 exercise of State power that he wields as an incident of  
16 public office.

17 The Nevada Supreme Court concluded that  
18 Respondent did have a free speech right to vote, and  
19 that overrode the Nevada recusal statute. For four  
20 reasons, that holding was error.

21 First, since the earliest days of the  
22 Republic recusal rules have been understood to serve  
23 important interests unrelated to any views a legislator  
24 may want to express, by requiring disqualification when  
25 circumstances indicate that private interests may have

1 affected his independence of judgment.

2 JUSTICE KENNEDY: The -- the -- the case  
3 is -- is presented to us with briefs that seem to pass  
4 in the night. Your emphasis was on whether or not there  
5 was a right to vote that's protected under the First  
6 Amendment, and -- which is what the Nevada court held  
7 and you're quite correct to address it. But the  
8 Respondent says: Well, this interest has a chilling  
9 effect on -- on protected speech. I think we have to  
10 reach both parts of that argument.

11 Do you -- DO you agree with me?

12 MR. ELWOOD: I think that the Court could  
13 simply address what the Nevada Supreme Court did and  
14 tell it whether it got it right or got it wrong, whether  
15 there's a speech interest, and what -- whether that is  
16 subject to strict scrutiny or not.

17 But I think that, even though that argument  
18 I don't think was raised or passed on below, that the  
19 Court would have discretion to address that. I think it  
20 would give additional guidance to the Nevada Supreme  
21 Court.

22 JUSTICE KENNEDY: Well, if we -- if we say  
23 that intermediate scrutiny is the test, even under that  
24 test, certainly under that test, the regulation cannot  
25 chill speech any more than necessary to fulfill the

1 governmental interests, even under the intermediate  
2 standard.

3 MR. ELWOOD: I --

4 JUSTICE KENNEDY: And -- and it just seems  
5 to me it's difficult for it to just address the standard  
6 of proof without deciding the case. Maybe you're right.  
7 Maybe we can just answer the -- the question that was  
8 certified and -- and send it back, if -- if you prevail.  
9 I'm not sure.

10 MR. ELWOOD: I think -- I think you're  
11 right, Justice Kennedy, that it would provide more  
12 guidance to the Nevada Supreme Court. It would be a  
13 pretty narrow reversal and remand, assuming that the  
14 Court merely reached the speech question.

15 But on the associational question, I think  
16 it's important to emphasize from the outset that I think  
17 this would have a negligible effect on association,  
18 because it simply would not apply all that frequently.  
19 In order for the recusal statute to apply, two  
20 circumstances have to be simultaneously met. First,  
21 there has to be a qualifying relationship which is close  
22 and ongoing, and simultaneously it must have the -- it  
23 must -- the third party must have a private, usually  
24 pecuniary, interest before that same legislator.

25 JUSTICE GINSBURG: As I understand the

1 objection, it's not to the recusal rules in general, but  
2 it's to the vagueness of this particular one. As I  
3 understand it, there's no concern about the specific  
4 categories that were mentioned, like family member or  
5 employer.

6 MR. ELWOOD: That is correct, Justice --

7 JUSTICE GINSBURG: So we're dealing not with  
8 can you have recusal rules. Everybody believes, yes,  
9 you can. It's the degree of specificity.

10 MR. ELWOOD: Well, that was the basis of the  
11 holding of the Nevada Supreme Court, was that those  
12 implicated speech rights and that all of them would be  
13 subject to strict scrutiny. So from the outset, we may  
14 all be agreed that the court below applied fundamentally  
15 too high a level of scrutiny.

16 JUSTICE KENNEDY: But the -- the objection  
17 to the statute on the grounds that it's vague doesn't go  
18 away simply because intermediate scrutiny applies, does  
19 it, assuming intermediate scrutiny?

20 MR. ELWOOD: No, but I think that the -- our  
21 response to the vagueness argument is that Respondent  
22 concedes that the four categories for members of your  
23 households, relatives, employers, and business  
24 relationships are clear. He says that on page 2 of his  
25 brief. So the question is whether the "substantially

1 similar" language gums up the works, essentially.

2 Now, "substantially similar" is a statutory  
3 phrase that has had to have been used by every State  
4 legislature in the country and by Congress.

5 JUSTICE GINSBURG: But not in this context.  
6 And you don't disagree that -- I forgot which brief told  
7 us that there's no State has a similar catch-all.

8 MR. ELWOOD: Well, first, I would disagree  
9 with the characterization of it as a catch-all, because  
10 it only sweeps in relationships that are substantially  
11 similar. But Seattle, for example, has a, what is a  
12 true catch-all, which sweeps in -- it applies "whenever  
13 it could appear to a reasonable person having knowledge  
14 of the relevant circumstances that the covered  
15 individual's judgment is impaired because of either a  
16 personal or business relationship not covered under  
17 subsection A or B above," which lists the covered  
18 relationships, "or a transaction or activity engaged in  
19 by the covered individual."

20 So while Nevada may be the only statute that  
21 applies "substantially similar" to these four  
22 categories, it is not alone in that structure. And I  
23 think more importantly, it is not anywhere close to  
24 alone in its breadth. The New Jersey statute is I  
25 think, if anything, broader: "A direct or indirect

1 financial or personal involvement." There are numerous  
2 State statutes which apply to business associates.

3 JUSTICE ALITO: Well, I found this statute  
4 very difficult to understand, but maybe you can explain  
5 what's -- what I found a bit puzzling. The statute  
6 talks about a commitment in a private capacity to the  
7 interests of others.

8 Now, I take it that that commitment doesn't  
9 have to be something contractual. When you're talking  
10 about relatives, that would assume -- that that would  
11 include emotional commitments to the relatives who are  
12 listed; is that correct?

13 MR. ELWOOD: I think it would include the  
14 things -- the same things that are covered by  
15 ordinary -- every other recusal statute, which is very  
16 close personal relationships and relationships that give  
17 rise to a financial interest on the -- for the public  
18 official. And we're not talking about, you know --

19 JUSTICE ALITO: Not -- not a financial  
20 interest of the public official, a financial interest of  
21 the -- the relative or the person who is substantially  
22 similar to a relative. Or is that wrong?

23 MR. ELWOOD: Well, I think that in the case  
24 of the relative, yes, it's the financial interest of the  
25 relative, and that's why the very close personal



1 relationship. But all of the other relationships for  
2 members of the household, who are presumably part of the  
3 same economic unit, and for employers, in whom the  
4 officer has obviously a very close financial interest  
5 and they're tied together, and for business  
6 relationships, all of those are to get at the financial  
7 interests of the officer, not of the third party.

8 JUSTICE ALITO: Maybe if I give you an  
9 example it will be clearer. Let's take somebody who is  
10 within the third degree of consanguinity. So that would  
11 include second cousins?

12 MR. ELWOOD: Yes.

13 JUSTICE ALITO: Okay. Now, let's say a  
14 public officer is considering something that would  
15 affect everybody's property taxes in town or a measure  
16 that would affect the benefits or the wages of everybody  
17 who works for the town. And this official has a second  
18 cousin whose property taxes would be affected or works  
19 for the town, and the second cousin's wages or benefits  
20 would be affected. Now, would that person have to  
21 recuse?

22 MR. ELWOOD: I think that the -- it would  
23 depend on a couple of things. First of all, it is a  
24 covered relationship, the second cousin would be a  
25 covered relationship. And -- and I think the interest

1     there I think would be the subject of some debate  
2     whether it is a private interest because it is a broadly  
3     shared interest. But I suppose because his property  
4     taxes might increase, it would be a private interest.

5             There is still the question of whether a  
6     reasonable person under those circumstances would view  
7     his -- his judgment, his independence of judgment, as  
8     being materially affected.

9             JUSTICE ALITO: Well, if I were a public  
10    officer I would find it very difficult to figure out  
11    whether a reasonable person would think that an effect  
12    on my second cousin's property taxes would require --  
13    would materially affect my judgment. But it's even  
14    worse than that because of the "substantially similar."  
15    So the public officer not only has to think about second  
16    cousins; the person has to think about everybody who is  
17    like a second cousin to him or her. I have no idea how  
18    you -- how you go about that.

19            MR. ELWOOD: Well, the way that that has  
20    been defined, and this appears -- this is not just a  
21    Nevada Commission on Ethics interpretation. This is  
22    what the legislature understood it to mean, if you look  
23    at the legislative history, when they added the statute  
24    in 1999. What they were looking for by adding the  
25    "substantially similar" relationships were relationships

1 that were substantially similar to household and  
2 substantially similar to family. And what is at issue  
3 there is not the fact that you have a genetic similarity  
4 makes you more likely to see things their way, but that  
5 families are presumed to be among your closest  
6 relationships.

7 JUSTICE KENNEDY: Suppose that you spent  
8 your life in the civil rights movement or the right to  
9 bear arms movement or one or the other sides of the  
10 abortion debate, and these are your acquaintances, this  
11 is your -- it's been one of your principal activities,  
12 not for pay, but just because of your civic commitment.  
13 And then you are elected to the legislature and under  
14 this Nevada statute that controls, must you recuse  
15 whenever an officer of that association has -- is paid?

16 MR. ELWOOD: No, Your Honor. Because, to  
17 begin with, a personal relationship, it only covers the  
18 very closest personal relationships. So your most  
19 intimate and closest relationships on earth would be  
20 covered.

21 JUSTICE KENNEDY: They have coffee together  
22 every morning and they're in the same book club.

23 MR. ELWOOD: And even that, Justice Kennedy,  
24 applies with extraordinary rareness. The last case that  
25 I'm aware of where personal interests alone justified

1     recusal was in 1999 before the statute was amended.

2                   JUSTICE SCALIA:  Mr. Elwood, for me at least  
3     we've -- we've jumped way ahead.  I'm not so much  
4     concerned about the vagueness as I am about the  
5     proposition that ethical rules adopted by legislatures  
6     for voting are subject to review by this Court or by any  
7     court under the First Amendment.  This is the first case  
8     I'm aware of that we've ever had which makes such an  
9     allegation or -- I'm not even aware of any other case in  
10    220 years in Federal courts.

11                   And it's certainly not because legislative  
12    rules have not been vague.  The first Congress adopted a  
13    rule that, quote, "No member shall vote on any question  
14    in the event of which he is immediately and particularly  
15    interested."  I don't consider that very precise.  And  
16    the rules adopted by Thomas Jefferson for the Senate,  
17    "Where the private interests of a member are concerned  
18    in a bill or question, he is to withdraw."  "The private  
19    interests," what does that mean?  "And where such an  
20    interest has appeared, his voice is disallowed, even  
21    after a division."

22                   Now, that's been around in our Congress  
23    forever, but our Constitution provides that -- that the  
24    rules of the legislature are to be determined by  
25    Congress and not by this Court, and I am sure we would

1 not, we would not review those rules. Now, is there a  
2 contradiction between leaving those rules to Congress  
3 and the First Amendment? Do you really think that --  
4 that the two are set in opposition to each other?

5 MR. ELWOOD: Certainly, Justice Scalia, I  
6 would not think so. And this is the first case that I'm  
7 aware of, it's the first time anyone has said it to my  
8 knowledge. I don't even know of law review articles  
9 that said it before basically the decision that is under  
10 review for neutral laws of general applicability.

11 But to return to Justice Kennedy's question,  
12 what this law --

13 JUSTICE BREYER: You agree with Justice  
14 Scalia?

15 MR. ELWOOD: I agree emphatically with  
16 Justice Scalia, except that I could never put it as well  
17 as he did.

18 JUSTICE SCALIA: You're ending up  
19 skirmishing on what seems to me a less significant  
20 aspect of this case. This case is enormously important  
21 on that major question. I'm not inclined to resolve it  
22 on the question, well, you know, this is too vague. I  
23 mean, it's even vaguer than what the first Congress  
24 adopted. It seems to me that just opens, opens the door  
25 to future litigation challenging ethical rules, which --

1     which does not make me happy.

2                   MR. ELWOOD:  It is true.  And in addition to  
3     that, to expand it even more, apply it even more  
4     broadly, with the exception of essentially the D.C.  
5     Circuit's opinion in *Clarke v. United States*, this is  
6     the first opinion I'm aware of where anyone has even  
7     held that there is a First Amendment interest in any  
8     sort of expressive official act.

9                   CHIEF JUSTICE ROBERTS:  You modified your  
10    answer to Justice Scalia by saying you're not aware of  
11    any case that applied the First Amendment to rules of  
12    general -- neutral rules of general applicability, I  
13    think.  But if the First Amendment doesn't apply, that  
14    doesn't matter, does it?  You can't limit your -- the  
15    type of rules that you say are not -- are okay and are  
16    not if the First Amendment doesn't apply at all?

17                  MR. ELWOOD:  I'm not sure I understand your  
18    question, Justice, but I think --

19                  CHIEF JUSTICE ROBERTS:  Well, if the First  
20    Amendment doesn't apply to this type of activity, then  
21    you would have no First Amendment objection to biased  
22    rules of specific applicability.

23                  MR. ELWOOD:  Oh, absolutely we would,  
24    because I think *R.A.V. v. City of St. Paul* speech that  
25    is subject to prescription can't be regulated in a

1 viewpoint-based manner.

2 CHIEF JUSTICE ROBERTS: I thought your  
3 position was that this wasn't speech protected by the  
4 First Amendment.

5 MR. ELWOOD: But even speech that is not  
6 protected by the First Amendment, such as fighting words  
7 in R.A.V., can't be regulated in a viewpoint-based  
8 manner.

9 CHIEF JUSTICE ROBERTS: So someone can  
10 challenge one of these rules on the grounds that it's  
11 not neutral, that it applies in a disproportionate way  
12 to particular members of the legislature?

13 MR. ELWOOD: I think they could challenge it  
14 in a way -- alleging that it was viewpoint-based if it  
15 were only applied to Democrats or Republicans. But I  
16 don't think that if it were an otherwise normally  
17 applicable rule that it would be subject to challenge on  
18 that basis. That is the relevance of neutrality.

19 JUSTICE KAGAN: I'm not sure why you should  
20 concede even that, Mr. Elwood. If this is just conduct,  
21 if this is not proscribable speech of the kind that  
22 R.A.V. was talking about, why should we care about the  
23 viewpoint based doctrine that's arisen in First  
24 Amendment law?

25 MR. ELWOOD: Well, in the event, Justice

1 Kagan, that is how I interpret R.A.V., that it would not  
2 be an available option to have a viewpoint-based recusal  
3 statute that affected things differently depending on  
4 viewpoint.

5 CHIEF JUSTICE ROBERTS: Do you think that  
6 the rules in the House of Representatives allocating  
7 time on the floor or committee membership are neutral?  
8 They're biased in favor of whichever party happens to be  
9 in the majority.

10 MR. ELWOOD: They are -- I think that  
11 they're -- I think that they're neutrally applicable. I  
12 don't know that they would -- I am not aware of them  
13 applying different amounts of time to majority and  
14 minority members. I may be incorrect about that.

15 JUSTICE SCALIA: Well, and if they did we  
16 would review it.

17 MR. ELWOOD: I think that any time you're  
18 talking about -- I mean, depending on what the house is,  
19 there's an extra measure of deference when you're  
20 applying, obviously, to the houses of Congress.

21 JUSTICE SCALIA: Isn't that nice. But the  
22 cases come up here anyway, right?

23 MR. ELWOOD: They certainly do come.

24 JUSTICE SCALIA: Look, fighting words are  
25 words. They are speech. There's no doubt that they're



1 speech. And it's a considerable question whether the  
2 vote of a legislature is speech for purposes of the  
3 first -- is speech at all, not whether it's a fighting  
4 speech or something else, whether it's speech. It's a  
5 vote.

6 MR. ELWOOD: But in any event, all the Court  
7 even needs to get to is whether laws of neutral  
8 applicability would be covered, because that's all this  
9 statute is.

10 JUSTICE ALITO: This statute doesn't apply  
11 just to voting. It says that the public officer shall  
12 not vote upon or advocate the passage or failure of the  
13 message.

14 MR. ELWOOD: But that is essentially --

15 JUSTICE ALITO: Advocating the passage or  
16 failure of the message is surely speech in the ordinary  
17 understanding of the concept.

18 MR. ELWOOD: But that is to essentially  
19 complete the disqualification just as under Thomas  
20 Jefferson's recusal rule. When you were disqualified  
21 under Jefferson's rule, you were out of it. You  
22 couldn't essentially function as a legislator, and  
23 that's all that attempts to do. It hasn't been applied  
24 to Mr. Carrigan.

25 JUSTICE KENNEDY: It doesn't apply to

1 outside advocacy? It just applies to advocacy within  
2 the limits --

3 MR. ELWOOD: Absolutely. It does not apply  
4 to advocacy as a citizen outside the legislature.

5 JUSTICE KENNEDY: But even if you have a law  
6 which is not directed to speech and is directed at  
7 conduct which is not speech, that law is still --  
8 correct me if I'm wrong -- even under intermediate  
9 scrutiny, subject to invalidation if it has a chilling  
10 effect on -- on speech as an incidental matter, if that  
11 chilling effect is more than is necessary to accomplish  
12 the purpose of the statute. Isn't that correct?

13 MR. ELWOOD: I -- if it is reviewed -- I  
14 mean, it depends on the test you use. We don't think  
15 that O'Brien, which is a test that some of the amici  
16 have proposed, is an appropriate standard, because even  
17 O'Brien is talking about laws that have a much greater  
18 effect on expression because, after all, burning a draft  
19 card, one of the main reasons you would want to do that  
20 is an expressive reason.

21 Whereas these really are laws that have  
22 nothing to do with what views people think you are going  
23 to be expressing. And we think that a closer analogy  
24 are cases like Burdick, where there are laws of neutral  
25 applicability that States use to regulate their

1 processes of self-government. And those, unless they  
2 have a severe burden on association, have been subject  
3 to review for reasonableness under *Burdick* and *Timmons*,  
4 and that entire line of cases. We think that furnishes  
5 a much more appropriate analogy for this case.

6 JUSTICE BREYER: The statute says "or  
7 advocate the passage of." So I guess that's speech.

8 MR. ELWOOD: But, Justice Breyer --

9 JUSTICE BREYER: And the -- I mean, the  
10 basic question is, again, do you agree with Justice  
11 Scalia's question, the import of it; or don't you?

12 MR. ELWOOD: But Justice --

13 JUSTICE BREYER: If it doesn't apply, if  
14 voting is not speech, then no matter how outrageous the  
15 law or rule, it doesn't fall within the First Amendment;  
16 and if it is speech, then you get into some of the  
17 questions that were raised, is this too vague or is it  
18 not?

19 So which is it?

20 MR. ELWOOD: Justice Breyer, I don't think  
21 we have to get as far as the position that Justice Kagan  
22 was suggesting, that I think Justice Scalia is  
23 suggesting, because we're willing to abide by *R.A.V.* and  
24 require neutrality in the regulations of this. I think  
25 the --

1 JUSTICE BREYER: We might have to write an  
2 opinion, irrespective --

3 (Laughter.)

4 JUSTICE BREYER: -- which says --

5 JUSTICE SCALIA: You may be willing to, but  
6 I'm not.

7 JUSTICE BREYER: -- either it is speech or  
8 not, and so that's why we're asking the question, to get  
9 your opinion --

10 MR. ELWOOD: Right.

11 JUSTICE BREYER: -- which is an informed  
12 opinion, about how we should write that paragraph. Do  
13 we say that voting is within the First Amendment scope  
14 or do we say it is not?

15 MR. ELWOOD: I think you would say that it  
16 is not, that it is not -- voting --

17 JUSTICE BREYER: In that case, the most  
18 outrageous law you can think of --

19 MR. ELWOOD: Right.

20 JUSTICE BREYER: -- in respect of voting is  
21 not covered by the First Amendment?

22 MR. ELWOOD: I -- Justice Breyer, we again  
23 are willing to bite off -- we are willing to abide by  
24 R.A.V. --

25 JUSTICE BREYER: No, I'm not asking for

1 willing to do --

2 MR. ELWOOD: It can be a neutral restriction  
3 on voting, which is not itself --

4 JUSTICE SCALIA: Mr. Elwood, why is that  
5 extraordinary? Why aren't you willing to accept that?  
6 I mean, if -- if the Speaker of the House counts the  
7 votes wrong and he says the ayes have it when it's  
8 obvious that the ayes don't have it, do we review that?

9 MR. ELWOOD: I think that that represents --

10 JUSTICE SCALIA: Is there any greater  
11 violation of the principles of democracy than counting  
12 the votes wrong in the legislature? Yet that matter is  
13 not reviewable here, is it?

14 MR. ELWOOD: I -- I don't believe that it  
15 would be.

16 JUSTICE SCALIA: So why is it extraordinary  
17 that this one should not be reviewable?

18 MR. ELWOOD: Justice, I just think that  
19 there are certain things that you don't -- there's a --  
20 there's a sort of principle when you're dealing with  
21 other branches of government that you don't look behind  
22 it when they certify things. This Court has held that  
23 in various contexts. And I don't think -- you know, it  
24 may well be that that would support an even -- a  
25 stronger rule than we are advocating; but, you know, all

1 we are here to defend is a neutral law on the part of  
2 the State of Nevada.

3 JUSTICE ALITO: In several recent cases the  
4 Court has taken pains to make the point that it is not  
5 going to recognize any new categories of unprotected  
6 speech. But the argument that you seem to be endorsing  
7 now in response to some questions is that there is this  
8 new category of unprotected speech, which is advocacy of  
9 the passage of legislation when a recusal statute comes  
10 into play.

11 MR. ELWOOD: But I think that if there's any  
12 law that has a better claim to -- to be added to that  
13 category, it's one that would be consistent with a law  
14 or a rule that was adopted by the first Congress 7 days  
15 after they first achieved a quorum. I mean, those were  
16 the people who were the people who proposed and framed  
17 the First Amendment, and they never indicated that they  
18 thought any sort of personal First Amendment right was  
19 implicated by recusal rules, either by them or Thomas  
20 Jefferson's rule, which was not even a rule adopted by  
21 the whole House.

22 JUSTICE SOTOMAYOR: Counsel, just to clarify  
23 this issue, because I don't know that I've heard you  
24 state it explicitly, the second part of this recusal  
25 statute that bars the advocacy of a measure in which

1     there's an interest prohibited by the statute, it is  
2     your position that's advocacy in the legislative body?

3                 MR. ELWOOD:   Absolutely.

4                 JUSTICE SOTOMAYOR:   So it's only limited to  
5     getting up on the floor and talking about that?

6                 MR. ELWOOD:   That is absolutely correct.   We  
7     view it as basically completing the disqualification and  
8     saying you are just not, you cannot act as a legislature  
9     in deciding whether this bill will be passed.

10                JUSTICE SOTOMAYOR:   That person can still go  
11    outside and give all the press releases they want?

12                MR. ELWOOD:   Absolutely, they can.

13                JUSTICE SOTOMAYOR:   What do we do with cases  
14    like Miller v. Town of Hull and Colson v. Grohman that  
15    have recognized retaliation claims because of speeches  
16    given during the casting of a vote?   Would those cases  
17    still be viable if we decide that there is no First  
18    Amendment right in voting?

19                MR. ELWOOD:   I -- I think they would be  
20    viable under the -- the way we are framing it, which is  
21    that basically if it's a law of general applicability  
22    that you could still bring a claim of retaliation,  
23    which -- those kind of claims are problematic for other  
24    reasons because there's a lot of what would be called  
25    retaliation that is itself protected by the First

1 Amendment.

2 But if you're talking about a official who  
3 is a civil service employee, assuming you need to even  
4 get there because they have their own civil service  
5 rights to be there, they would still have the claim that  
6 it was based on viewpoint-based discrimination, and  
7 under the rule we are proposing -- or the rule that we  
8 are willing to abide by, certainly -- *R.A.V. v. City of*  
9 *St. Paul* would protect those people for a retaliation  
10 claim.

11 JUSTICE SCALIA: Mr. Carrigan -- if -- if we  
12 did not review any of these ethical rules applicable to  
13 a legislature, at least where the rule is adopted by the  
14 legislative body itself, as -- as opposed to being  
15 imposed upon it by -- by some other body, there is the  
16 protection that all of the legislators are subject to  
17 it. So if it's vague for Mr. Carrigan in this case,  
18 it's vague for everybody else as well.

19 MR. ELWOOD: That is true, Justice Scalia.

20 JUSTICE SCALIA: And so it's sort of a  
21 self-regulating mechanism. You --

22 MR. ELWOOD: That's true.

23 JUSTICE SCALIA: You have to be willing to  
24 abide by whatever -- whatever vagueness and whatever  
25 ethical rules you -- you have opposed -- imposed on



1 somebody else.

2 MR. ELWOOD: That is true, and this law  
3 applied -- for the better part of 30 years, it applied  
4 to every legislator in the State of Nevada. In July of  
5 2009 the State Supreme Court struck it down as applied  
6 to members of the legislature. But this was the rule  
7 they lived under and they didn't think it was ambiguous,  
8 they didn't think that it chilled their associational  
9 rights. They seemed to think it was just -- that it was  
10 just fine.

11 CHIEF JUSTICE ROBERTS: I suppose you would  
12 have a First Amendment claim under your theory if the  
13 generally applicable rule was applied in a  
14 discriminatory manner; it turned out, you go back and  
15 look and over the last 2 years the only people who have  
16 been sanctioned for violating the ethics rules have been  
17 members of the minority party.

18 MR. ELWOOD: I think that that is another  
19 one of those --

20 CHIEF JUSTICE ROBERTS: That would be a  
21 viable First Amendment --

22 MR. ELWOOD: Those sort of discriminatory  
23 enforcement claims are whole 'nother ball of wax. And I  
24 mean, they're certainly, you know, very hard to prove;  
25 and they bring up all those sort of Armstrong issues

1 about, you know, presumptive regularity and that people  
2 are acting in good faith.

3 I don't know that that would be a First  
4 Amendment claim, but perhaps a equal protection claim.  
5 But it's certainly not presented here. There's never  
6 been any allegation that these laws have been enforced  
7 discriminatorily. In fact, arising from the same vote,  
8 the Nevada Commission on Ethics sanctioned an opponent  
9 of the Lazy 8 Casino because he had an undisclosed  
10 interest in -- business interest in the Nugget, which  
11 was a political opponent of this.

12 If I could reserve the remainder of my time  
13 for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
15 Elwood.

16 Mr. Rosenkranz.

17 ORAL ARGUMENT OF JOSHUA E. ROSENKRANZ

18 ON BEHALF OF THE RESPONDENT

19 MR. ROSENKRANZ: Thank you, Mr. Chief  
20 Justice, and may it please the Court:

21 The core problem with this statute which the  
22 Court has been grappling with is this: an elect -- an  
23 unelected commission has arrogated to itself essentially  
24 the right to invalidate an election result and to do it  
25 in a way that treats core political association as

1 corrupting. If the police of political purity are going  
2 to tell an elected official that he cannot cast the vote  
3 that he ran on and was elected to cast, they have to do  
4 it clearly, they have to do it prospectively, and they  
5 have to do it for an important reason.

6 CHIEF JUSTICE ROBERTS: So if the  
7 legislature adopts a rule that says from now on we're  
8 going to require a four-fifths majority for a bill to  
9 pass, that lowers the effectiveness of the speech of  
10 someone in the minority, and you can challenge that on  
11 First Amendment grounds?

12 MR. ROSENKRANZ: I think not, Your Honor,  
13 because that is a way of organizing the institution that  
14 applies equally to all members of the institution.

15 JUSTICE SCALIA: So does this.

16 MR. ROSENKRANZ: Well, this will -- this  
17 will single out individuals at any particular moment in  
18 time who are specifically isolated and told that  
19 that particular individual cannot vote.

20 JUSTICE SOTOMAYOR: How is that different  
21 from the minority people in the Chief Justice's? It  
22 only affects them when they're in the minority?

23 MR. ROSENKRANZ: Well, yes, Your Honor. And  
24 I think --

25 JUSTICE SOTOMAYOR: So it only affects

1 somebody if they fall within the strictures of the  
2 statute?

3 MR. ROSENKRANZ: And my -- my point is  
4 simply that this takes one particular legislator and  
5 says, you cannot vote. And those rules are completely  
6 fine in certain circumstances, but not when the effect  
7 is to tell someone that the rationale, the reason that  
8 you are being isolated is because you associated with  
9 someone politically who helped you win an election.

10 JUSTICE GINSBURG: Mr. Rosenkranz, you are  
11 not -- is it right that you are not challenging any part  
12 of this statute except the one that -- that says  
13 "substantially similar"? The rest you have no  
14 constitutional objection to; is that right?

15 MR. ROSENKRANZ: That is correct, Justice  
16 Ginsburg. And more precisely, we are challenging the  
17 use of that "substantially similar" provision to expand  
18 the statute to -- to relationships that bear no relation  
19 to the actual text of the statute.

20 JUSTICE SCALIA: Mr. Rosenkranz, is -- is  
21 the vote of a judge in a case like the vote of a  
22 legislator? Is -- is that speech? Because judges are  
23 subject to ethical rules which -- which prohibit their  
24 participating if there would be, quote, "an appearance  
25 of impropriety." If there's anything vaguer than that I

1 can't imagine what it might be. Can I get out of all  
2 that stuff?

3 (Laughter.)

4 MR. ROSENKRANZ: Here's -- here's what you  
5 can get out of, Your Honor. You can get out of -- for  
6 example, if you are, in addition to being a judge, a law  
7 professor at a State university and that university  
8 fires you because of an opinion that you issued, that  
9 opinion is speech. That vote has speech aspects to it.

10 JUSTICE SCALIA: Are you answering my  
11 question? I want to know whether I can get out of this  
12 appearance of impropriety stuff.

13 MR. ROSENKRANZ: The answer is no.

14 JUSTICE SCALIA: Why?

15 MR. ROSENKRANZ: For two reasons. One is  
16 that judges are just plain different from legislators.  
17 Judges are supposed to bring no political loyalties at  
18 all to them when they are sitting on the bench.  
19 Legislators are actually not only allowed to, but  
20 expected, to bring political loyalties when they --

21 JUSTICE SCALIA: What does that have to do  
22 with whether the First Amendment applies, with all of  
23 its prohibitions against vagueness?

24 MR. ROSENKRANZ: The answer again, Your  
25 Honor, is when it comes to judges, we tolerate quite a

1 bit more by way of chill of a judge's vote precisely  
2 because judges are supposed to act judicial and purge  
3 their vote of all extraneous effects.

4 JUSTICE SCALIA: That's too bad, because I  
5 would have been much more attracted to your position.

6 (Laughter.)

7 MR. ROSENKRANZ: I -- I understand, Your  
8 Honor.

9 JUSTICE KAGAN: And -- and Mr. Rosenkranz,  
10 what about officials in the Executive Branch? When the  
11 Secretary of Defense gives a speech and the President  
12 doesn't like it and the President fires the Secretary of  
13 Defense, does the Secretary of Defense have a First  
14 Amendment action?

15 MR. ROSENKRANZ: The Secretary of Defense  
16 has a First Amendment argument. It would be a very weak  
17 one under -- under this Court's opinion in Garcetti.  
18 But his First Amendment rights are implicated if it's a  
19 speech that he's giving not in the line of his duty.

20 JUSTICE KAGAN: So all the official acts in  
21 the legislature, in the Executive Branch, you're somehow  
22 saying courts are different, so I guess we don't have to  
23 worry about that, but official acts across the  
24 government are now subject to First Amendment analysis?

25 MR. ROSENKRANZ: Absolutely not, Your Honor,

1 and that was this Court's holding in Garcetti. And the  
2 reason this Court held that in Garcetti was that there  
3 the government is acting as employer. The government is  
4 entitled to discipline its own employees like any other  
5 employer can. But we all agree government as employer,  
6 that Pickering standard, doesn't really work in the  
7 context of regulation of political activity.

8 JUSTICE ALITO: What about the rules of  
9 civility in the houses of Congress? There are things  
10 that a member of the Senate, for example, cannot say  
11 about another Senator, or make a personal attack. That  
12 would be protected by the First Amendment if the Senator  
13 stepped outside the door. Are those -- is there First  
14 Amendment protection for that? Do they have -- do those  
15 rules have to pass First Amendment scrutiny?

16 MR. ROSENKRANZ: Within the chamber, Your  
17 Honor, no, if it's just the chamber that's sanctioning  
18 someone. And the reason is those are Roberts Rules of  
19 Order that apply to everyone and that -- that  
20 order the -- the debate. But I --

21 JUSTICE KAGAN: Well, I don't understand  
22 that. I mean, this rule applies to everyone, too. It  
23 might apply to one person on one vote and to another  
24 person on another vote, but everybody at every vote has  
25 to look at these ethical rules and decide whether they

1 have to recuse themselves as a result.

2 MR. ROSENKRANZ: And -- and so this is a  
3 rule, though -- we have to go back to what its effect is  
4 outside of the legislature. This is a rule that takes  
5 political associations and treats them as corrupting,  
6 core political associations, volunteering of the sort --

7 JUSTICE KAGAN: Well, do you think that if  
8 there were a statute -- let's take out the vagueness  
9 aspect of this. If there were a statute that said you  
10 can't vote on anything where you have yourself some  
11 monetary gain attached to it or if a very close family  
12 member or if a close business associate or campaign  
13 manager of your campaign, do you think that would be  
14 unconstitutional?

15 MR. ROSENKRANZ: It would not be vague, Your  
16 Honor. But it would be unconstitutional, unless the  
17 State demonstrates why a campaign manager is corrupting.

18 JUSTICE KAGAN: Because the -- the State --  
19 what the State thinks is that a campaign manager is just  
20 like a business partner.

21 MR. ROSENKRANZ: And -- and the answer to  
22 that is no. A volunteer campaign manager is not just  
23 like a business partner. There is no pecuniary gain to  
24 the -- to the candidate or the legislator as there is in  
25 a relationship with a business partner. There's



1 personal political loyalty. That's what the Ethics  
2 Commission said was wrong --

3 JUSTICE GINSBURG: -- no -- there's no -- I  
4 thought this -- the -- the only reason that we have this  
5 case is that the three-time campaign manager was -- did  
6 have a financial stake in this vote because the project  
7 was approved.

8 MR. ROSENKRANZ: No, Your Honor, that's not  
9 why we're here. That's not why the commission said we  
10 are here in the first instance. The commission is now  
11 saying we're here because of that, but what the  
12 commission said was it's the closeness of this  
13 relationship, without regard to the financial gain,  
14 which the commission accepted was zero for this  
15 particular lobbyist. Regardless of the financial gain,  
16 it was the political loyalty. This guy helped you win.  
17 Because he helped you win, you will be beholden to him  
18 and do him more favors.

19 Well, lots of political activists help a  
20 candidate win. But on that --

21 JUSTICE KENNEDY: But it -- it seems to me  
22 that if you're going to make this argument -- and this  
23 is the point we discussed with Mr. Elwood -- there are  
24 two ways to do it. Number one, say this infringes the  
25 right to vote, which is a First Amendment right; or you

1 can say that this impinges unduly on necessary rights of  
2 association that preceded your election to the  
3 legislative post.

4 It seems to me that the latter is the only  
5 way that you can make your case and to avoid the force  
6 of the argument that the Petitioner makes.

7 MR. ROSENKRANZ: Your Honor, it is certainly  
8 correct that the latter is far narrower. This is an  
9 outlier statute. No other legislature has ever adopted  
10 a statute that says campaign manager or political  
11 loyalty is corrupting. And so this Court could very  
12 easily say, look, this is just different from all of the  
13 other recusal statutes.

14 JUSTICE GINSBURG: It doesn't seem to be  
15 different from the ones that Mr. Elwood read to us. I  
16 think he read probably one from New Jersey and --

17 MR. ROSENKRANZ: Your Honor, he -- he cited  
18 one case from New Jersey. The statute does not refer to  
19 political loyalty. And in that case it was a close  
20 friendship, and in the course of describing the close  
21 friendship the court, after listing multiple factors,  
22 said one of them was that they were both part of the  
23 same political club. They also vacationed together.  
24 That's a completely different application.

25 No State and no commission -- so far as we

1 know from the briefs, there's no case cited where any  
2 commission has said this relationship between a  
3 volunteer and a candidate is itself so corrupting that  
4 we have to disqualify the candidate from casting the  
5 vote, the vote that he ran on, that the voters elected  
6 him to cast.

7                   And if this -- if this is accepted, it  
8 places an impossible drag on the associational rights.  
9 The candidate will have to think twice before ever  
10 hiring or enlisting a volunteer who is a political  
11 activist. He will want to recruit the best, the most  
12 talented, the most savvy, but he will always have to ask  
13 himself: What will this person do 3 years from now that  
14 might disqualify me from -- from embarking on my duty  
15 that I was elected to engage in?

16                   JUSTICE SCALIA: That's rather exaggerated.  
17 I mean, you have to worry he's going to buy a casino  
18 or -- or something like that? I mean --

19                   MR. ROSENKRANZ: No, Your Honor. Let me  
20 give you a concrete example from real life that happens  
21 all the time. If the NRA or NARAL decide that they  
22 believe strongly in a piece of legislation and they hire  
23 a lobbyist, so there's benefit to the lobbyist from this  
24 relationship, and that lobbyist says "I, too, am on  
25 mission; I continually lose in the legislature because

1 it hangs in the balance, I'm going to work for  
2 candidates who will tip the balance for me, the  
3 commission's opinion says that that lobbyist, because  
4 he's worked on that campaign and wins, will by that very  
5 act invalidate the vote of the legislator.

6 That's just untenable, and there's no way to  
7 interpret the -- the opinion that the commission  
8 actually wrote to make that anything other than the  
9 natural consequence of its -- of its opinion.

10 And worse yet, from the -- from the --

11 JUSTICE SCALIA: If that's what it means,  
12 you would think the legislature would change it,  
13 wouldn't you?

14 MR. ROSENKRANZ: Well --

15 JUSTICE SCALIA: I mean, it doesn't just  
16 hurt Mr. Carrigan. That -- you know, that -- that would  
17 be something every legislator would -- would worry about  
18 and say, oh, boy, we've got to change this.

19 MR. ROSENKRANZ: Yes, Your Honor --

20 JUSTICE SCALIA: So why don't we let them  
21 change it?

22 MR. ROSENKRANZ: Yes, Your Honor. Yet the  
23 legislature comes in with an amicus brief to this Court  
24 and says that its interpretation of this statute is all  
25 it needs to have is a relationship that is analogous or

1 parallel to those -- this is on page 32 of their amicus  
2 brief -- analogous or parallel, and they are defending  
3 the application of this statute to political loyalty.

4 But let's look at the other side of the  
5 equation; that is the -- the Vasquezes of the world, the  
6 NRA advocate. On that side of the equation, anyone who  
7 deeply holds a view that's political -- let's say it's  
8 Mr. Vasquez, he is pro-development. They will refrain  
9 from joining campaigns out of fear that when they join  
10 the campaign, they will get the candidate disqualified.

11 JUSTICE BREYER: So why -- I mean, what the  
12 commission says is Mr. Vasquez has been a close personal  
13 friend, confidante, and political advisor throughout the  
14 years. So that doesn't sound like any volunteer. It  
15 sounds like somebody sitting on a case where his best  
16 friend is likely to gain millions of dollars.

17 MR. ROSENKRANZ: That --

18 JUSTICE BREYER: That's what it seems when I  
19 read that opinion, that they're thinking all these  
20 things combined is what causes this to fall within the  
21 category of a reasonable person might have doubts about  
22 the independence of judgment.

23 MR. ROSENKRANZ: Your Honor, they gave a  
24 gestalt at the end.

25 JUSTICE BREYER: Yes.

1                   MR. ROSENKRANZ: They lead with  
2    "instrumental in the success of all three of Councilman  
3    Carrigan's campaigns," and they go through a long  
4    narrative about the political relationship. These were  
5    not --

6                   JUSTICE BREYER: That's part of it. But  
7    my -- my basic question is, as you know, with judges,  
8    and I guess you have a very vague statute which was  
9    quoted to you, and what we have are subsidiary rules  
10   with ethics commissioners. I have in my office --  
11   they're not commissioners; they're committees of judges.

12                   And I have in my office seven volumes which  
13   I look at when there's a question, as others do, and  
14   those seven volumes contain dozens of opinions of a  
15   committee trying to apply vague statutes and vague  
16   rules -- not constitutionally vague, but generally.

17                   So what's wrong with Nevada doing exactly  
18   the same thing here?

19                   MR. ROSENKRANZ: Because the difference,  
20   Your Honor, is judges are a --

21                   JUSTICE BREYER: Oh, so you're saying that  
22   the difference is that we're judges?

23                   MR. ROSENKRANZ: Yes.

24                   JUSTICE BREYER: You mean Congress and  
25   legislators and Executive Branch people couldn't have

1 exactly the same system?

2 MR. ROSENKRANZ: So --

3 JUSTICE BREYER: And they have general  
4 rules? It's called the common law system.

5 MR. ROSENKRANZ: The answer is no, not when  
6 it affects associational rights. So let me just  
7 distinguish --

8 JUSTICE SOTOMAYOR: Did you argue  
9 associational rights below?

10 MR. ROSENKRANZ: Oh absolutely, Your Honor.  
11 And the commission --

12 JUSTICE SOTOMAYOR: Why do you think the  
13 court didn't address it? Because it relied on the First  
14 Amendment analysis?

15 MR. ROSENKRANZ: I don't know why the court  
16 didn't address it. It was front and center. It was a  
17 section -- it was called overbreadth, but for eight  
18 pages, from page 9 to page 18, there is extensive  
19 discussion that what they meant by overbreadth is this  
20 reaches too broad, this reaches relationships that  
21 should not be reached. It was not in the cert  
22 opposition, but it was front and center before the  
23 Nevada Supreme Court.

24 JUSTICE GINSBURG: Is there any catch-all  
25 that you would say would pass your constitutional test?

1 You told us that the four specific categories, member of  
2 the household, employer, that those are all right  
3 because they're specific. But you don't like the  
4 "substantially similar." Is there any catch-all that a  
5 legislature could adopt that would pass what you --  
6 what's constitutional?

7 MR. ROSENKRANZ: I -- it's hard to imagine  
8 one. Let me just point out, no -- it is very, very rare  
9 for a legislature to do anything other than what's in A  
10 through D.

11 And the problem with this catch-all, which  
12 by the way is the term that was used by both the courts  
13 below -- the problem with this catch-all is perhaps the  
14 words are okay, maybe. I mean, I can imagine someone  
15 interpreting those words so narrowly that they're okay.  
16 But what this catch-all does is to add language to the  
17 original four criteria, so it's not just family members  
18 and business associates. It's now friends, close  
19 friends.

20 JUSTICE BREYER: You didn't answer my  
21 question, which is since the Judiciary uses what's  
22 called the common law method, why is it impermissible  
23 for the Executive Branch or the Legislative Branch also  
24 to use a common law, case-by-case method of elucidating  
25 through example what a general -- what a general



1 provision means?

2 MR. ROSENKRANZ: The answer, Your Honor, is  
3 the Judiciary does not engage in political activity  
4 outside --

5 JUSTICE BREYER: Well, I -- so you're saying  
6 that one who engages has to use a -- a definitive  
7 rule-based method rather than a common law method? So  
8 my question there would be, assuming your difference  
9 between the branches is right, still why?

10 MR. ROSENKRANZ: And the answer is that the  
11 candidate and the volunteer have to know ex ante whether  
12 to engage in this relationship or not.

13 JUSTICE KAGAN: But why do they have to know  
14 ex ante? There was an advisory process that was set up  
15 by the Nevada commission here.

16 MR. ROSENKRANZ: And the --

17 JUSTICE KAGAN: Mr. Carrigan chose not to  
18 use it. But he could have gone to the commission, said:  
19 What do you think about this relationship? Does it fit  
20 or does it not fit?

21 MR. ROSENKRANZ: Your Honor, the advisory  
22 process, the problem with it is that it comes too late.  
23 The relationship was already in place. If you're -- if  
24 the -- if the commission is going to invalidate the  
25 result of an election, where everyone is talking about

1 this issue and everyone knows about this relationship,  
2 they've got to tell them before they're engaged in the  
3 relationship. Mr. Carrigan would have dropped Mr.  
4 Vasquez.

5 JUSTICE KENNEDY: Well, I mean, but that --  
6 but that's unworkable to say, you know, that every  
7 potential -- I think I might run for office next year  
8 and so I'm going to get advice from some committee as to  
9 who I can associate with? That just is unworkable.

10 MR. ROSENKRANZ: My point exactly, Your  
11 Honor. You cannot -- you -- you don't know in advance,  
12 because you can't know what's going to come out 3 years  
13 later. You can't know what conflicts will arise, and so  
14 you don't know in advance. You can't present the  
15 question to the -- to the commission.

16 CHIEF JUSTICE ROBERTS: Counsel, I've kind  
17 of lost the thread of your argument. Is this a  
18 vagueness claim or a First Amendment claim? I gather  
19 your claim is going to be the same even if the statute  
20 clearly said family members, you know, business  
21 partners, and political consultants.

22 MR. ROSENKRANZ: Correct, Your Honor; and it  
23 is both. There are basically two halves to it. One is,  
24 even if statute were perfectly clear, this is a  
25 relationship that the State is not allowed to view as

1 toxic, because it is not a toxic relationship in a  
2 democratic process; and secondly, this is also vague, so  
3 there was no notice up front as to the fact that the  
4 commission would later invalidate the result of the  
5 election on this basis.

6 CHIEF JUSTICE ROBERTS: Is your vagueness  
7 argument, is that a First Amendment argument of its own?

8 MR. ROSENKRANZ: It is a baseline vagueness  
9 argument on due process grounds, but it gets elevated  
10 because of the First Amendment interest.

11 CHIEF JUSTICE ROBERTS: So we can decide  
12 your vagueness -- if we agree with you on vagueness, we  
13 don't have to determine whether the First Amendment  
14 applies in this type of situation?

15 MR. ROSENKRANZ: Oh, that is correct, Your  
16 Honor, absolutely.

17 JUSTICE GINSBURG: In the -- in the Nevada  
18 court you argued overbreadth. That was the -- at least  
19 how the court understood your challenge, and here  
20 overbreadth takes a back seat, and vagueness is the  
21 principle on which you rely dominantly.

22 So what accounts for the shift? You were  
23 arguing overbreadth before the Nevada Supreme Court.

24 MR. ROSENKRANZ: The answer, Your Honor, is  
25 that the Nevada Supreme Court shifted. So before the

1 Nevada Supreme Court, everything was on the table.  
2 There was vagueness, there was overbreadth, there was  
3 extended relationships -- extending to a relationship  
4 that's First Amendment-protected.

5 The two key pieces, first was vagueness and  
6 then second was this overbreadth argument as I've  
7 described it, which really was about the protected  
8 relationship. The Nevada Supreme Court called it  
9 overbreadth, but if you look carefully at what it  
10 actually says, it is vagueness at every step of the way.  
11 It is talking about -- this is on pages 14 to 15 on to  
12 16 and 17. It is talking about the Constitution  
13 demanding a high level of --

14 JUSTICE KENNEDY: What's the standard for  
15 vagueness that we apply? We apply vagueness to First  
16 Amendment prohibitions or restrictions on speech. We  
17 apply vagueness to criminal statutes. This isn't a  
18 criminal statute. It does have a civil penalty. What  
19 is the case that I consult to see what standard of  
20 vagueness I apply?

21 MR. ROSENKRANZ: Gentile, Your Honor.  
22 Gentile is a case that is about sanctions. It's about  
23 sanctions for First Amendment-protected activity. And  
24 the standard really is -- I mean, it's articulated the  
25 same way in all these circumstances, but it really is,

1 can a reasonably intelligent person know in advance that  
2 they are going to be sanctioned for this?

3 CHIEF JUSTICE ROBERTS: Here we're talking  
4 about penalty for participating. What -- what if it's a  
5 disclosure rule saying, you know, you can participate,  
6 you can vote, you can advocate, you just have to  
7 disclose interest of this sort.

8 MR. ROSENKRANZ: I think --

9 CHIEF JUSTICE ROBERTS: Is that problematic  
10 under --

11 MR. ROSENKRANZ: Not at all, Your Honor.  
12 That's perfectly appropriate. That is in fact what Mr.  
13 Carrigan did right at the outset of --

14 CHIEF JUSTICE ROBERTS: Right. Well,  
15 doesn't that burden his First Amendment rights?

16 MR. ROSENKRANZ: A lot, yes; but a lot less  
17 so. And this Court has -- is very comfortable with  
18 disclosure when you're talking about public officials as  
19 lighter medicine, less severe medicine than an outright  
20 ban or a punishment for that association. That's the  
21 way it should work in the political process. Everyone  
22 in this election was aware of Vasquez's role. It was  
23 front page news when the hearing was going on. And so  
24 for a commission --

25 JUSTICE SOTOMAYOR: If the relationship

1 wasn't particularly special, no more special than any  
2 other political volunteer, why did that become front  
3 page news?

4 MR. ROSENKRANZ: Oh --

5 JUSTICE SOTOMAYOR: And if your client  
6 didn't have a suspicion that he was on the edge of a  
7 law, why did he bother going to the city attorney to get  
8 an opinion?

9 MR. ROSENKRANZ: Because as he testified,  
10 and the commission did not disagree, this guy is a Boy  
11 Scout, Your Honor. He does everything to avoid any  
12 appearance of impropriety. And he said: I did that  
13 because I just wanted to make sure; I am not a lawyer.  
14 And the city attorney, of course, gave an opinion  
15 that gave him a clean bill of health, said: Yes, go  
16 forth and do this.

17 Now, if the lawyer doesn't know and the  
18 commissioners can't settle on which of these things the  
19 relationship is most similar to, and the district court  
20 can't choose one, how is it possible for someone in  
21 Mr. Carrigan's position to know ex ante --

22 JUSTICE SOTOMAYOR: How will we ever  
23 write -- how will the Congress ever write a law that  
24 would be so clear that clients would never have to go to  
25 lawyers --

1 (Laughter.)

2 JUSTICE SOTOMAYOR: -- or that lawyers  
3 couldn't disagree about? We would have to invalidate  
4 virtually every law as vague.

5 MR. ROSENKRANZ: Less so in the First  
6 Amendment -- I mean, more so in the First Amendment  
7 context. In all the other contexts, the standards are  
8 lightened --

9 JUSTICE SOTOMAYOR: But you're not -- you're  
10 not denying that most laws would be vague --

11 MR. ROSENKRANZ: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: Under that definition?

13 MR. ROSENKRANZ: And there is a --

14 JUSTICE SOTOMAYOR: That lawyers disagree on  
15 the conclusion of what the law means?

16 MR. ROSENKRANZ: And -- and there is a big  
17 difference between ambiguity of particular words and  
18 what the commission did here, which was to say we see  
19 these four categories, we are not applying any of these  
20 four categories. We're saying -- we're extracting a  
21 principle. It's a principle of closeness.

22 Now, close enough for government work when  
23 it comes to relationships that are First Amendment  
24 protected just isn't good enough when it -- when you're  
25 talking about that context.

1           So I did want to talk just for a moment  
2   about the degree of burden that we're talking about  
3   here, because the commission seems to be saying no big  
4   deal, this is just a disqualification provision. It's  
5   not actually a burden at all.

6           Now, I think we all agree that if the State  
7   of Nevada declared that anyone who is a campaign manager  
8   can never lobby the legislature, that would be  
9   unconstitutional, and they'll fine them for it, where  
10   the strict scrutiny would also apply if the State passed  
11   a law fining a candidate for choosing a campaign manager  
12   who lobbies the legislature.

13           JUSTICE KAGAN: I'm not sure I understand  
14   that, Mr. Rosenkranz. There are many laws out there  
15   that say people who serve in certain government  
16   capacities, when they leave those jobs, can't lobby for  
17   a certain number of years. How is that any different?

18           MR. ROSENKRANZ: It would be subject to  
19   scrutiny for sure. It would be subject to First  
20   Amendment scrutiny. And that would be justified on the  
21   ground not of the closeness of relationships that are  
22   formed, but on the ground that you don't want  
23   legislators here and now as they are sitting in the  
24   chamber thinking about generating business with their  
25   future clients and changing their votes because of that.



1 That's the justification.

2 But there's no such justification here. The  
3 commission has never articulated why political loyalty  
4 is so toxic that it needs to be banished from politics.  
5 And so, just on the -- on the directness of the burden  
6 yet, for a political activist who is engaged in these  
7 sorts of relationships, the burden of being told, you've  
8 got to choose right at the outset, are you going to  
9 represent -- are you going to help this candidate get  
10 elected or are you going to lobby? That is worse than a  
11 fine, because a political activist wants to do both  
12 precisely because they care about the ultimate results.

13 And for the candidate himself who is  
14 deciding right upfront which of the universe of players  
15 am I going to take as volunteers, they need to know  
16 upfront whether this relationship will be viewed as  
17 toxic, and if it is, they will not engage in that  
18 relationship.

19 This is no less direct than the burden that  
20 this Court recognized as unconstitutional in the Davis  
21 case, the Millionaire's Amendment Case, or in Burdick,  
22 where the only burden was that the paid petitioner would  
23 have to register to vote, which is a nominal burden, but  
24 those whose consciences were affected by a registration  
25 were kept out of the process.

1                   If there are no further questions, I  
2 respectfully request that the Court affirm the judgment.  
3 Thank you.

4                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

5                   Mr. Elwood, you have 5 minutes remaining.

6                   REBUTTAL ARGUMENT OF JOHN P. ELWOOD

7                   ON BEHALF OF THE PETITIONER

8                   MR. ELWOOD: Now, my colleague argues that  
9 the Nevada recusal statute targets political  
10 association, and that is simply not the case. Nothing  
11 in the statute about politics. Mr. Carrigan was recused  
12 because he had a business relationship with Mr. Vasquez.  
13 Wholly apart from the personal relationship and the fact  
14 that he was his three-time campaign manager, he was also  
15 the firm -- the campaign's main outside vendor, and 89  
16 percent of the Carrigan campaign expenditures were paid  
17 through his advertising firm. That is --

18                  JUSTICE BREYER: I think his argument is --  
19 I don't see -- that the Ethics Commission at least in  
20 part relied upon the fact that he was the campaign  
21 manager, and he is saying, I think, as I understand it,  
22 or at least I have this question, that an ethics  
23 commission cannot disqualify a legislator on the ground,  
24 even in part, that an individual had a political  
25 association with him previously.

1 MR. ELWOOD: I think that --

2 JUSTICE BREYER: It may be a new argument in  
3 this Court, I don't know.

4 MR. ELWOOD: I think the fact that this  
5 happened to be a political relationship was incidental.  
6 If Mr. Carrigan -- Mr. Vasquez does two things, he's a  
7 campaign manager, he's a -- he assists in development.  
8 If Mr. Carrigan had had exactly the same relationship,  
9 but had just been working with him on the development  
10 side, it would have been exactly the same situation. If  
11 he had helped him with past -- I think the fact that --

12 JUSTICE BREYER: Is that a new argument in  
13 this Court, as I've stated it to you?

14 MR. ELWOOD: I -- I don't believe so. That  
15 they've made that argument --

16 JUSTICE BREYER: You made that argument  
17 below?

18 MR. ELWOOD: That -- right. What we have  
19 here -- I don't know if they use the term that it was  
20 incidental. But I mean they -- if you look at the  
21 opinion at pages 105 to 106 of the Pet. App, it's clear  
22 that they're looking at the business relationship. It's  
23 relevant, certainly, to have helped him win three  
24 elections, because that's relevant to the closeness of  
25 their personal relationship, but --

1 JUSTICE SOTOMAYOR: I think Justice Breyer's  
2 question -- he can tell me if I'm wrong -- is whether  
3 that argument by them was actually raised below the way  
4 he is stating today?

5 MR. ELWOOD: I'm sorry? I -- the argument  
6 by the --

7 JUSTICE SOTOMAYOR: Whether that  
8 associational right of the political --

9 MR. ELWOOD: Oh. My understanding, the way  
10 I view the briefs is there two references to an  
11 associational right in the briefs, and the opening brief  
12 before the Supreme Court, I think it's page 918 -- and  
13 it was in the context of making a vagueness argument. I  
14 looked through it, you can look through it and see what  
15 you think, but I did not see that as an argument that  
16 this is burdening our associational rights. But I  
17 think --

18 JUSTICE ALITO: If they based their decision  
19 solely on the -- on the fact that Vasquez had been the  
20 campaign manager in the past and he was a great campaign  
21 manager, and perhaps Carrigan would like him to be his  
22 campaign manager in the future, would there be a problem  
23 then?

24 MR. ELWOOD: I think that -- I think  
25 probably not, because if the question is whether it --

1 it burdens associations so much that it's chilling, and  
2 I mean, basically I think that's a -- an empirical  
3 question. And because you have to have a particular  
4 interest, a private interest in order to be recused, I  
5 think that it wouldn't arise so frequently that it would  
6 be a problem; but I think more fundamentally here, or at  
7 least for purposes of this case, because it comes here  
8 at least Respondent says this as an as-applied  
9 challenge.

10 What we have here is a relationship that was  
11 front page news, because this isn't just some plain  
12 vanilla campaign volunteer. This is somebody with whom  
13 he has a very intimate business relationship that --  
14 that involved this expenditure of \$46,000.

15 And I think another thing that is worth  
16 noting is that in 10 years on the books this law has  
17 never been applied to campaign volunteers. It's -- in  
18 order -- campaign volunteers specifically come up in the  
19 legislative history of the '99 Act, and they would say  
20 would not, without more, be covered, because what this  
21 covers is the same types of relationships that every  
22 other recusal statute covers -- very close relationships  
23 and relationships that give rise to a financial interest  
24 in the public official.

25 JUSTICE ALITO: Well, suppose somebody had

1 made extensive independent expenditures in support of  
2 the -- the public officer's prior campaign, and the  
3 public officer may hope that they -- similar  
4 expenditures will be made in the future. Would that be  
5 a basis?

6 MR. ELWOOD: I don't think it would be a  
7 basis under the Nevada law. Because that's a law --

8 JUSTICE ALITO: Why not?

9 MR. ELWOOD: Because it's not a -- it's not  
10 a personal relationship, it's not household, it's not  
11 relative, it's not employer, and it's not a business  
12 relationship.

13 JUSTICE GINSBURG: Is there a way to get  
14 advice as to -- I think you said he went to the county  
15 attorney, he could have gone to -- to the ethics  
16 commission, and they were told ethics commissions can  
17 give advice only after the -- is in office, they don't  
18 give -- they are not obliged to give advice to  
19 candidates. So when Carrigan is running he apparently  
20 has no access to the ethics commission?

21 MR. ELWOOD: I think that that's right. The  
22 ethics commission only has authority to give opinions to  
23 sitting candidates.

24 If there are no further questions --

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1                   The case is submitted.

2                   (Whereupon, at 11:06 a.m., the case in the  
3 above-entitled matter was submitted.)

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<b>A</b>	<b>adopt</b> 40:5	<b>Amendment</b> 4:6	1:14	43:7,9 44:6
<b>abide</b> 19:23	<b>adopted</b> 12:5,12	12:7 13:3 14:7	<b>appeared</b> 12:20	50:6,18 51:2,12
20:23 24:8,24	12:16 13:24	14:11,13,16,20	<b>appears</b> 10:20	51:15,16 52:3,5
<b>abortion</b> 11:10	22:14,20 24:13	14:21 15:4,6,24	<b>applicability</b>	52:13,15
<b>above-entitled</b>	34:9	19:15 20:13,21	13:10 14:12,22	<b>arisen</b> 15:23
1:11 55:3	<b>adopts</b> 27:7	22:17,18 23:18	17:8 18:25	<b>arising</b> 26:7
<b>abridge</b> 3:12	<b>advance</b> 42:11	24:1 25:12,21	23:21	<b>arms</b> 11:9
<b>absolutely</b> 14:23	42:14 45:1	26:4 27:11	<b>applicable</b> 15:17	<b>Armstrong</b> 25:25
18:3 23:3,6,12	<b>advertising</b>	29:22 30:14,16	16:11 24:12	<b>arrogated</b> 26:23
30:25 39:10	50:17	30:18,24 31:12	25:13	<b>articles</b> 13:8
43:16	<b>advice</b> 42:8	31:14,15 33:25	<b>application</b> 34:24	<b>articulated</b> 44:24
<b>accept</b> 21:5	54:14,17,18	39:14 42:18	37:3	49:3
<b>accepted</b> 33:14	<b>advisor</b> 37:13	43:7,10,13	<b>applied</b> 6:14	<b>asking</b> 20:8,25
35:7	<b>advisory</b> 41:14	44:16 45:15	14:11 15:15	<b>aspect</b> 13:20
<b>access</b> 54:20	41:21	47:6,6,23 48:20	17:23 25:3,3,5	32:9
<b>accomplish</b>	<b>advocacy</b> 18:1,1	49:21	25:13 53:17	<b>aspects</b> 29:9
18:11	18:4 22:8,25	<b>Amendment-p...</b>	<b>applies</b> 6:18 7:12	<b>assists</b> 51:7
<b>accounts</b> 43:22	23:2	44:4,23	7:21 11:24	<b>associate</b> 32:12
<b>achieved</b> 22:15	<b>advocate</b> 17:12	<b>amici</b> 18:15	15:11 18:1	42:9
<b>acquaintances</b>	19:7 37:6 45:6	<b>amicus</b> 36:23	27:14 29:22	<b>associated</b> 28:8
11:10	<b>advocating</b> 17:15	37:1	31:22 43:14	<b>associates</b> 8:2
<b>act</b> 14:8 23:8	21:25	<b>amounts</b> 16:13	<b>apply</b> 5:18,19 8:2	40:18
30:2 36:5 53:19	<b>affect</b> 9:15,16	<b>analogous</b> 36:25	14:3,13,16,20	<b>association</b> 5:17
<b>acting</b> 26:2 31:3	10:13	37:2	17:10,25 18:3	11:15 19:2
<b>action</b> 30:14	<b>affirm</b> 50:2	<b>analogy</b> 18:23	19:13 31:19,23	26:25 34:2
<b>activist</b> 35:11	<b>agree</b> 4:11 13:13	19:5	38:15 44:15,15	45:20 50:10,25
49:6,11	13:15 19:10	<b>analysis</b> 30:24	44:17,20 48:10	<b>associational</b>
<b>activists</b> 33:19	31:5 43:12 48:6	39:14	<b>applying</b> 16:13	5:15 25:8 35:8
<b>activities</b> 11:11	<b>agreed</b> 6:14	<b>answer</b> 5:7 14:10	16:20 47:19	39:6,9 52:8,11
<b>activity</b> 7:18	<b>ahead</b> 12:3	29:13,24 32:21	<b>appropriate</b>	52:16
14:20 31:7 41:3	<b>ALITO</b> 8:3,19	39:5 40:20 41:2	18:16 19:5	<b>associations</b>
44:23	9:8,13 10:9	41:10 43:24	45:12	32:5,6 53:1
<b>acts</b> 30:20,23	17:10,15 22:3	<b>answering</b> 29:10	<b>approved</b> 33:7	<b>assume</b> 8:10
<b>actual</b> 28:19	31:8 52:18	<b>ante</b> 41:11,14	<b>April</b> 1:9	<b>assuming</b> 5:13
<b>add</b> 40:16	53:25 54:8	46:21	<b>argue</b> 39:8	6:19 24:3 41:8
<b>added</b> 10:23	<b>allegation</b> 12:9	<b>anyway</b> 16:22	<b>argued</b> 43:18	<b>as-applied</b> 53:8
22:12	26:6	<b>apart</b> 50:13	<b>argues</b> 50:8	<b>attached</b> 32:11
<b>adding</b> 10:24	<b>alleging</b> 15:14	<b>App</b> 51:21	<b>arguing</b> 43:23	<b>attack</b> 31:11
<b>addition</b> 14:2	<b>allocating</b> 16:6	<b>apparently</b> 54:19	<b>argument</b> 1:12	<b>attempts</b> 17:23
29:6	<b>allowed</b> 29:19	<b>appear</b> 7:13	2:2,5,8 3:3,7	<b>attorney</b> 46:7,14
<b>additional</b> 4:20	42:25	<b>appearance</b>	4:10,17 6:21	54:15
<b>address</b> 4:7,13	<b>ambiguity</b> 47:17	28:24 29:12	22:6 26:17	<b>attracted</b> 30:5
4:19 5:5 39:13	<b>ambiguous</b> 25:7	46:12	30:16 33:22	<b>authority</b> 54:22
39:16	<b>amended</b> 12:1	<b>APPEARANC...</b>	34:6 42:17 43:7	<b>available</b> 16:2



<p><b>avoid</b> 34:5 46:11</p> <p><b>aware</b> 11:25 12:8 12:9 13:7 14:6 14:10 16:12 45:22</p> <p><b>eyes</b> 21:7,8</p> <p><b>a.m</b> 1:13 3:2 55:2</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>B</b> 7:17</p> <p><b>back</b> 5:8 25:14 32:3 43:20</p> <p><b>bad</b> 30:4</p> <p><b>balance</b> 36:1,2</p> <p><b>ball</b> 25:23</p> <p><b>ban</b> 45:20</p> <p><b>banished</b> 49:4</p> <p><b>bars</b> 22:25</p> <p><b>based</b> 15:23 24:6 52:18</p> <p><b>baseline</b> 43:8</p> <p><b>basic</b> 19:10 38:7</p> <p><b>basically</b> 13:9 23:7,21 42:23 53:2</p> <p><b>basis</b> 6:10 15:18 43:5 54:5,7</p> <p><b>bear</b> 11:9 28:18</p> <p><b>behalf</b> 1:15,18 2:4,7,10 3:8 26:18 50:7</p> <p><b>beholden</b> 33:17</p> <p><b>believe</b> 21:14 35:22 51:14</p> <p><b>believes</b> 6:8</p> <p><b>bench</b> 29:18</p> <p><b>benefit</b> 35:23</p> <p><b>benefits</b> 9:16,19</p> <p><b>best</b> 35:11 37:15</p> <p><b>better</b> 22:12 25:3</p> <p><b>biased</b> 14:21 16:8</p> <p><b>big</b> 47:16 48:3</p> <p><b>bill</b> 12:18 23:9 27:8 46:15</p>	<p><b>binding</b> 3:14</p> <p><b>bit</b> 8:5 30:1</p> <p><b>bite</b> 20:23</p> <p><b>body</b> 23:2 24:14 24:15</p> <p><b>book</b> 11:22</p> <p><b>books</b> 53:16</p> <p><b>bother</b> 46:7</p> <p><b>boy</b> 36:18 46:10</p> <p><b>Branch</b> 30:10,21 38:25 40:23,23</p> <p><b>branches</b> 21:21 41:9</p> <p><b>breadth</b> 7:24</p> <p><b>Breyer</b> 13:13 19:6,8,9,13,20 20:1,4,7,11,17 20:20,22,25 37:11,18,25 38:6,21,24 39:3 40:20 41:5 50:18 51:2,12 51:16</p> <p><b>Breyer's</b> 52:1</p> <p><b>brief</b> 6:25 7:6 36:23 37:2 52:11</p> <p><b>briefs</b> 4:3 35:1 52:10,11</p> <p><b>bring</b> 23:22 25:25 29:17,20</p> <p><b>broad</b> 39:20</p> <p><b>broader</b> 7:25</p> <p><b>broadly</b> 10:2 14:4</p> <p><b>burden</b> 19:2 45:15 48:2,5 49:5,7,19,22 49:23</p> <p><b>burdening</b> 52:16</p> <p><b>burdens</b> 53:1</p> <p><b>Burdick</b> 18:24 19:3 49:21</p> <p><b>burning</b> 18:18</p>	<p><b>business</b> 6:23 7:16 8:2 9:5 26:10 32:12,20 32:23,25 40:18 42:20 48:24 50:12 51:22 53:13 54:11</p> <p><b>buy</b> 35:17</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 2:1 3:1</p> <p><b>called</b> 23:24 39:4 39:17 40:22 44:8</p> <p><b>campaign</b> 32:12 32:13,17,19,22 33:5 34:10 36:4 37:10 48:7,11 50:14,16,20 51:7 52:20,20 52:22 53:12,17 53:18 54:2</p> <p><b>campaigns</b> 37:9 38:3</p> <p><b>campaign's</b> 50:15</p> <p><b>candidate</b> 32:24 33:20 35:3,4,9 37:10 41:11 48:11 49:9,13</p> <p><b>candidates</b> 36:2 54:19,23</p> <p><b>capacities</b> 48:16</p> <p><b>capacity</b> 8:6</p> <p><b>card</b> 18:19</p> <p><b>care</b> 15:22 49:12</p> <p><b>carefully</b> 44:9</p> <p><b>Carrigan</b> 1:6 3:5 17:24 24:11,17 36:16 41:17 42:3 45:13 50:11,16 51:6,8 52:21 54:19</p> <p><b>Carrigan's</b> 38:3 46:21</p>	<p><b>case</b> 3:4 4:2 5:6 8:23 11:24 12:7 12:9 13:6,20,20 14:11 19:5 20:17 24:17 28:21 33:5 34:5 34:18,19 35:1 37:15 44:19,22 49:21,21 50:10 53:7 55:1,2</p> <p><b>cases</b> 16:22 18:24 19:4 22:3 23:13,16</p> <p><b>case-by-case</b> 40:24</p> <p><b>casino</b> 26:9 35:17</p> <p><b>cast</b> 27:2,3 35:6</p> <p><b>casting</b> 23:16 35:4</p> <p><b>catch-all</b> 7:7,9,12 39:24 40:4,11 40:13,16</p> <p><b>categories</b> 6:4 6:22 7:22 22:5 40:1 47:19,20</p> <p><b>category</b> 22:8,13 37:21</p> <p><b>causes</b> 37:20</p> <p><b>center</b> 39:16,22</p> <p><b>cert</b> 39:21</p> <p><b>certain</b> 21:19 28:6 48:15,17</p> <p><b>certainly</b> 4:24 12:11 13:5 16:23 24:8 25:24 26:5 34:7 51:23</p> <p><b>certified</b> 5:8</p> <p><b>certify</b> 21:22</p> <p><b>challenge</b> 15:10 15:13,17 27:10 43:19 53:9</p> <p><b>challenging</b></p>	<p>13:25 28:11,16</p> <p><b>chamber</b> 31:16 31:17 48:24</p> <p><b>change</b> 36:12,18 36:21</p> <p><b>changing</b> 48:25</p> <p><b>characterization</b> 7:9</p> <p><b>Chief</b> 3:3,9 14:9 14:19 15:2,9 16:5 25:11,20 26:14,19 27:6 27:21 42:16 43:6,11 45:3,9 45:14 50:4 54:25</p> <p><b>chill</b> 4:25 30:1</p> <p><b>chilled</b> 25:8</p> <p><b>chilling</b> 4:8 18:9 18:11 53:1</p> <p><b>choose</b> 46:20 49:8</p> <p><b>choosing</b> 48:11</p> <p><b>chose</b> 41:17</p> <p><b>Circuit's</b> 14:5</p> <p><b>circumstances</b> 3:25 5:20 7:14 10:6 28:6 44:25</p> <p><b>cited</b> 34:17 35:1</p> <p><b>citizen</b> 18:4</p> <p><b>city</b> 14:24 24:8 46:7,14</p> <p><b>civic</b> 11:12</p> <p><b>civil</b> 11:8 24:3,4 44:18</p> <p><b>civility</b> 31:9</p> <p><b>claim</b> 22:12 23:22 24:5,10 25:12 26:4,4 42:18,18,19</p> <p><b>claims</b> 23:15,23 25:23</p> <p><b>clarify</b> 22:22</p> <p><b>Clarke</b> 14:5</p>
---	--	--	---	---

<p><b>clean</b> 46:15  <b>clear</b> 6:24 42:24  46:24 51:21  <b>clearer</b> 9:9  <b>clearly</b> 27:4  42:20  <b>client</b> 46:5  <b>clients</b> 46:24  48:25  <b>close</b> 5:21 7:23  8:16,25 9:4  32:11,12 34:19  34:20 37:12  40:18 47:22  53:22  <b>closeness</b> 33:12  47:21 48:21  51:24  <b>closer</b> 18:23  <b>closest</b> 11:5,18  11:19  <b>club</b> 11:22 34:23  <b>coffee</b> 11:21  <b>colleague</b> 50:8  <b>Colson</b> 23:14  <b>combined</b> 37:20  <b>come</b> 16:22,23  42:12 53:18  <b>comes</b> 22:9  29:25 36:23  41:22 47:23  53:7  <b>comfortable</b>  45:17  <b>commission</b> 1:3  3:4 10:21 26:8  26:23 33:2,9,10  33:12,14 34:25  35:2 36:7 37:12  39:11 41:15,18  41:24 42:15  43:4 45:24  46:10 47:18  48:3 49:3 50:19</p>	<p>50:23 54:16,20  54:22  <b>commissioners</b>  38:10,11 46:18  <b>commissions</b>  54:16  <b>commission's</b>  36:3  <b>commitment</b> 8:6  8:8 11:12  <b>commitments</b>  8:11  <b>committee</b> 16:7  38:15 42:8  <b>committees</b>  38:11  <b>common</b> 39:4  40:22,24 41:7  <b>complete</b> 17:19  <b>completely</b> 28:5  34:24  <b>completing</b> 23:7  <b>concede</b> 15:20  <b>concedes</b> 6:22  <b>concept</b> 17:17  <b>concern</b> 6:3  <b>concerned</b> 12:4  12:17  <b>concluded</b> 3:17  <b>conclusion</b> 47:15  <b>concrete</b> 35:20  <b>conduct</b> 15:20  18:7  <b>confidante</b> 37:13  <b>conflict</b> 3:12  <b>conflicts</b> 42:13  <b>Congress</b> 7:4  12:12,22,25  13:2,23 16:20  22:14 31:9  38:24 46:23  <b>consanguinity</b>  9:10  <b>consciences</b></p>	<p>49:24  <b>consequence</b>  36:9  <b>consider</b> 12:15  <b>considerable</b>  17:1  <b>considering</b> 9:14  <b>consistent</b> 22:13  <b>Constitution</b>  12:23 44:12  <b>constitutional</b>  28:14 39:25  40:6  <b>constitutionally</b>  38:16  <b>consult</b> 44:19  <b>consultants</b>  42:21  <b>contain</b> 38:14  <b>context</b> 7:5 31:7  47:7,25 52:13  <b>contexts</b> 21:23  47:7  <b>continually</b> 35:25  <b>contractual</b> 8:9  <b>contradiction</b>  13:2  <b>controls</b> 11:14  <b>core</b> 26:21,25  32:6  <b>correct</b> 4:7 6:6  8:12 18:8,12  23:6 28:15 34:8  42:22 43:15  <b>corrupting</b> 27:1  32:5,17 34:11  35:3  <b>Councilman</b> 38:2  <b>counsel</b> 22:22  42:16 50:4  54:25  <b>counting</b> 21:11  <b>country</b> 7:4  <b>counts</b> 21:6</p>	<p><b>county</b> 54:14  <b>couple</b> 9:23  <b>course</b> 34:20  46:14  <b>court</b> 1:1,12 3:10  3:17 4:6,12,13  4:19,21 5:12,14  6:11,14 12:6,7  12:25 17:6  21:22 22:4 25:5  26:20,22 31:2  34:11,21 36:23  39:13,15,23  43:18,19,23,25  44:1,8 45:17  46:19 49:20  50:2 51:3,13  52:12  <b>courts</b> 12:10  30:22 40:12  <b>Court's</b> 30:17  31:1  <b>cousin</b> 9:18,24  10:17  <b>cousins</b> 9:11  10:16  <b>cousin's</b> 9:19  10:12  <b>covered</b> 7:14,16  7:17,19 8:14  9:24,25 11:20  17:8 20:21  53:20  <b>covers</b> 11:17  53:21,22  <b>criminal</b> 44:17  44:18  <b>criteria</b> 40:17</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 3:1 40:10  <b>Davis</b> 49:20  <b>days</b> 3:21 22:14  <b>deal</b> 48:4  <b>dealing</b> 6:7 21:20</p>	<p><b>debate</b> 10:1  11:10 31:20  <b>decide</b> 23:17  31:25 35:21  43:11  <b>deciding</b> 5:6 23:9  49:14  <b>decision</b> 13:9  52:18  <b>declared</b> 48:7  <b>deeply</b> 37:7  <b>defend</b> 22:1  <b>defending</b> 37:2  <b>Defense</b> 30:11  30:13,13,15  <b>deference</b> 16:19  <b>defined</b> 10:20  <b>definition</b> 47:12  <b>definitive</b> 41:6  <b>degree</b> 6:9 9:10  48:2  <b>demanding</b> 44:13  <b>democracy</b> 21:11  <b>democratic</b> 43:2  <b>Democrats</b>  15:15  <b>demonstrates</b>  32:17  <b>denying</b> 47:10  <b>depend</b> 9:23  <b>depending</b> 16:3  16:18  <b>depends</b> 18:14  <b>described</b> 44:7  <b>describing</b> 34:20  <b>determine</b> 43:13  <b>determined</b>  12:24  <b>development</b>  51:7,9  <b>difference</b> 38:19  38:22 41:8  47:17  <b>different</b> 16:13</p>
--	--	--	---	---

27:20 29:16 30:22 34:12,15 34:24 48:17 <b>differently</b> 16:3 <b>difficult</b> 5:5 8:4 10:10 <b>direct</b> 7:25 49:19 <b>directed</b> 18:6,6 <b>directness</b> 49:5 <b>disagree</b> 7:6,8 46:10 47:3,14 <b>disallowed</b> 12:20 <b>discipline</b> 31:4 <b>disclose</b> 45:7 <b>disclosure</b> 45:5 45:18 <b>discretion</b> 4:19 <b>discrimination</b> 24:6 <b>discriminatorily</b> 26:7 <b>discriminatory</b> 25:14,22 <b>discussed</b> 33:23 <b>discussion</b> 39:19 <b>disproportionate</b> 15:11 <b>disqualification</b> 3:24 17:19 23:7 48:4 <b>disqualified</b> 17:20 37:10 <b>disqualify</b> 35:4 35:14 50:23 <b>distinguish</b> 39:7 <b>district</b> 46:19 <b>division</b> 12:21 <b>doctrine</b> 15:23 <b>doing</b> 38:17 <b>dollars</b> 37:16 <b>dominantly</b> 43:21 <b>door</b> 13:24 31:13 <b>doubt</b> 16:25	<b>doubts</b> 37:21 <b>dozens</b> 38:14 <b>draft</b> 18:18 <b>drag</b> 35:8 <b>dropped</b> 42:3 <b>due</b> 43:9 <b>duty</b> 30:19 35:14 <b>D.C</b> 1:8,15 14:4 <hr/> <b>E</b> <hr/> <b>E</b> 1:17 2:1,6 3:1,1 26:17 <b>earliest</b> 3:21 <b>earth</b> 11:19 <b>easily</b> 34:12 <b>economic</b> 9:3 <b>edge</b> 46:6 <b>effect</b> 4:9 5:17 10:11 18:10,11 18:18 28:6 32:3 <b>effectiveness</b> 27:9 <b>effects</b> 30:3 <b>eight</b> 39:17 <b>either</b> 7:15 20:7 22:19 <b>elect</b> 26:22 <b>elected</b> 11:13 27:2,3 35:5,15 49:10 <b>election</b> 26:24 28:9 34:2 41:25 43:5 45:22 <b>elections</b> 51:24 <b>elevated</b> 43:9 <b>elucidating</b> 40:24 <b>Elwood</b> 1:15 2:3 2:9 3:6,7,9 4:12 5:3,10 6:6,10 6:20 7:8 8:13 8:23 9:12,22 10:19 11:16,23 12:2 13:5,15 14:2,17,23 15:5 15:13,20,25	16:10,17,23 17:6,14,18 18:3 18:13 19:8,12 19:20 20:10,15 20:19,22 21:2,4 21:9,14,18 22:11 23:3,6,12 23:19 24:19,22 25:2,18,22 26:15 33:23 34:15 50:5,6,8 51:1,4,14,18 52:5,9,24 54:6 54:9,21 <b>embarking</b> 35:14 <b>emotional</b> 8:11 <b>emphasis</b> 4:4 <b>emphasize</b> 5:16 <b>emphatically</b> 13:15 <b>empirical</b> 53:2 <b>employee</b> 24:3 <b>employees</b> 31:4 <b>employer</b> 6:5 31:3,5,5 40:2 54:11 <b>employers</b> 6:23 9:3 <b>endorsing</b> 22:6 <b>enforced</b> 26:6 <b>enforcement</b> 25:23 <b>engage</b> 35:15 41:3,12 49:17 <b>engaged</b> 7:18 42:2 49:6 <b>engages</b> 41:6 <b>enlisting</b> 35:10 <b>enormously</b> 13:20 <b>entire</b> 19:4 <b>entitled</b> 31:4 <b>equal</b> 26:4 <b>equally</b> 27:14	<b>equation</b> 37:5,6 <b>error</b> 3:20 <b>ESQ</b> 1:15,17 2:3 2:6,9 <b>essentially</b> 7:1 14:4 17:14,18 17:22 26:23 <b>ethical</b> 12:5 13:25 24:12,25 28:23 31:25 <b>ethics</b> 1:3 3:4 10:21 25:16 26:8 33:1 38:10 50:19,22 54:15 54:16,20,22 <b>event</b> 12:14 15:25 17:6 <b>everybody</b> 6:8 9:16 10:16 24:18 31:24 <b>everybody's</b> 9:15 <b>ex</b> 41:11,14 46:21 <b>exactly</b> 38:17 39:1 42:10 51:8 51:10 <b>exaggerated</b> 35:16 <b>example</b> 7:11 9:9 29:6 31:10 35:20 40:25 <b>exception</b> 14:4 <b>Executive</b> 30:10 30:21 38:25 40:23 <b>exercise</b> 3:15 <b>expand</b> 14:3 28:17 <b>expected</b> 29:20 <b>expenditure</b> 53:14 <b>expenditures</b> 50:16 54:1,4	<b>explain</b> 8:4 <b>explicitly</b> 22:24 <b>express</b> 3:24 <b>expressing</b> 18:23 <b>expression</b> 18:18 <b>expressive</b> 3:13 14:8 18:20 <b>extended</b> 44:3 <b>extending</b> 44:3 <b>extensive</b> 39:18 54:1 <b>extra</b> 16:19 <b>extracting</b> 47:20 <b>extraneous</b> 30:3 <b>extraordinary</b> 11:24 21:5,16 <hr/> <b>F</b> <hr/> <b>fact</b> 11:3 26:7 43:3 45:12 50:13,20 51:4 51:11 52:19 <b>factors</b> 34:21 <b>failure</b> 17:12,16 <b>faith</b> 26:2 <b>fall</b> 19:15 28:1 37:20 <b>families</b> 11:5 <b>family</b> 6:4 11:2 32:11 40:17 42:20 <b>far</b> 19:21 34:8,25 <b>favor</b> 16:8 <b>favors</b> 33:18 <b>fear</b> 37:9 <b>Federal</b> 12:10 <b>fighting</b> 15:6 16:24 17:3 <b>figure</b> 10:10 <b>financial</b> 8:1,17 8:19,20,24 9:4 9:6 33:6,13,15 53:23 <b>find</b> 10:10 <b>fine</b> 25:10 28:6
--	---	---	--	--

<p>48:9 49:11  <b>fining</b> 48:11  <b>fires</b> 29:8 30:12  <b>firm</b> 50:15,17  <b>first</b> 3:21 4:5  5:20 7:8 9:23  12:7,7,12 13:3  13:6,7,23 14:6  14:7,11,13,16  14:19,21 15:4,6  15:23 17:3  19:15 20:13,21  22:14,15,17,18  23:17,25 25:12  25:21 26:3  27:11 29:22  30:13,16,18,24  31:12,13,15  33:10,25 39:13  42:18 43:7,10  43:13 44:4,5,15  44:23 45:15  47:5,6,23 48:19  <b>fit</b> 41:19,20  <b>floor</b> 16:7 23:5  <b>force</b> 34:5  <b>forever</b> 12:23  <b>forgot</b> 7:6  <b>formed</b> 48:22  <b>forth</b> 46:16  <b>found</b> 8:3,5  <b>four</b> 3:19 6:22  7:21 40:1,17  47:19,20  <b>four-fifths</b> 27:8  <b>framed</b> 22:16  <b>framing</b> 23:20  <b>free</b> 3:12,18  <b>frequently</b> 5:18  53:5  <b>friend</b> 37:13,16  <b>friends</b> 40:18,19  <b>friendship</b> 34:20  34:21</p>	<p><b>front</b> 39:16,22  43:3 45:23 46:2  53:11  <b>fulfill</b> 4:25  <b>function</b> 17:22  <b>fundamentally</b>  6:14 53:6  <b>furnishes</b> 19:4  <b>further</b> 50:1  54:24  <b>future</b> 13:25  48:25 52:22  54:4</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>G</b> 3:1  <b>gain</b> 32:11,23  33:13,15 37:16  <b>Garcetti</b> 30:17  31:1,2  <b>gather</b> 42:18  <b>general</b> 6:1  13:10 14:12,12  23:21 39:3  40:25,25  <b>generally</b> 25:13  38:16  <b>generating</b> 48:24  <b>genetic</b> 11:3  <b>Gentile</b> 44:21,22  <b>gestalt</b> 37:24  <b>getting</b> 23:5  <b>Ginsburg</b> 5:25  6:7 7:5 28:10  28:16 33:3  34:14 39:24  43:17 54:13  <b>give</b> 4:20 8:16  9:8 23:11 35:20  53:23 54:17,18  54:18,22  <b>given</b> 23:16  <b>gives</b> 30:11  <b>giving</b> 30:19  <b>go</b> 6:17 10:18</p>	<p>23:10 25:14  32:3 38:3 46:15  46:24  <b>going</b> 18:22 22:5  27:1,8 33:22  35:17 36:1  41:24 42:8,12  42:19 45:2,23  46:7 49:8,9,10  49:15  <b>good</b> 26:2 47:24  <b>government</b>  21:21 30:24  31:3,3,5 47:22  48:15  <b>governmental</b>  5:1  <b>grappling</b> 26:22  <b>great</b> 52:20  <b>greater</b> 18:17  21:10  <b>Grohman</b> 23:14  <b>ground</b> 48:21,22  50:23  <b>grounds</b> 6:17  15:10 27:11  43:9  <b>guess</b> 19:7 30:22  38:8  <b>guidance</b> 4:20  5:12  <b>gums</b> 7:1  <b>guy</b> 33:16 46:10</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>halves</b> 42:23  <b>hangs</b> 36:1  <b>happened</b> 51:5  <b>happens</b> 16:8  35:20  <b>happy</b> 14:1  <b>hard</b> 25:24 40:7  <b>health</b> 46:15  <b>heard</b> 22:23  <b>hearing</b> 45:23</p>	<p><b>held</b> 4:6 14:7  21:22 31:2  <b>help</b> 33:19 49:9  <b>helped</b> 28:9  33:16,17 51:11  51:23  <b>high</b> 6:15 44:13  <b>hire</b> 35:22  <b>hiring</b> 35:10  <b>history</b> 10:23  53:19  <b>holding</b> 3:20 6:11  31:1  <b>holds</b> 37:7  <b>Honor</b> 11:16  27:12,23 29:5  29:25 30:8,25  31:17 32:16  33:8 34:7,17  35:19 36:19,22  37:23 38:20  39:10 41:2,21  42:11,22 43:16  43:24 44:21  45:11 46:11  47:11  <b>hope</b> 54:3  <b>house</b> 16:6,18  21:6 22:21  <b>household</b> 9:2  11:1 40:2 54:10  <b>households</b> 6:23  <b>houses</b> 16:20  31:9  <b>Hull</b> 23:14  <b>hurt</b> 36:16</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> 10:17  <b>imagine</b> 29:1  40:7,14  <b>immediately</b>  12:14  <b>impaired</b> 7:15  <b>impermissible</b></p>	<p>40:22  <b>impinges</b> 34:1  <b>implicated</b> 6:12  22:19 30:18  <b>import</b> 19:11  <b>important</b> 3:23  5:16 13:20 27:5  <b>importantly</b> 7:23  <b>imposed</b> 24:15  24:25  <b>impossible</b> 35:8  <b>impropriety</b>  28:25 29:12  46:12  <b>incident</b> 3:15  <b>incidental</b> 18:10  51:5,20  <b>inclined</b> 13:21  <b>include</b> 8:11,13  9:11  <b>incorrect</b> 16:14  <b>increase</b> 10:4  <b>independence</b>  4:1 10:7 37:22  <b>independent</b>  54:1  <b>indicate</b> 3:25  <b>indicated</b> 22:17  <b>indirect</b> 7:25  <b>individual</b> 7:19  27:19 50:24  <b>individuals</b> 27:17  <b>individual's</b> 7:15  <b>informed</b> 20:11  <b>infringes</b> 33:24  <b>instance</b> 33:10  <b>institution</b> 27:13  27:14  <b>instrumental</b>  38:2  <b>intelligent</b> 45:1  <b>interest</b> 3:12 4:8  4:15 5:24 8:17  8:20,20,24 9:4</p>
--	---	---	--	--

9:25 10:2,3,4 12:20 14:7 23:1 26:10,10 43:10 45:7 53:4,4,23 <b>interested</b> 12:15 <b>interests</b> 3:23,25 5:1 8:7 9:7 11:25 12:17,19 <b>intermediate</b> 4:23 5:1 6:18 6:19 18:8 <b>interpret</b> 16:1 36:7 <b>interpretation</b> 10:21 36:24 <b>interpreting</b> 40:15 <b>intimate</b> 11:19 53:13 <b>invalidate</b> 26:24 36:5 41:24 43:4 47:3 <b>invalidation</b> 18:9 <b>involved</b> 53:14 <b>involvement</b> 8:1 <b>irrespective</b> 20:2 <b>isolated</b> 27:18 28:8 <b>issue</b> 11:2 22:23 42:1 <b>issued</b> 29:8 <b>issues</b> 25:25	2:6 26:17 <b>judge</b> 28:21 29:6 <b>judges</b> 28:22 29:16,17,25 30:2 38:7,11,20 38:22 <b>judge's</b> 30:1 <b>judgment</b> 4:1 7:15 10:7,7,13 37:22 50:2 <b>judicial</b> 30:2 <b>Judiciary</b> 40:21 41:3 <b>July</b> 25:4 <b>jumped</b> 12:3 <b>Justice</b> 3:3,9 4:2 4:22 5:4,11,25 6:6,7,16 7:5 8:3 8:19 9:8,13 10:9 11:7,21,23 12:2 13:5,11,13 13:13,16,18 14:9,10,18,19 15:2,9,19,25 16:5,15,21,24 17:10,15,25 18:5 19:6,8,9 19:10,12,13,20 19:21,22 20:1,4 20:5,7,11,17 20:20,22,25 21:4,10,16,18 22:3,22 23:4,10 23:13 24:11,19 24:20,23 25:11 25:20 26:14,20 27:6,15,20,25 28:10,15,20 29:10,14,21 30:4,9,20 31:8 31:21 32:7,18 33:3,21 34:14 35:16 36:11,15 36:20 37:11,18	37:25 38:6,21 38:24 39:3,8,12 39:24 40:20 41:5,13,17 42:5 42:16 43:6,11 43:17 44:14 45:3,9,14,25 46:5,22 47:2,9 47:12,14 48:13 50:4,18 51:2,12 51:16 52:1,1,7 52:18 53:25 54:8,13,25 <b>Justice's</b> 27:21 <b>justification</b> 49:1 49:2 <b>justified</b> 11:25 48:20	46:17,21 49:15 51:3,19 <b>knowledge</b> 7:13 13:8 <b>knows</b> 42:1	48:23 <b>legislator's</b> 3:13 <b>legislature</b> 7:4 10:22 11:13 12:24 15:12 17:2 18:4 21:12 23:8 24:13 25:6 27:7 30:21 32:4 34:9 35:25 36:12,23 40:5,9 48:8,12 <b>legislatures</b> 12:5 <b>let's</b> 9:9,13 32:8 37:4,7 <b>level</b> 6:15 44:13 <b>life</b> 11:8 35:20 <b>lightened</b> 47:8 <b>lighter</b> 45:19 <b>limit</b> 14:14 <b>limited</b> 23:4 <b>limits</b> 18:2 <b>line</b> 19:4 30:19 <b>listed</b> 8:12 <b>listing</b> 34:21 <b>lists</b> 7:17 <b>litigation</b> 13:25 <b>lived</b> 25:7 <b>lobbies</b> 48:12 <b>lobby</b> 48:8,16 49:10 <b>lobbyist</b> 33:15 35:23,23,24 36:3 <b>long</b> 38:3 <b>look</b> 10:22 16:24 21:21 25:15 31:25 34:12 37:4 38:13 44:9 51:20 52:14 <b>looked</b> 52:14 <b>looking</b> 10:24 51:22 <b>lose</b> 35:25 <b>lost</b> 42:17
<b>J</b> <b>Jefferson</b> 12:16 <b>Jefferson's</b> 17:20,21 22:20 <b>Jersey</b> 7:24 34:16,18 <b>jobs</b> 48:16 <b>JOHN</b> 1:15 2:3,9 3:7 50:6 <b>join</b> 37:9 <b>joining</b> 37:9 <b>JOSHUA</b> 1:17		<b>K</b> <b>Kagan</b> 15:19 16:1 19:21 30:9 30:20 31:21 32:7,18 41:13 41:17 48:13 <b>Kennedy</b> 4:2,22 5:4,11 6:16 11:7,21,23 17:25 18:5 33:21 42:5 44:14 <b>Kennedy's</b> 13:11 <b>kept</b> 49:25 <b>key</b> 44:5 <b>kind</b> 15:21 23:23 42:16 <b>know</b> 8:18 13:8 13:22 16:12 21:23,25 22:23 25:24 26:1,3 29:11 35:1 36:16 38:7 39:15 41:11,13 42:6,11,12,13 42:14,20 45:1,5	<b>L</b> <b>language</b> 7:1 40:16 <b>late</b> 41:22 <b>Laughter</b> 20:3 29:3 30:6 47:1 <b>law</b> 13:8,12 15:24 18:5,7 19:15 20:18 22:1,12,13 23:21 25:2 29:6 39:4 40:22,24 41:7 46:7,23 47:4,15 48:11 53:16 54:7,7 <b>laws</b> 3:11 13:10 17:7 18:17,21 18:24 26:6 47:10 48:14 <b>lawyer</b> 46:13,17 <b>lawyers</b> 46:25 47:2,14 <b>Lazy</b> 26:9 <b>lead</b> 38:1 <b>leave</b> 48:16 <b>leaving</b> 13:2 <b>legally</b> 3:14 <b>legislation</b> 22:9 35:22 <b>legislative</b> 10:23 12:11 23:2 24:14 34:3 40:23 53:19 <b>legislator</b> 3:23 5:24 17:22 25:4 28:4,22 32:24 36:5,17 50:23 <b>legislators</b> 24:16 29:16,19 38:25	

<p><b>lot</b> 23:24 45:16 45:16 <b>lots</b> 33:19 <b>lowers</b> 27:9 <b>loyalties</b> 29:17 29:20 <b>loyalty</b> 33:1,16 34:11,19 37:3 49:3</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>main</b> 18:19 50:15 <b>major</b> 13:21 <b>majority</b> 16:9,13 27:8 <b>making</b> 52:13 <b>manager</b> 32:13 32:17,19,22 33:5 34:10 48:7 48:11 50:14,21 51:7 52:20,21 52:22 <b>manner</b> 15:1,8 25:14 <b>materially</b> 10:8 10:13 <b>matter</b> 1:11 14:14 18:10 19:14 21:12 55:3 <b>mean</b> 10:22 12:19 13:23 16:18 18:14 19:9 21:6 22:15 25:24 31:22 35:17,18 36:15 37:11 38:24 40:14 42:5 44:24 47:6 51:20 53:2 <b>means</b> 36:11 41:1 47:15 <b>meant</b> 39:19 <b>measure</b> 9:15 16:19 22:25</p>	<p><b>mechanism</b> 24:21 <b>medicine</b> 45:19 45:19 <b>member</b> 6:4 12:13,17 31:10 32:12 40:1 <b>members</b> 6:22 9:2 15:12 16:14 25:6,17 27:14 40:17 42:20 <b>membership</b> 16:7 <b>mentioned</b> 6:4 <b>merely</b> 5:14 <b>message</b> 17:13 17:16 <b>met</b> 5:20 <b>method</b> 40:22,24 41:7,7 <b>MICHAEL</b> 1:6 <b>Miller</b> 23:14 <b>Millionaire's</b> 49:21 <b>millions</b> 37:16 <b>minority</b> 16:14 25:17 27:10,21 27:22 <b>minutes</b> 50:5 <b>mission</b> 35:25 <b>modified</b> 14:9 <b>moment</b> 27:17 48:1 <b>monetary</b> 32:11 <b>morning</b> 11:22 <b>movement</b> 11:8 11:9 <b>multiple</b> 34:21</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 2:1,1 3:1 <b>NARAL</b> 35:21 <b>narrative</b> 38:4 <b>narrow</b> 5:13 <b>narrower</b> 34:8</p>	<p><b>narrowly</b> 40:15 <b>natural</b> 36:9 <b>necessary</b> 4:25 18:11 34:1 <b>need</b> 24:3 49:15 <b>needs</b> 17:7 36:25 49:4 <b>negligible</b> 5:17 <b>neutral</b> 3:11 13:10 14:12 15:11 16:7 17:7 18:24 21:2 22:1 <b>neutrality</b> 15:18 19:24 <b>neutrally</b> 16:11 <b>Nevada</b> 1:3 3:4 3:17,19 4:6,13 4:20 5:12 6:11 7:20 10:21 11:14 22:2 25:4 26:8 38:17 39:23 41:15 43:17,23,25 44:1,8 48:7 50:9 54:7 <b>never</b> 13:16 22:17 26:5 46:24 48:8 49:3 53:17 <b>new</b> 1:17,17 7:24 22:5,8 34:16,18 51:2,12 <b>news</b> 45:23 46:3 53:11 <b>nice</b> 16:21 <b>night</b> 4:4 <b>nominal</b> 49:23 <b>normally</b> 15:16 <b>nother</b> 25:23 <b>notice</b> 43:3 <b>noting</b> 53:16 <b>NRA</b> 35:21 37:6 <b>Nugget</b> 26:10 <b>number</b> 33:24</p>	<p>48:17 <b>numerous</b> 8:1</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 2:1 3:1 <b>objection</b> 6:1,16 14:21 28:14 <b>obliged</b> 54:18 <b>obvious</b> 21:8 <b>obviously</b> 9:4 16:20 <b>office</b> 3:16 38:10 38:12 42:7 54:17 <b>officer</b> 9:4,7,14 10:10,15 11:15 17:11 54:3 <b>officer's</b> 54:2 <b>official</b> 3:11 8:18 8:20 9:17 14:8 24:2 27:2 30:20 30:23 53:24 <b>officials</b> 30:10 45:18 <b>oh</b> 14:23 36:18 38:21 39:10 43:15 46:4 52:9 <b>okay</b> 9:13 14:15 40:14,15 <b>ones</b> 34:15 <b>ongoing</b> 5:22 <b>opening</b> 52:11 <b>opens</b> 13:24,24 <b>opinion</b> 14:5,6 20:2,9,12 29:8 29:9 30:17 36:3 36:7,9 37:19 46:8,14 51:21 <b>opinions</b> 38:14 54:22 <b>opponent</b> 26:8 26:11 <b>opposed</b> 24:14 24:25 <b>opposition</b> 13:4</p>	<p>39:22 <b>option</b> 16:2 <b>oral</b> 1:11 2:2,5 3:7 26:17 <b>order</b> 5:19 31:19 31:20 53:4,18 <b>ordinary</b> 8:15 17:16 <b>organizing</b> 27:13 <b>original</b> 40:17 <b>outlier</b> 34:9 <b>outrageous</b> 19:14 20:18 <b>outright</b> 45:19 <b>outset</b> 5:16 6:13 45:13 49:8 <b>outside</b> 18:1,4 23:11 31:13 32:4 41:4 50:15 <b>overbreadth</b> 39:17,19 43:18 43:20,23 44:2,6 44:9 <b>overrode</b> 3:19 <b>O'Brien</b> 18:15 18:17</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 1:15 2:3,9 3:1,7 50:6 <b>page</b> 2:2 6:24 37:1 39:18,18 45:23 46:3 52:12 53:11 <b>pages</b> 39:18 44:11 51:21 <b>paid</b> 11:15 49:22 50:16 <b>pains</b> 22:4 <b>paragraph</b> 20:12 <b>parallel</b> 37:1,2 <b>part</b> 9:2 22:1,24 25:3 28:11 34:22 38:6 50:20,24</p>
---	---	---	--	---

<b>participate</b> 45:5	31:11 33:1	<b>precisely</b> 28:16	10:3,12	20:8 29:11 38:7
<b>participating</b>	37:12 50:13	30:1 49:12	<b>proposed</b> 18:16	38:13 40:21
28:24 45:4	51:25 54:10	<b>prescription</b>	22:16	41:8 42:15
<b>particular</b> 6:2	<b>Pet</b> 51:21	14:25	<b>proposing</b> 24:7	50:22 52:2,25
15:12 27:17,19	<b>petitioner</b> 1:4,16	<b>present</b> 42:14	<b>proposition</b> 12:5	53:3
28:4 33:15	2:4,10 3:8 34:6	<b>presented</b> 4:3	<b>proscribable</b>	<b>questions</b> 19:17
47:17 53:3	49:22 50:7	26:5	15:21	22:7 50:1 54:24
<b>particularly</b>	<b>phrase</b> 7:3	<b>President</b> 30:11	<b>prospectively</b>	<b>quite</b> 4:7 29:25
12:14 46:1	<b>Pickering</b> 31:6	30:12	27:4	<b>quorum</b> 22:15
<b>partner</b> 32:20,23	<b>piece</b> 35:22	<b>press</b> 23:11	<b>protect</b> 24:9	<b>quote</b> 12:13
32:25	<b>pieces</b> 44:5	<b>presumably</b> 9:2	<b>protected</b> 3:14	28:24
<b>partners</b> 42:21	<b>place</b> 41:23	<b>presumed</b> 11:5	4:5,9 15:3,6	<b>quoted</b> 38:9
<b>parts</b> 4:10	<b>places</b> 35:8	<b>presumptive</b>	23:25 31:12	
<b>party</b> 5:23 9:7	<b>plain</b> 29:16 53:11	26:1	44:7 47:24	<hr/> <b>R</b> <hr/>
16:8 25:17	<b>play</b> 22:10	<b>pretty</b> 5:13	<b>protection</b> 24:16	<b>R</b> 3:1
<b>pass</b> 4:3 27:9	<b>players</b> 49:14	<b>prevail</b> 5:8	26:4 31:14	<b>raised</b> 4:18 19:17
31:15 39:25	<b>please</b> 3:10	<b>previously</b> 50:25	<b>prove</b> 25:24	52:3
40:5	26:20	<b>principal</b> 11:11	<b>provide</b> 5:11	<b>ran</b> 27:3 35:5
<b>passage</b> 17:12	<b>point</b> 22:4 28:3	<b>principle</b> 21:20	<b>provides</b> 12:23	<b>rare</b> 40:8
17:15 19:7 22:9	33:23 40:8	43:21 47:21,21	<b>provision</b> 28:17	<b>rareness</b> 11:24
<b>passed</b> 4:18 23:9	42:10	<b>principles</b> 21:11	41:1 48:4	<b>rationale</b> 28:7
48:10	<b>police</b> 27:1	<b>prior</b> 54:2	<b>pro-developm...</b>	<b>reach</b> 4:10
<b>Paul</b> 14:24 24:9	<b>political</b> 26:11,25	<b>private</b> 3:25 5:23	37:8	<b>reached</b> 5:14
<b>pay</b> 11:12	27:1 29:17,20	8:6 10:2,4	<b>public</b> 3:16 8:17	39:21
<b>pecuniary</b> 5:24	31:7 32:5,6	12:17,18 53:4	8:20 9:14 10:9	<b>reaches</b> 39:20,20
32:23	33:1,16,19	<b>probably</b> 34:16	10:15 17:11	<b>read</b> 34:15,16
<b>penalty</b> 44:18	34:10,19,23	52:25	45:18 53:24	37:19
45:4	35:10 37:3,7,13	<b>problem</b> 26:21	54:2,3	<b>real</b> 35:20
<b>people</b> 18:22	38:4 41:3 42:21	40:11,13 41:22	<b>punishment</b>	<b>really</b> 13:3 18:21
22:16,16 24:9	45:21 46:2 49:3	52:22 53:6	45:20	31:6 44:7,24,25
25:15 26:1	49:6,11 50:9,24	<b>problematic</b>	<b>purge</b> 30:2	<b>reason</b> 18:20
27:21 38:25	51:5 52:8	23:23 45:9	<b>purity</b> 27:1	27:5 28:7 31:2
48:15	<b>politically</b> 28:9	<b>process</b> 41:14,22	<b>purpose</b> 18:12	31:18 33:4
<b>percent</b> 50:16	<b>politics</b> 49:4	43:2,9 45:21	<b>purposes</b> 17:2	<b>reasonable</b> 7:13
<b>perfectly</b> 42:24	50:11	49:25	53:7	10:6,11 37:21
45:12	<b>position</b> 15:3	<b>processes</b> 19:1	<b>put</b> 13:16	<b>reasonableness</b>
<b>person</b> 7:13 8:21	19:21 23:2 30:5	<b>professor</b> 29:7	<b>puzzling</b> 8:5	19:3
9:20 10:6,11,16	46:21	<b>prohibit</b> 28:23		<b>reasonably</b> 45:1
23:10 31:23,24	<b>possible</b> 46:20	<b>prohibited</b> 23:1	<hr/> <b>Q</b> <hr/>	<b>reasons</b> 3:20
35:13 37:21	<b>post</b> 34:3	<b>prohibitions</b>	<b>qualifying</b> 5:21	18:19 23:24
45:1	<b>potential</b> 42:7	29:23 44:16	<b>question</b> 5:7,14	29:15
<b>personal</b> 7:16 8:1	<b>power</b> 3:15	<b>project</b> 33:6	5:15 6:25 10:5	<b>rebuttal</b> 2:8
8:16,25 11:17	<b>preceded</b> 34:2	<b>proof</b> 5:6	12:13,18 13:11	26:13 50:6
11:18,25 22:18	<b>precise</b> 12:15	<b>property</b> 9:15,18	13:21,22 14:18	<b>recognize</b> 22:5
			17:1 19:10,11	<b>recognized</b> 23:15

<p>49:20  <b>recruit</b> 35:11  <b>recusal</b> 3:11,19  3:22 5:19 6:1,8  8:15 12:1 16:2  17:20 22:9,19  22:24 34:13  50:9 53:22  <b>recuse</b> 9:21  11:14 32:1  <b>recused</b> 50:11  53:4  <b>refer</b> 34:18  <b>references</b> 52:10  <b>refrain</b> 37:8  <b>regard</b> 33:13  <b>Regardless</b>  33:15  <b>register</b> 49:23  <b>registration</b>  49:24  <b>regularity</b> 26:1  <b>regulate</b> 18:25  <b>regulated</b> 14:25  15:7  <b>regulation</b> 4:24  31:7  <b>regulations</b>  19:24  <b>relation</b> 28:18  <b>relationship</b> 5:21  7:16 9:1,24,25  11:17 32:25  33:13 35:2,24  36:25 38:4  41:12,19,23  42:1,3,25 43:1  44:3,8 45:25  46:19 49:16,18  50:12,13 51:5,8  51:22,25 53:10  53:13 54:10,12  <b>relationships</b>  6:24 7:10,18</p>	<p>8:16,16 9:1,6  10:25,25 11:6  11:18,19 28:18  39:20 44:3  47:23 48:21  49:7 53:21,22  53:23  <b>relative</b> 8:21,22  8:24,25 54:11  <b>relatives</b> 6:23  8:10,11  <b>releases</b> 23:11  <b>relevance</b> 15:18  <b>relevant</b> 7:14  51:23,24  <b>relied</b> 39:13  50:20  <b>rely</b> 43:21  <b>remainder</b> 26:12  <b>remaining</b> 50:5  <b>remand</b> 5:13  <b>represent</b> 49:9  <b>Representatives</b>  16:6  <b>represents</b> 21:9  <b>Republic</b> 3:22  <b>Republicans</b>  15:15  <b>request</b> 50:2  <b>require</b> 10:12  19:24 27:8  <b>requiring</b> 3:11,24  <b>reserve</b> 26:12  <b>resolve</b> 13:21  <b>respect</b> 20:20  <b>respectfully</b> 50:2  <b>Respondent</b> 1:18  2:7 3:18 4:8  6:21 26:18 53:8  <b>response</b> 6:21  22:7  <b>rest</b> 28:13  <b>restriction</b> 21:2  <b>restrictions</b></p>	<p>44:16  <b>result</b> 26:24 32:1  41:25 43:4  <b>results</b> 49:12  <b>retaliation</b> 23:15  23:22,25 24:9  <b>return</b> 13:11  <b>reversal</b> 5:13  <b>review</b> 12:6 13:1  13:8,10 16:16  19:3 21:8 24:12  <b>reviewable</b> 21:13  21:17  <b>reviewed</b> 18:13  <b>right</b> 3:18 4:5,14  5:6,11 11:8  16:22 20:10,19  22:18 23:18  26:24 28:11,14  33:25,25 40:2  41:9 45:13,14  49:8,14 51:18  52:8,11 54:21  <b>rights</b> 6:12 11:8  24:5 25:9 30:18  34:1 35:8 39:6  39:9 45:15  52:16  <b>rise</b> 8:17 53:23  <b>Roberts</b> 3:3 14:9  14:19 15:2,9  16:5 25:11,20  26:14 27:6  31:18 42:16  43:6,11 45:3,9  45:14 50:4  54:25  <b>role</b> 45:22  <b>Rosenkranz</b> 1:17  2:6 26:16,17,19  27:12,16,23  28:3,10,15,20  29:4,13,15,24  30:7,9,15,25</p>	<p>31:16 32:2,15  32:21 33:8 34:7  34:17 35:19  36:14,19,22  37:17,23 38:1  38:19,23 39:2,5  39:10,15 40:7  41:2,10,16,21  42:10,22 43:8  43:15,24 44:21  45:8,11,16 46:4  46:9 47:5,11,13  47:16 48:14,18  <b>rule</b> 12:13 15:17  17:20,21 19:15  21:25 22:14,20  22:20 24:7,7,13  25:6,13 27:7  31:22 32:3,4  45:5  <b>rules</b> 3:22 6:1,8  12:5,12,16,24  13:1,2,25 14:11  14:12,15,22  15:10 16:6  22:19 24:12,25  25:16 28:5,23  31:8,15,18,25  38:9,16 39:4  <b>rule-based</b> 41:7  <b>run</b> 42:7  <b>running</b> 54:19  <b>R.A.V</b> 14:24  15:7,22 16:1  19:23 20:24  24:8  <hr/> <b>S</b>  <hr/> <b>S</b> 2:1 3:1  <b>sanctioned</b> 25:16  26:8 45:2  <b>sanctioning</b>  31:17  <b>sanctions</b> 44:22  44:23</p>	<p><b>savvy</b> 35:12  <b>saying</b> 14:10  23:8 30:22  33:11 38:21  41:5 45:5 47:20  48:3 50:21  <b>says</b> 4:8 6:24  17:11 19:6 20:4  21:7 27:7 28:5  28:12 34:10  35:24 36:3,24  37:12 44:10  53:8  <b>Scalia</b> 12:2 13:5  13:14,16,18  14:10 16:15,21  16:24 19:22  20:5 21:4,10,16  24:11,19,20,23  27:15 28:20  29:10,14,21  30:4 35:16  36:11,15,20  <b>Scalia's</b> 19:11  <b>scope</b> 20:13  <b>Scout</b> 46:11  <b>scrutiny</b> 4:16,23  6:13,15,18,19  18:9 31:15  48:10,19,20  <b>seat</b> 43:20  <b>Seattle</b> 7:11  <b>second</b> 9:11,17  9:19,24 10:12  10:15,17 22:24  44:6  <b>secondly</b> 43:2  <b>Secretary</b> 30:11  30:12,13,15  <b>section</b> 39:17  <b>see</b> 11:4 44:19  47:18 50:19  52:14,15  <b>self-government</b></p>
--	--	--	--	--



<p>19:1  <b>self-regulating</b> 24:21  <b>Senate</b> 12:16 31:10  <b>Senator</b> 31:11,12  <b>send</b> 5:8  <b>serve</b> 3:22 48:15  <b>service</b> 24:3,4  <b>set</b> 13:4 41:14  <b>settle</b> 46:18  <b>seven</b> 38:12,14  <b>severe</b> 19:2 45:19  <b>shared</b> 10:3  <b>shift</b> 43:22  <b>shifted</b> 43:25  <b>side</b> 37:4,6 51:10  <b>sides</b> 11:9  <b>significant</b> 13:19  <b>similar</b> 7:1,2,7 7:11,21 8:22 10:14,25 11:1,2 28:13,17 40:4 46:19 54:3  <b>similarity</b> 11:3  <b>simply</b> 4:13 5:18 6:18 28:4 50:10  <b>simultaneously</b> 5:20,22  <b>single</b> 27:17  <b>sitting</b> 29:18 37:15 48:23 54:23  <b>situation</b> 43:14 51:10  <b>skirmishing</b> 13:19  <b>solely</b> 52:19  <b>somebody</b> 9:9 25:1 28:1 37:15 53:12,25  <b>sorry</b> 52:5  <b>sort</b> 14:8 21:20</p>	<p>22:18 24:20 25:22,25 32:6 45:7  <b>sorts</b> 49:7  <b>SOTOMAYOR</b> 22:22 23:4,10 23:13 27:20,25 39:8,12 45:25 46:5,22 47:2,9 47:12,14 52:1,7  <b>sound</b> 37:14  <b>sounds</b> 37:15  <b>Speaker</b> 21:6  <b>special</b> 46:1,1  <b>specific</b> 6:3 14:22 40:1,3  <b>specifically</b> 27:18 53:18  <b>specificity</b> 6:9  <b>speech</b> 3:12,14 3:18 4:9,15,25 5:14 6:12 14:24 15:3,5,21 16:25 17:1,2,3,4,4,16 18:6,7,10 19:7 19:14,16 20:7 22:6,8 27:9 28:22 29:9,9 30:11,19 44:16  <b>speeches</b> 23:15  <b>spent</b> 11:7  <b>St</b> 14:24 24:9  <b>stake</b> 33:6  <b>standard</b> 5:2,5 18:16 31:6 44:14,19,24  <b>standards</b> 47:7  <b>state</b> 3:15 7:3,7 8:2 22:2,24 25:4,5 29:7 32:17,18,19 34:25 42:25 48:6,10  <b>stated</b> 51:13</p>	<p><b>States</b> 1:1,12 14:5 18:25  <b>stating</b> 52:4  <b>statute</b> 3:19 5:19 6:17 7:20,24 8:3,5,15 10:23 11:14 12:1 16:3 17:9,10 18:12 19:6 22:9,25 23:1 26:21 28:2 28:12,18,19 32:8,9 34:9,10 34:18 36:24 37:3 38:8 42:19 42:24 44:18 50:9,11 53:22  <b>statutes</b> 8:2 34:13 38:15 44:17  <b>statutory</b> 7:2  <b>step</b> 44:10  <b>stepped</b> 31:13  <b>strict</b> 4:16 6:13 48:10  <b>strictures</b> 28:1  <b>stronger</b> 21:25  <b>strongly</b> 35:22  <b>struck</b> 25:5  <b>structure</b> 7:22  <b>stuff</b> 29:2,12  <b>subject</b> 4:16 6:13 10:1 12:6 14:25 15:17 18:9 19:2 24:16 28:23 30:24 48:18,19  <b>submitted</b> 55:1,3  <b>subsection</b> 7:17  <b>subsidiary</b> 38:9  <b>substantially</b> 6:25 7:2,10,21 8:21 10:14,25 11:1,2 28:13,17 40:4  <b>success</b> 38:2</p>	<p><b>suggesting</b> 19:22 19:23  <b>support</b> 21:24 54:1  <b>suppose</b> 10:3 11:7 25:11 53:25  <b>supposed</b> 29:17 30:2  <b>Supreme</b> 1:1,12 3:17 4:13,20 5:12 6:11 25:5 39:23 43:23,25 44:1,8 52:12  <b>sure</b> 5:9 12:25 14:17 15:19 46:13 48:13,19  <b>surely</b> 17:16  <b>suspicion</b> 46:6  <b>sweeps</b> 7:10,12  <b>system</b> 39:1,4</p> <hr/> <p><b>T</b></p> <p><b>T</b> 2:1,1  <b>table</b> 44:1  <b>take</b> 8:8 9:9 32:8 49:15  <b>taken</b> 22:4  <b>takes</b> 28:4 32:4 43:20  <b>talented</b> 35:12  <b>talk</b> 48:1  <b>talking</b> 8:9,18 15:22 16:18 18:17 23:5 24:2 41:25 44:11,12 45:3,18 47:25 48:2  <b>talks</b> 8:6  <b>targets</b> 50:9  <b>taxes</b> 9:15,18 10:4,12  <b>tell</b> 4:14 27:2 28:7 42:2 52:2  <b>term</b> 3:4 40:12</p>	<p>51:19  <b>test</b> 4:23,24,24 18:14,15 39:25  <b>testified</b> 46:9  <b>text</b> 28:19  <b>Thank</b> 26:14,19 50:3,4 54:25  <b>theory</b> 25:12  <b>thing</b> 38:18 53:15  <b>things</b> 8:14,14 9:23 11:4 16:3 21:19,22 31:9 37:20 46:18 51:6  <b>think</b> 4:9,12,17 4:18,19 5:10,10 5:15,16 6:20 7:23,25 8:13,23 9:22,25 10:1,11 10:15,16 13:3,6 14:13,18,24 15:13,16 16:5 16:10,11,17 18:14,22,23 19:4,20,22,24 20:15,18 21:9 21:18,23 22:11 23:19 25:7,8,9 25:18 27:12,24 32:7,13 34:16 35:9 36:12 39:12 41:19 42:7 45:8 48:6 50:18,21 51:1,4 51:11 52:1,12 52:15,17,24,24 53:2,5,6,15 54:6,14,21  <b>thinking</b> 37:19 48:24  <b>thinks</b> 32:19  <b>third</b> 5:23 9:7,10  <b>Thomas</b> 12:16 17:19 22:19</p>
---	---	--	---	--

22:18 33:4 <b>thread</b> 42:17 <b>three</b> 38:2 51:23 <b>three-time</b> 33:5 50:14 <b>tied</b> 9:5 <b>time</b> 13:7 16:7,13 16:17 26:12 27:18 35:21 <b>Timmons</b> 19:3 <b>tip</b> 36:2 <b>today</b> 52:4 <b>told</b> 7:6 27:18 40:1 49:7 54:16 <b>tolerate</b> 29:25 <b>town</b> 9:15,17,19 23:14 <b>toxic</b> 43:1,1 49:4 49:17 <b>transaction</b> 7:18 <b>treats</b> 26:25 32:5 <b>true</b> 7:12 14:2 24:19,22 25:2 <b>trying</b> 38:15 <b>turned</b> 25:14 <b>twice</b> 35:9 <b>two</b> 5:19 13:4 29:15 33:24 42:23 44:5 51:6 52:10 <b>type</b> 14:15,20 43:14 <b>types</b> 53:21	<b>understood</b> 3:22 10:22 43:19 <b>undisclosed</b> 26:9 <b>unduly</b> 34:1 <b>unelected</b> 26:23 <b>unit</b> 9:3 <b>United</b> 1:1,12 14:5 <b>universe</b> 49:14 <b>university</b> 29:7,7 <b>unprotected</b> 22:5 22:8 <b>unrelated</b> 3:23 <b>untenable</b> 36:6 <b>unworkable</b> 42:6 42:9 <b>upfront</b> 49:14,16 <b>use</b> 18:14,25 28:17 40:24 41:6,18 51:19 <b>uses</b> 40:21 <b>usually</b> 5:23	52:19 <b>Vasquez</b> 37:5 <b>Vasquez's</b> 45:22 <b>vendor</b> 50:15 <b>viable</b> 23:17,20 25:21 <b>view</b> 10:6 23:7 37:7 42:25 52:10 <b>viewed</b> 49:16 <b>viewpoint</b> 15:23 16:4 <b>viewpoint-based</b> 15:1,7,14 16:2 24:6 <b>views</b> 3:23 18:22 <b>violating</b> 25:16 <b>violation</b> 21:11 <b>virtually</b> 47:4 <b>voice</b> 12:20 <b>volumes</b> 38:12 38:14 <b>volunteer</b> 32:22 35:3,10 37:14 41:11 46:2 53:12 <b>volunteering</b> 32:6 <b>volunteers</b> 49:15 53:17,18 <b>vote</b> 3:13,18 4:5 12:13 17:2,5,12 23:16 26:7 27:2 27:19 28:5,21 28:21 29:9 30:1 30:3 31:23,24 31:24 32:10 33:6,25 35:5,5 36:5 45:6 49:23 <b>voters</b> 35:5 <b>votes</b> 21:7,12 48:25 <b>voting</b> 12:6 17:11 19:14 20:13,16	20:20 21:3 23:18 <hr/> <b>W</b> <hr/> <b>wages</b> 9:16,19 <b>want</b> 3:24 18:19 23:11 29:11 35:11 48:1,22 <b>wanted</b> 46:13 <b>wants</b> 49:11 <b>Washington</b> 1:8 1:15 <b>wasn't</b> 15:3 46:1 <b>wax</b> 25:23 <b>way</b> 10:19 11:4 12:3 15:11,14 23:20 26:25 27:13 30:1 34:5 36:6 40:12 44:10,25 45:21 52:3,9 54:13 <b>ways</b> 33:24 <b>weak</b> 30:16 <b>Wednesday</b> 1:9 <b>went</b> 54:14 <b>we're</b> 6:7 8:18 19:23 20:8 27:7 33:9,11 38:22 45:3 47:20,20 48:2 <b>we've</b> 12:3,3,8 36:18 <b>whichever</b> 16:8 <b>Wholly</b> 50:13 <b>wields</b> 3:15 <b>willing</b> 19:23 20:5,23,23 21:1 21:5 24:8,23 <b>win</b> 28:9 33:16 33:17,20 51:23 <b>wins</b> 36:4 <b>withdraw</b> 12:18 <b>words</b> 15:6 16:24 16:25 40:14,15 47:17	<b>work</b> 31:6 36:1 45:21 47:22 <b>worked</b> 36:4 <b>working</b> 51:9 <b>works</b> 7:1 9:17 9:18 <b>world</b> 37:5 <b>worry</b> 30:23 35:17 36:17 <b>worse</b> 10:14 36:10 49:10 <b>worth</b> 53:15 <b>wouldn't</b> 36:13 53:5 <b>write</b> 20:1,12 46:23,23 <b>wrong</b> 4:14 8:22 18:8 21:7,12 33:2 38:17 52:2 <b>wrote</b> 36:8 <hr/> <b>X</b> <hr/> <b>x</b> 1:2,7 <hr/> <b>Y</b> <hr/> <b>year</b> 42:7 <b>years</b> 12:10 25:3 25:15 35:13 37:14 42:12 48:17 53:16 <b>York</b> 1:17,17 <hr/> <b>Z</b> <hr/> <b>zero</b> 33:14 <hr/> <b>\$</b> <hr/> <b>\$46,000</b> 53:14 <hr/> <b>1</b> <hr/> <b>10</b> 53:16 <b>10-568</b> 1:4 3:4 <b>10:09</b> 1:13 3:2 <b>105</b> 51:21 <b>106</b> 51:21 <b>11:06</b> 55:2 <b>14</b> 44:11
--	---	---	---	--

<b>15</b> 44:11				
<b>16</b> 44:12				
<b>17</b> 44:12				
<b>18</b> 39:18				
<b>1999</b> 10:24 12:1				
<b>2</b>				
<b>2</b> 6:24 25:15				
<b>2009</b> 25:5				
<b>2011</b> 1:9				
<b>220</b> 12:10				
<b>26</b> 2:7				
<b>27</b> 1:9				
<b>3</b>				
<b>3</b> 2:4 35:13 42:12				
<b>30</b> 25:3				
<b>32</b> 37:1				
<b>5</b>				
<b>5</b> 50:5				
<b>50</b> 2:10				
<b>7</b>				
<b>7</b> 22:14				
<b>8</b>				
<b>8</b> 26:9				
<b>89</b> 50:15				
<b>9</b>				
<b>9</b> 39:18				
<b>918</b> 52:12				
<b>99</b> 53:19				